FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JULY 1, 2020, TO DECEMBER 31, 2020

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2020 TO DECEMBER 31, 2020

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Took oath of office May 1, 2018

MAUREEN K. OHLHAUSEN, *Commissioner*
Took oath of office April 4, 2012.

NOAH JOSHUA PHILLIPS, *Commissioner*
Took oath of office May 2, 2018

ROHIT CHOPRA, *Commissioner*
Took oath of office May 2, 2018

REBECCA KELLY SLAUGHTER, *Commissioner*
Took oath of office May 2, 2018

CHRISTINE S. WILSON, *Commissioner*
Took oath of office September 26, 2018

APRIL J. TABOR, *Secretary*
Appointed June 8, 2020.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2020, TO DECEMBER 31, 2020

IN THE MATTER OF

ORTHO-CLINICAL DIAGNOSTICS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4723; File No. 192 3050
Complaint, July 8, 2020 – Decision, July 8, 2020

This consent order addresses Ortho-Clinical Diagnostics, Inc.'s representations concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union. The complaint alleges that that Respondent violated Section 5(a) of the Federal Trade Commission Act by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework and that Ortho did not verify the truth of the Privacy Shield assurances in its privacy policy, either through a self-assessment or a third party compliance review. The consent order prohibits the Respondent from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Kenneth H. Abbe* and *Stacy Procter.*

For the *Respondents*: *Gina M. Dunsmuir, Vice President and Associate General Counsel.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that Ortho-Clinical Diagnostics, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Ortho-Clinical Diagnostics, Inc., is a New York corporation with its principal office or place of business at 1001 US Route 202, Raritan, NJ 08869.

2. Respondent provides medical device and in vitro diagnostics services.

3. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, https://www.orthoclinicaldiagnostics.com/en-us/home/privacy-policy, privacy policies and statements about its practices, including

statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard. Any company that voluntarily withdraws or lets its self-certification lapse must take steps to affirm to Commerce that it is continuing to protect the personal information it received while it participated in the program or delete or return the data collected. Companies must also respond promptly to inquiries and other requests for information from Commerce relating to the company's adherence to the Privacy Shield Principles.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, or failed to comply with the Privacy Shield Principles, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

9. Respondent has disseminated or caused to be disseminated privacy policies and statements on the https://www.orthoclinicaldiagnostics.com/en-us/home/privacy-policy website, including, but not limited to, the following statements:

EU-U.S. Privacy Shield

> Ortho-Clinical Diagnostics, Inc. (and its parent/subsidiary company, Ortho- Clinical Diagnostics Bermuda Co. Ltd.) participates in and has certified its compliance with the EU-U.S. Privacy Shield Framework and the Swiss-U.S. Privacy Shield Framework. Ortho-Clinical Diagnostics, Inc. is committed to subjecting all personal data received from the European Union (EU) member countries and Switzerland, respectively, in reliance on each Privacy Shield Framework, to the Framework's applicable Principles. To learn more about the Privacy Shield Frameworks, and to view our certification visit the U.S. Department of Commerce's Privacy Shield List. https://www.privacyshield.gov/list.

10. Although Respondent obtained Privacy Shield certification in April 2017, that certification lapsed one year later, in 2018.

11. In August 2018, Commerce warned the company to take down its claims that it participated in Privacy Shield unless and until such time as it completed the recertification process. Respondent did not do so. While Respondent retained data it collected while it participated in Privacy Shield, it did not withdraw and affirm its commitment to protect such data.

12. After allowing its certification to lapse, Respondent continued to claim, as indicated in paragraph 9, that it participated in the EU-U.S. Privacy Shield framework.

13. The Privacy Shield Principles include Supplemental Principle 7, which requires any company that participates in Privacy Shield to verify, at least once a year, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented. The verification statement must be signed by a corporate officer or the outside reviewer and is required to be made available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

14. Respondent is under the jurisdiction of the FTC. During the 2017-18 period that Respondent was certified to participate in Privacy Shield, Respondent failed to comply with the requirement to obtain, through self-assessment or outside compliance review, an attested verification statement that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented. Respondent failed to provide its attested verification statement to the FTC.

Count 1—Privacy Misrepresentation

15. As described in Paragraph 9, Respondent represented, directly or indirectly, expressly or by implication, that it is a current participant in the EU-U.S Privacy Shield framework.

16. In fact, as described in Paragraphs 10-12, Respondent was not a current participant in the EU-U.S. Privacy Shield framework in 2018 and 2019. Respondent's certification lapsed in 2018, and it was not renewed. Therefore, the representation set forth in Paragraph 15 is false or misleading.

Count 2—Misrepresentation Regarding Verification

17. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles.

18. In fact, as described in Paragraphs 13-14, Respondent did not comply with the EU-U.S. Privacy Shield framework principles. In particular, it failed to comply with the verification requirement in Privacy Shield Supplemental Principle 7. Therefore, the representation set forth in Paragraph 17 is false or misleading.

Count 3—Misrepresentation Regarding Continuing Obligations

19. As described in Paragraph 9, Respondent represented that it complied with the EU-U.S. Privacy Shield framework principles.

20. In fact, as described in Paragraph 11, Respondent has not affirmed to Commerce that it will continue to apply the principles to personal information that it received during the time it participated in the program. Therefore, the representation set forth in Paragraph 19 is false or misleading.

Violations of Section 5 of the FTC Act

21. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this eighth day of July, 2020, has issued this complaint against Respondent.

By the Commission, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of thirty (30) days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Ortho-Clinical Diagnostics, Inc., is a New York corporation with its principal office or place of business at 1001 US Route 202, Raritan, NJ 08869.

2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Ortho-Clinical Diagnostics, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework, the Swiss-U.S. Privacy Shield framework, and the APEC Cross-Border Privacy Rules.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, must:

A. affirm to the Department of Commerce, within ten (10) days after the effective date of this Order and on an annual basis thereafter for as long as it retains such information, that it will

   1. continue to apply the EU-U.S. Privacy Shield framework principles to the personal information it received while it participated in the Privacy Shield; or

   2. protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield framework) or Swiss (for the Swiss-U.S. Privacy Shield framework) law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

B. return or delete the information within ten (10) days after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within sixty (60) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Ninety (90) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the

United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *Ortho-Clinical Diagnostics, Inc.,* FTC File No. 1923050, Docket No. C-4723.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on July 8, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

B. this Order's application to any respondent that is not named as a defendant in such complaint; and

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commission Slaughter not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Ortho-Clinical Diagnostics, Inc. ("Ortho" or "Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period

will become part of the public record. After thirty days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that Ortho made concerning its participation in the Privacy Shield framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield framework allows for the lawful transfer of personal data from the EU to participating companies. The framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the framework, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

Ortho markets and sells medical devices and in vitro diagnostics services to the global clinical laboratory and immunohematology communities. It collects personal data from its suppliers and capital customers around the world, including from EU citizens. According to the Commission's complaint, from approximately September 2017 until March 2019, Ortho published on its website, https://www.orthoclinicaldiagnostics.com/en-us/home/privacy-policy, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed three-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the first count in the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. Privacy Shield Framework. The second count alleges that Ortho did not verify the truth of the Privacy Shield assurances in its privacy policy, either through a self-assessment or a third party compliance review, so its representation that it "complied with" the Privacy Shield principles was false. Finally, the third count alleges that Ortho failed to annually affirm to Commerce that Ortho will continue to apply the Privacy Shield Principles to personal data it received while it was part of the framework after it withdraws from Privacy Shield.

Part I of the proposed order prohibits the Respondent from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework. Part II also specifically requires the Respondent to comply with the Privacy Shield requirement to continue to protect personal information received while in the framework.

Analysis to Aid Public Comment

Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status and mandates that the Respondent submit an initial compliance report to the FTC. Part V requires the Respondent to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part VI mandates that the Respondent make available to the FTC information or subsequent compliance reports, as requested.

Part VII is a provision "sun-setting" the order after twenty years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

WILLIAMS-SONOMA, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4724; File No. 202 3025
Complaint, July 13, 2020 – Decision, July 13, 2020

This consent order addresses Williams-Sonoma, Inc.'s marketing, sale, and distribution of home products as made in the United States. The complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act by representing that its Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, including the materials and subcomponents used to make such products, are all or virtually all made in the United States although they are wholly imported or incorporate significant imported materials or subcomponents. The consent order prohibits Respondent from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Participants

For the *Commission*: *Julia Solomon Ensor.*

For the *Respondents*: *Alex Schneider* and *Christie Grymes Thompson, Kelley Drye & Warren LLP.*

COMPLAINT

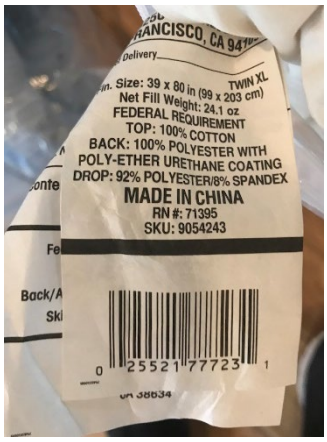
The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Williams-Sonoma, Inc., a corporation, also doing business as Williams Sonoma, Williams Sonoma Home, Pottery Barn, Pottery Barn Kids, Pottery Barn Teen, West Elm, Rejuvenation, Outward, and Mark & Graham ("Respondent" or "Williams-Sonoma"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation, with its principal place of business at 3250 Van Ness Avenue, San Francisco, CA 94109.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed home products to consumers, including cookware, furniture, light fixtures, linens, small electronics, and others. Respondent advertises these home products in stores and online, including, but not limited to, on its websites and social media platforms. Respondent offers for sale, sells, and distributes its products throughout the United States.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. In 2018, the Commission received reports that Respondent disseminated Internet advertisements and promotional materials for Pottery Barn Teen organic mattress pads stating those products were "Crafted in America from local and imported materials." When consumers purchased the mattress pads, they discovered that the pads were, in fact, made in China.



5. After receiving and verifying these reports, the FTC contacted Williams-Sonoma, which quickly updated its website to include correct country-of-origin information for this product. As part of the FTC's inquiry, the FTC instructed Respondent to undertake a larger review of its country-of-origin verification process.

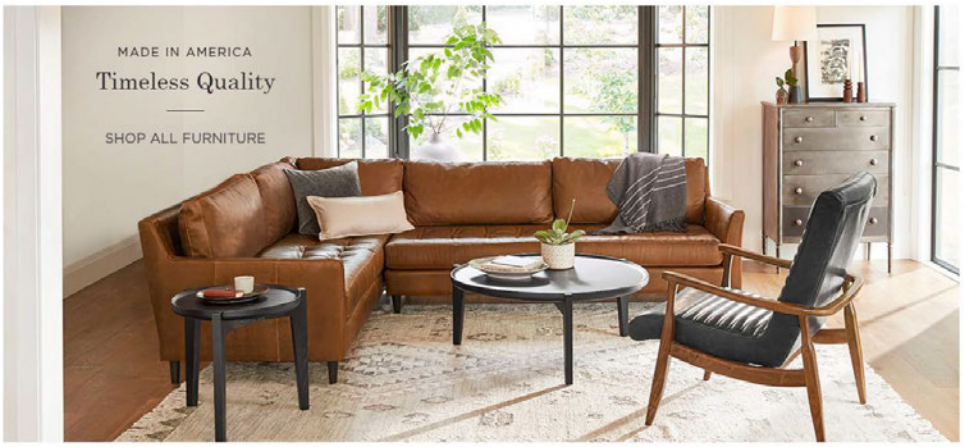
6. On June 13, 2018, in response to Williams-Sonoma's quick action to update its claims, explanation that the mattress pad misrepresentation was an isolated instance of human error, and commitment to a multi-step verification process to prevent deceptive country-of-origin claims, FTC staff closed its investigation with a letter on the public record in lieu of formal enforcement action. *See* Exhibit A. The staff's letter specified that it "should not be construed as a determination that there was no violation of Section 5 . . . [and t]he Commission reserves the right to take such further action as the public interest may require."

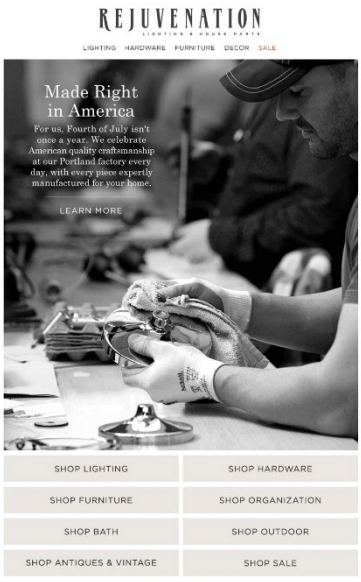
8. Specifically, since June 13, 2018, to induce consumers to purchase Goldtouch Bakeware, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, Respondent disseminated or caused to be disseminated advertisements that contain the following statements and depictions, among others:

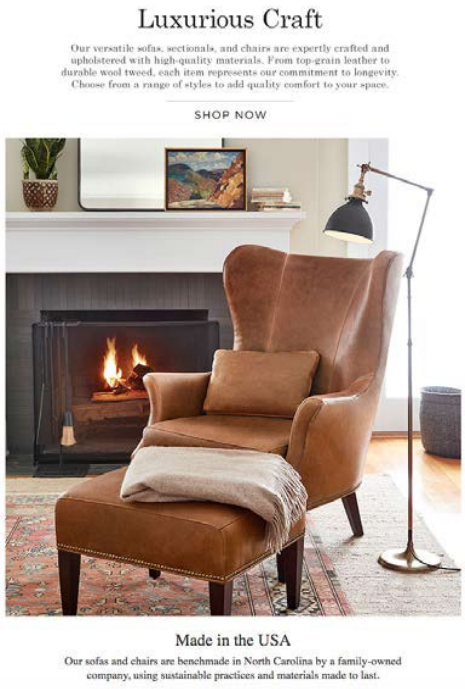
a. Goldtouch Bakeware is made in America or in the USA

Complaint

b. Rejuvenation-branded products are made in America or in the USA

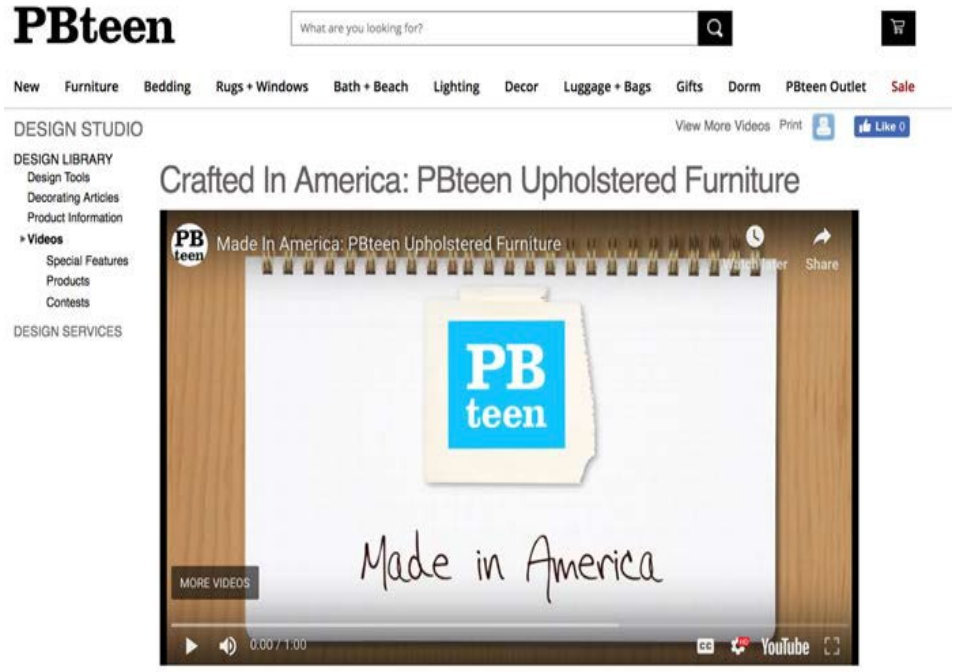






(Company website and emails).

c. Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture is made in America or in the USA



(Company video).

9. In numerous instances, including, but not limited to, the promotional materials referenced in paragraph 8, Respondent has represented that all Goldtouch Bakeware, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded

upholstered furniture products, including raw materials and subcomponents, were all or virtually all made in the United States.

10. In fact, numerous Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products are wholly imported, or contain significant imported materials or components.

11. Therefore, Respondent's broad claims that all Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products are all or virtually all made in the United States deceive consumers.

Count I

False or Unsubstantiated Representation – Made in USA

12. In connection with the advertising, promotion, offering for sale, or sale of Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, Respondent has represented, directly or indirectly, expressly or by implication, that such products, including the materials and subcomponents used to make such products, are all or virtually all made in the United States.

13. In fact, in numerous instances, Respondent's Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products are wholly imported or incorporate significant imported materials or subcomponents. Therefore, the representations set forth in paragraph 12 are false or misleading, or were not substantiated at the time the representations were made.

Violations of Section 5

14. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this thirteenth day of July 2020, has issued this Complaint against Respondent.

By the Commission, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Williams-Sonoma, Inc., a Delaware corporation, also doing business as Williams Sonoma, Williams Sonoma Home, Pottery Barn, Pottery Barn Kids, Pottery Barn Teen, West Elm, Rejuvenation, Outward, and Mark & Graham, with its principal place of business at 3250 Van Ness Avenue, San Francisco, CA 94109.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Clear(ly) and conspicuous(ly)**" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "**Made in the United States**" means any representation, express or implied, that a product or service, or a specified component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," "produced," or "crafted" in the United States or in America, or any other U.S.-origin claim.

C. "**Respondent**" means Williams-Sonoma, Inc., also d/b/a Williams Sonoma, Williams Sonoma Home, Pottery Barn, Pottery Barn Kids, Pottery Barn Teen,

West Elm, Rejuvenation, Outward, and Mark & Graham, and its successors and assigns.

Provisions

I.

Prohibition Against Misrepresentations Regarding U.S.-Origin Claims

IT IS ORDERED that Respondent, Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any home product, or any other product or service, must not make any representation, expressly or by implication, that a product is Made in the United States unless:

A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or

B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or

C. For a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

II.

Prohibition Against Deceptive Country of Origin Claims, Including False and/or Unsubstantiated Claims

IT IS FURTHER ORDERED that Respondent, Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the sale of any home product, or any other product or service, must not make any representation, expressly or by implication, regarding the country of origin of any product or service unless the representation is non-misleading, and, at the time such representation is made, Respondent possesses and relies upon a reasonable basis for the representation.

III.

Monetary Relief

IT IS FURTHER ORDERED that:

A. Respondent must pay to the Commission $1,000,000, which Respondent stipulates its undersigned counsel holds in escrow for no purpose other than payment to the Commission.

B. Such payment must be made within 8 days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

IV.

Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Respondent relinquishes dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondent has no right to challenge any activities pursuant to this Provision.

E. In the event of default on any obligation to make payment under this Order, interest, computed as if pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for 10 days beyond the date that payment is due, the entire amount will immediately become due and payable.

F. Each day of nonpayment is a violation through continuing failure to obey or neglect to obey a final order of the Commission and thus will be deemed a separate offense and violation for which a civil penalty shall accrue.

G. Respondent acknowledges that its Taxpayer Identification Numbers (Social Security or Employer Identification Numbers) may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

V.

Customer Information

IT IS FURTHER ORDERED that Respondent, Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, must directly or indirectly provide sufficient customer information to enable the Commission to efficiently administer consumer redress. Notwithstanding the foregoing, nothing in this Provision shall be construed to not require Respondent to comply with a consumer request to delete the consumer's personal information pursuant to Cal. Civ. Code 1798.105. If a representative of the Commission requests in writing any information related to redress, Respondent must provide it, in the form prescribed by the Commission, within 14 days.

VI.

Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives having managerial responsibilities for conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and

Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VII.

Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, and the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on:

_____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Williams-Sonoma, Inc.

VIII.

Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

E. A copy of each materially different advertisement or other marketing material making a representation subject to this Order.

IX.

Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order, including any failure to transfer any assets as required by this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X.

Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on July 13, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Slaughter not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Williams-Sonoma, Inc., also d/b/a Williams Sonoma, Williams Sonoma Home, Pottery Barn, Pottery Barn Kids, Pottery Barn Teen, West Elm, Rejuvenation, Outward, and Mark & Graham ("Respondent").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves Respondent's marketing, sale, and distribution of home products as made in the United States. According to the FTC's complaint, Respondent represented that its Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, including the materials and subcomponents used to make such products, are all or virtually all made in the United States. In fact, in numerous instances, Respondent's Goldtouch Bakeware products, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products are wholly imported or incorporate significant imported materials or subcomponents. Based on the foregoing, the complaint alleges that Respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent Respondent from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits Respondent from making U.S.-origin claims for its products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondent from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondent has a reasonable basis substantiating the representation.

Parts III through V are monetary provisions. Part III imposes a judgment of $1,000,000. Part IV includes additional monetary provisions relating to collections. Part V requires Respondent to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Analysis to Aid Public Comment

Parts VI through IX are reporting and compliance provisions. Part VI requires Respondent to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part VII requires Respondent to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part VIII requires Respondent to maintain certain records, including records necessary to demonstrate compliance with the order. Part IX requires Respondent to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondent's personnel.

Finally, Part X is a "sunset" provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

TRI STAR ENERGY, LLC, HOLLINGSWORTH OIL COMPANY, INC., C & H PROPERTIES, AND MR. RONALD L. HOLLINGSWORTH

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4720; File No. 201 0074
Complaint, June 23, 2020 – Decision, August 12, 2020

This consent order addresses the $214 million acquisition by Tri Star Energy, LLC of certain assets of Hollingsworth Oil Company, Inc., C & H Properties, and Ronald L. Hollingsworth. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially lessening competition for the retail sale of gasoline and the retail sale of diesel in and around Whites Creek, Tennessee, and Greenbrier, Tennessee. Under the order respondent must divest to the upfront buyer, Cox Oil Company, Inc., retail fuel assets in two local markets in Tennessee.

Participants

For the *Commission*: *Catharine Bill* and *Ashley Masters.*

For the *Respondents*: *Jay Nixon* and *Beth Vessel, Waller Lansden Dortch & Davis LLP; Van Jolas* and *Bradley Weber, Locke Lord, LLP;* and *Albert Bart, Sherrard, Roe, Voigt Harbison.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Tri Star Energy, LLC has entered into an agreement to acquire certain assets of Respondent Hollingsworth Oil Company, Inc. and Respondent C & H Properties, among other entities, from Respondent Mr. Ronald L. Hollingsworth (collectively, "Hollingsworth"), that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

Complaint

I. RESPONDENTS

Tri Star Energy, LLC

1. Respondent Tri Star Energy, LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 1740 Ed Temple Boulevard, Nashville, Tennessee 37208.

2. Respondent Tri Star Energy, LLC is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

3. Respondent Tri Star Energy, LLC and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Hollingsworth

4. Hollingsworth is comprised of three affiliated entities:

   a. Respondent Hollingsworth Oil Company, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172;

   b. Respondent C & H Properties is a general partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172; and

   c. Respondent Ronald L. Hollingsworth is a natural person residing in and doing business under, and by virtue of, the laws of the State of Tennessee, with his office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

5. Hollingsworth is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

6. Hollingsworth is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

7. Pursuant to an Asset Purchase Agreement dated March 6, 2020, as amended (the "Asset Purchase Agreement"), Tri Star Energy, LLC proposes to acquire retail outlets and other interests from Hollingsworth (the "Acquisition"). Tri Star proposes to acquire certain interests of the following Hollingsworth affiliated entities: Hollingsworth Oil Company, Inc., a corporation, Lynn Transport, LLC, a limited liability company, C & H Properties, a general partnership, Hollingsworth Family Limited Partnership, a limited partnership, H & S Properties, a general partnership, Mid-Tenn Services, LLC, a limited liability company, and Ronald L. Hollingsworth, a natural person.

8. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

9. The relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. No economic or practical alternative to the retail sale of gasoline or diesel exists.

10. The relevant geographic markets in which to analyze the effects of the Acquisition are two local markets within the following cities: Whites Creek, Tennessee, and Greenbrier, Tennessee.

11. The relevant geographic markets for retail gasoline and retail diesel fuel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting such features as commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

IV. MARKET STRUCTURE

12. With regard to the retail sale of gasoline, the Acquisition, if consummated, would create a merger to monopoly in each relevant geographic market.

13. With regard to the retail sale of diesel fuel, the Acquisition, if consummated, would create a merger to monopoly in each relevant geographic market.

V. BARRIERS TO ENTRY

14. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

VI. EFFECTS OF THE ACQUISITION

15. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in each relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by increasing the likelihood that Respondent Tri Star would unilaterally exercise market power in each relevant market.

VII. VIOLATIONS CHARGED

16. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Asset Purchase Agreement entered into by Tri Star Energy, LLC, and Hollingsworth constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-third day of June, 2020, issues its Complaint against Respondents.

By the Commission, Commissioner Slaughter not participating.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Tri Star Energy, LLC ("Tri Star") of certain assets of Respondent Hollingsworth Oil Company, Inc. ("HOC") and Respondent C & H Properties, among other entities, from Respondent Mr. Ronald L. Hollingsworth ("Hollingsworth"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other

provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Tri Star is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1740 Ed Temple Boulevard, Nashville, Tennessee 37208.

2. Respondent HOC is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

3. Respondent C & H Properties is a general partnership organized, existing, and doing business under and by virtue of the laws of the state of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

4. Respondent Hollingsworth is a natural person with his office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

5. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

I. Definitions

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Tri Star" means Tri Star Energy, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Tri Star, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "HOC" means Hollingsworth Oil Company, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled

by HOC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "C & H" means C & H Properties, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by C & H, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Hollingsworth" means Ronald L. Hollingsworth, a natural person, all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Ronald L. Hollingsworth (including HOC and C & H), and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Cox" means Cox Oil Company, Inc., its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates, in each case controlled by Cox Oil Company, Inc. and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

F. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

G. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to the Decision and Order and this Order to Maintain Assets.

H. "Orders" means the Decision and Order and this Order to Maintain Assets.

II. Asset Maintenance

IT IS FURTHER ORDERED that until the Retail Fuel Assets have been fully transferred to the Acquirer, Respondents shall operate and maintain the Retail Fuel Assets and Retail Fuel Outlet Business in the ordinary course of business consistent with past practices. Included in these obligations, Respondents shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Retail Fuel Assets, to minimize the risk of loss of competitive potential of the Retail Fuel Outlet Business, to operate the Retail Fuel

Outlet Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of the Retail Fuel Assets, except for ordinary wear and tear.

B. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Assets, or terminate any of the operations of the Retail Fuel Outlet Business, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with the Retail Fuel Outlet Business.

D. Provide the Retail Fuel Outlet Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities for the Relevant Fuel Outlet Business.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with the Retail Fuel Outlet Business.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Retail Fuel Outlet Business, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from the Retail Fuel Outlet Business to another of Respondents' businesses.

G. Maintain and preserve the Business Information of the Retail Fuel Outlet Business.

H. Provide the resources necessary for the Retail Fuel Outlet Business to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to the Retail Fuel Outlet Business.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of the Retail Fuel Outlet Business, and operate the Retail Fuel

Outlet Business in accordance and in compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with the Retail Fuel Outlet Business.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed-to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Assets and consistent with the purposes of the Orders.

III. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Retail Fuel Assets to evaluate independently and offer employment to the Retail Fuel Employees.

B. Until one year after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Retail Fuel Employees, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by the Acquirer.

C. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Retail Fuel Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Retail Fuel Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

IV. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under this Order, the Decision and Order, or the Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or Retail Fuel Outlet Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph, including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

V. Monitor

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Decision and Order, and the Divestiture Agreement.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. No later than 5 days after the Commission appoints the Monitor, Respondents shall:

   A. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order and the Decision and Order, as set forth in Paragraph V.D of this Order and in Paragraph VIII.D of the Decision and Order;

   B. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor, as set forth in Paragraph V.D of this Order and Paragraph VIII.D of the Decision and Order; and

   C. Enter into an agreement with the Monitor that is approved by the Commission. If Respondents and the Monitor fail to sign an agreement

within the allotted time, the Commission will approve, and Respondents agree to consent to, an agreement with terms and provisions typical of Commission monitor agreements and require that the Monitor's fees will be his or her standard and customary fees plus expenses reasonably incurred performing duties as the Monitor.

D. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in this Order and the Decision and Order;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Shall report in writing to the Commission concerning Respondents' compliance with this Order and the Decision and Order: (i) 30 days after appointment and every 30 days thereafter until Respondents have completed all obligations required by Paragraphs II and III of the Decision and Order; (ii) when Respondents have completed the obligations required by Paragraphs II and III of the Decision and Order; and (iii) at any other time requested by the staff of the Commission; and

9. Shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and Paragraph III of the Decision and Order, or until such other time as may be determined by the Commission or its staff.

E. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third

parties, to allow the monitor to monitor Respondents' compliance with its obligations under the Orders; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.

F. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or are connected with any claim concerning the Monitor's performance of the Monitor's duties under this Order, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct.

For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.D of this Order.

G. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

H. Respondent shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including written reports submitted pursuant to Paragraph V.D.8, or any Person with whom the Monitor communicates in the performance of his/her duties.

I. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and subject to all obligations of this Paragraph V:

1. The Commission shall select such substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor, Respondents have not opposed, in writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement with the Monitor first appointed and referenced in Paragraph V.A, above; or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under this Order.

J. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Decision and Order.

VI. Compliance Reports

IT IS FURTHER ORDERED that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all the provisions of this Order to Maintain Assets; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as the reports required to be submitted by Respondents pursuant the Decision and Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts to comply with this Order and the Decision and Order.

VII. Change in Respondents

IT IS FURTHER ORDERED that Respondent Tri Star shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Tri Star Energy, LLC;

B. Any proposed acquisition, merger, or consolidation of Tri Star Energy, LLC; and

C. Any other change in the Respondent Tri Star, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon 5 days' written notice to the applicable Respondent made to its principal United States offices, registered office of its United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the

request of the authorized representative(s) of the Commission and at the expense of such Respondent; and

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

IX. Purpose

The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Outlet Business locations as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that Respondents obtain no Confidential Business Information relating to the Retail Fuel Outlet Business, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

X. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

A. 3 business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after Respondents' completion of the divestitures required by Paragraph II, and obligations required by Paragraph III, of the Decision and Order;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate 3 business days after the Decision and Order becomes final;

Provided further, however,, that if the Commission, pursuant to Paragraph II of the Decision and Order, requires Respondents to rescind the divestiture to Cox, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents's (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Tri Star Energy, LLC ("Tri Star") of certain assets of Respondent Hollingsworth Oil Company, Inc. ("HOC") and Respondent C & H Properties, among other entities, from Respondent Mr. Ronald L. Hollingsworth ("Hollingsworth"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Tri Star is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1740 Ed Temple Boulevard, Nashville, Tennessee 37208.

2. Respondent HOC is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

3. Respondent C & H Properties is a general partnership organized, existing, and doing business under and by virtue of the laws of the state of Tennessee, with its office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

4. Respondent Hollingsworth is a natural person with his office and principal place of business located at 1503 Memorial Boulevard, Springfield, Tennessee 37172.

5. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Tri Star" means Tri Star Energy, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Tri Star, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "HOC" means Hollingsworth Oil Company, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by HOC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "C & H" means C & H Properties its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by C & H, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Hollingsworth" means Ronald L. Hollingsworth, a natural person, all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Ronald L. Hollingsworth (including HOC and C & H), and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means: (i) Cox Oil Company, Inc. or (ii) any other Person that acquires the Retail Fuel Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Asset Purchase Agreement by and among Hollingsworth Oil Company, Inc., Lynn Transport, LLC, C&H Properties, Hollingsworth Family Limited Partnership, H&S Properties, Mid-Tenn Services, LLC, Ronald L. Hollingsworth, Tri Star Energy, LLC, and Tri Star Transport, LLC, dated March 6, 2020, as amended.

H. "Acquisition Date" means the date the Acquisition is consummated.

I. "Business Information" means books, records, data, and information, wherever located and however stored, including documents, written information, graphic materials, and data and information in electronic format, along with the knowledge of employees, contractors, and representatives. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, underground storage tank (UST) system registrations and reports, registrations, licenses, and permits (to the extent transferable), and operations. For clarity, Business Information includes Respondents' rights and control over information and material provided to any other Person.

J. "Confidential Business Information" means all Business Information not in the public domain that is related to or used in connection with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

K. "Consent" means any approval, consent, ratification, waiver, or other authorization.

L. "Contract" means all agreements, contracts, licenses, leases (including, but not limited to, ground leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.

M. "Cost" means costs not to exceed the actual cost of labor, goods and material, travel, third-party vendors, and other expenditures that are directly incurred to provide Transition Assistance; *provided, however*, that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, Renewable Identification Number ("RIN") sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents.

N. "Cox" means Cox Oil Company, Inc., its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates, in each case controlled by Cox Oil Company, Inc. and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

O. "Divestiture Agreement" means (i) the Purchase and Sale Agreement between Cox and Respondent Tri Star, dated June 5, 2020, and the Agreement to Assign, Assume and Purchase by and among Respondent Tri Star, Cox Oil Company, Inc., Dipak Lachmandas, and wife, Harsha Lachmandas, dated June 5, 2020, and including related ancillary agreements, amendments, joinders, schedules, exhibits, and attachments, thereto and contemplated therein, that have been approved by the Commission to accomplish the requirements of this Order, attached as Non-Public Appendix I; or (ii) any other agreement between Respondents (or a Divestiture Trustee) and the Acquirer that receives the prior approval of the Commission to divest the Retail Fuel Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto that have received the Commission's prior approval.

P. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.

Q. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph IX of this Order.

R. "Employee Information" means for each Retail Fuel Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

S. "Equipment" means all tangible personal property (other than Inventories) of every kind owned or leased by Respondents in connection with the operation of

the Retail Fuel Outlet Business, including, but not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of the Retail Fuel Outlet Business, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

T. "Fuel Products" means refined petroleum gasoline and diesel products.

U. "Governmental Permit" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for such Acquirer to operate any aspect of the Retail Fuel Outlet Business.

V. "Greenbrier Retail Fuel Outlet Business" means all business activities conducted by Respondent Tri Star, prior to the Acquisition Date, at or relating to 2222 Tom Austin Hwy, Greenbrier, TN 37073, including, but not limited to: (1) the promotion, marketing, provision, and retail sale of Fuel Products, and other related services; and (2) the supply, installation, and maintenance of equipment for the purpose of dispensing Fuel Products at the location.

W. "Intellectual Property" means intellectual property of any kind including, but not limited to, patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

X. "Inventories" means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out-of-date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

Y. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

Z. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

AA. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

BB. "Prior Notice Outlet" means the Retail Fuel Assets.

CC. "Products" means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business.

DD. "Respondents' Brands" means all of Respondents' trademarks, trade dress, logos, service marks, trade names, brand names, and all associated Intellectual Property rights used in connection with or related to the Retail Fuel Outlet Business.

EE. "Retail Fuel Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to, used in, or reserved for use in, the Retail Fuel Outlet Business, including, but not limited to:

1. All real property interests (including fee simple interests and real property leases and leasehold interests), including all easements and rights-of-way, together with all buildings and other structures, facilities, appurtenances, and improvements located thereon or affixed thereto (including all attached machinery, fixtures, and heating, plumbing, electrical, lighting, ventilating and air-conditioning equipment), whether owned, leased, or otherwise held;

2. All Equipment, including any Equipment removed from any location of the Retail Fuel Outlet Business since the date of the announcement of the Acquisition and not replaced;

3. All Inventories;

4. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto, to the extent transferable, and at the Acquirer's option;

5. All Governmental Permits, and all pending applications therefor or renewals thereof, to the extent transferable;

6. All intangible rights and property, including Intellectual Property, owned or licensed (as licensor or licensee) by Respondents (to the extent

transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and

7. Business Information; *provided, however,* that in cases in which Business Information included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets and to other, retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Retail Fuel Assets, or (b) where Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies of the materials containing such information with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes;

Provided, however, that the Retail Fuel Assets need not include the Retained Assets.

FF. "Retail Fuel Employee" means any full-time, part-time, or contract individual employed by Respondents, as applicable, at the Retail Fuel Outlet Business, as of March 6, 2020.

GG. "Retail Fuel Outlet Business" means:

1. The Greenbrier Retail Fuel Outlet Business; and

2. The Whites Creek Retail Fuel Outlet Business.

HH. "Retained Assets" means those assets listed on Non-Public Appendix II.

II. "Third Party" means any Person other than the Respondents or the Acquirer.

JJ. "Transition Assistance" means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents' brands for transitional purposes, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

KK. "Whites Creek Retail Fuel Outlet Business" means all business activities conducted by Respondent Hollingsworth, as applicable, prior to the Acquisition Date at or relating to Sudden Service Site 15 located at 500 Hickory Hills Blvd., Whites Creek, TN 37189, including, but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, and other fuels, automotive products, and related services; and (2) the operation of associated convenience stores and related businesses and services, including, but not limited to the retail sale, promotion, marketing and provision of food and grocery products (including dairy and bakery items, snacks, gum, and candy), foodservice and quick-serve restaurant items, beverages (including alcoholic beverages), tobacco products, general merchandise, ATM services, gaming and lottery tickets and services, money order services, car wash services, and all other businesses and services associated with the business operated or to be operated at the location.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, as an ongoing business, to Cox pursuant to the Divestiture Agreement.

Provided, however, that, if within 12 months after issuing the Order, the Commission determines, in consultation with the Acquirer and the Monitor should one be appointed, the Acquirer needs one or more Retained Assets to operate the Retail Fuel Assets in a manner that achieves the purposes of the Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets to the Acquirer.

B. If Respondents have divested the Retail Fuel Assets to Cox prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Cox is not acceptable as the acquirer of the Retail Fuel Assets, then Respondents shall immediately rescind the Cox Acquisition Agreement, and shall divest the Retail Fuel Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Retail Fuel Assets to Cox was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Retail Fuel Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall obtain, no later than the Divestiture Date and at their sole expense, all Consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for the Acquirer to operate any aspect of the Retail Fuel Outlet Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from Third Parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Permits relating to the Retail Fuel Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Retail Fuel Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Retail Fuel Assets to the Acquirer and (ii) assist the Acquirer in operating the Retail Fuel Assets and Retail Fuel Outlet Business in all material respects in the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall Provide Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Cost; and

3. For a period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of the Divestiture Agreement.

IV. Divestiture Agreement

IT IS FURTHERED ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

V. Asset Maintenance

IT IS FURTHER ORDERED that until the Retail Fuel Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Retail Fuel Assets and Retail Fuel Outlet Business are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Retail Fuel Assets and Retail Fuel Outlet Business, to minimize any risk of loss of competitive potential of the Retail Fuel Assets and Retail Fuel Outlet Business, to operate the Retail Fuel Assets and Retail Fuel Outlet Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Retail Fuel Assets and Retail Fuel Outlet Business, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or

otherwise impair the Retail Fuel Assets and Retail Fuel Outlet Business (other than in the manner prescribed in this Order and the Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Retail Fuel Assets and Retail Fuel Outlet Business; and

B. Not terminate the operations of the Retail Fuel Assets and Retail Fuel Outlet Business, and shall conduct or cause to be conducted the operations of the Retail Fuel Assets and Retail Fuel Outlet Business in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Retail Fuel Assets and Retail Fuel Outlet Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Retail Fuel Assets and Retail Fuel Outlet Business.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Retail Fuel Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Retail Fuel Assets to evaluate independently and offer employment to the Retail Fuel Employees.

B. Until one year after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Retail Fuel Employees, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with

Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by the Acquirer.

C. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Retail Fuel Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Retail Fuel Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information

received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or Retail Fuel Outlet Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph VII.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph, including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. No later than 5 days after the Commission appoints the Monitor, Respondents shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets as set forth in Paragraph VIII.D;

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in Paragraph VIII.D; and

3. Enter into an agreement with the Monitor that is approved by the Commission. If Respondents and the Monitor fail to sign an agreement within the allotted time, the Commission will approve, and Respondents agree to consent to, an agreement with terms and provisions typical of Commission monitor agreements and require that the Monitor's fees will be his or her standard and customary fees plus expenses reasonably incurred performing duties as the Monitor.

D. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in this Order and the Order to Maintain Assets;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement.

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Shall report in writing to the Commission concerning Respondents' compliance with this Order: (i) 30 days after appointment and every 30 days thereafter until Respondents have completed all obligations required by Paragraphs II and III of this Order; (ii) when Respondents have

completed the obligations required by Paragraphs II and III of this Order; and (iii) at any other time requested by the staff of the Commission; and

9. Shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and Paragraph III of this Order, or until such other time as may be determined by the Commission or its staff.

E. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the Monitor to monitor Respondents' compliance with its obligations under the Orders; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to this Order.

F. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or are connected with any claim concerning the Monitor's performance of the Monitor's duties under this Order, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct.

For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.D of this Order.

G. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

H. Respondent shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including written reports submitted pursuant to Paragraph VIII.D.8, or any Person with whom the Monitor communicates in the performance of his/her duties.

I. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and subject to all obligations of this Paragraph VIII:

1. The Commission shall select the substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor, Respondents have not opposed, in

writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement with the Monitor first appointed and referenced in Paragraph VIII.A, above; or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under this Order.

J. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price.

The divestiture shall be made in the manner and to the Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph IX.E.6, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph IX.E.5 of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Retail Fuel Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Notice

IT IS FURTHERED ORDERED that:

A. For a period of 10 years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission ("Notification") in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Prior Notice Outlet.

B. With respect to the Notification:

1. The Notification required by this Paragraph X shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall include a description of the proposed acquisition and provide:

   a. A map showing all retail fuel outlets by ownership (*e.g.*, OPIS Corporate Brand) within 5 driving miles of the relevant Prior Notice Outlet;

   b. For each retail fuel outlet owned by Respondents within 5 driving miles of the relevant Prior Notice Outlet, a list of the retail fuel outlets that Respondents monitored at any time within the preceding 12-month period (to the extent such information is available); and

   c. Respondents' pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph X.B.2.(b) of this Order.

3. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

4. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior Notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents Tri Star, HOC, and C & H shall:

1. notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date, and;

2. submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents Tri Star, HOC, and C & H shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents submit interim compliance reports 30 days after the Order is issued, and every 30 days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III; annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with its obligations under this Order are insufficient. Respondents shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance a full description of the measures Respondents have implemented or plan to implement to ensure that Respondents have complied or will comply with each paragraph of the Order;

3. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

IT IS FURTHER ORDERED that Respondent Tri Star shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Tri Star Energy, LLC;

B. Any proposed acquisition, merger, or consolidation of Tri Star Energy, LLC; or

C. Any other change in Respondent Tri Star, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose this Order is to ensure the continued use of the Retail Fuel Assets in the same Retail Fuel Outlet Business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on August 12, 2030.

By the Commission.

Non-Public Appendix I

Divestiture Agreements

[Redacted from Public Version but Incorporated by Reference]

Analysis to Aid Public Comment

Non-Public Appendix II

Retained Assets

[Redacted from Public Version but Incorporated by Reference]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Tri Star Energy, LLC ("Tri Star") and Hollingsworth Oil Company, Inc., C & H Properties, and Ronald L. Hollingsworth ("Hollingsworth" and collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from Tri Star's proposed acquisition of retail fuel assets from Hollingsworth.

Under the terms of the proposed Consent Agreement, Tri Star must divest to the upfront buyer, Cox Oil Company, Inc. ("Cox"), retail fuel assets in two local markets in Tennessee. Tri Star must complete the divestiture within 10 days after the closing of Tri Star's acquisition of Hollingsworth. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date Cox acquires the outlet.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Tri Star, a company headquartered in Nashville, Tennessee, owns and operates convenience stores and retail fuel outlets throughout Tennessee, Alabama, Georgia, and Kentucky. Tri Star operates 89 convenience stores with attached retail fuel outlets, including 82 in Tennessee. Tri Star's convenience stores operate under the Twice Daily, Hightail, and t-Fuel names, and its retail fuel outlets sell under a variety of third-party branded and unbranded fuel banners. Tri Star also supplies fuel to a network of 285 dealer locations.

Respondent Mr. Ronald L. Hollingsworth, a resident of the state of Tennessee, controls both Hollingsworth Oil Company, Inc. and C & H Properties, entities operating in Tennessee.

Hollingsworth operates a network of 54 convenience stores under the Sudden Service name with attached retail fuel outlets throughout middle Tennessee. Hollingsworth provides a variety of third-party branded and unbranded fuels at its Sudden Service outlets and to 172 wholesale fuel locations.

III. The Proposed Acquisition

On March 6, 2020, Tri Star entered into an agreement to acquire certain retail fuel outlets and other interests, from Hollingsworth and related entities (the "Acquisition"). The Acquisition would expand Tri Star's presence throughout middle Tennessee.

The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and the retail sale of diesel in each of two local markets in Tennessee.

IV. The Retail Sales of Gasoline and Diesel

The Commission's Complaint alleges that the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable – vehicles that run on gasoline cannot run on diesel and vehicles that run on diesel cannot run on gasoline.

The Commission's Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Acquisition are two local markets in and around Whites Creek, Tennessee, and Greenbrier, Tennessee.

The geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting a number of considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel are likely similar to the corresponding geographic markets for retail gasoline as many diesel consumers exhibit the same preferences and behaviors as gasoline consumers.

The Acquisition would eliminate competition in these local markets, resulting in a merger to monopoly in each market for the retail sale of gasoline and the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. The combined entity would be able to raise prices unilaterally in the two local

markets. Absent the Acquisition, Tri Star and Hollingsworth would continue to compete head to head in these local markets.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Tri Star to divest certain Tri Star and Hollingsworth retail fuel assets to Cox in each local market.

The proposed Consent Agreement requires that the divestiture be completed no later than 10 days after Tri Star consummates the Acquisition. The proposed Consent Agreement further requires Tri Star and Hollingsworth to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture to Cox is complete. For up to twelve months following the divestiture, Tri Star and Hollingsworth must make available transitional services, as needed, to assist Cox with the divestiture assets.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires Respondents to provide the Commission notice before re-acquiring the divested outlets for ten years. The prior notice provision is necessary because an acquisition of either or both divested assets would likely raise the same competitive concerns and may fall below the HSR Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date the Respondents complete the divestiture. The Commission may appoint an independent third party as a Monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

ELDORADO RESORTS, INC.,
AND
CAESARS ENTERTAINMENT CORPORATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACTAND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4721; File No. 191 0158
Complaint, June 25, 2020 – Decision, August 25, 2020

This consent order addresses the $17.3 billion acquisition by Eldorado Resorts, Inc. of certain assets of Caesars Entertainment Corporation. The complaint alleges that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating meaningful and substantial competition between Eldorado and Caesars for casino services in the South Lake Tahoe, Bossier City-Shreveport and Kansas City areas. The consent order requires the divestiture of the MontBleu and Eldorado Shreveport casinos to Twin River Worldwide Holdings, Inc.

Participants

For the *Commission*: *Michelle Fetterman, Jacob Hamburger* and *Joshua Smith.*

For the *Respondents*: *Fiona Schaeffer, Milbank LLP;* and *Ken Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Eldorado Resorts, Inc. ("Eldorado"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Caesars Entertainment Corporation ("Caesars"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Eldorado is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its headquarters and principal place of business located at 100 West Liberty Street, Suite 1150, Reno, Nevada 89501.

2. Respondent Caesars is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at One Caesars Palace Drive, Las Vegas, Nevada 89109.

II. JURISDICTION

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

III. THE ACQUISITION

4. Pursuant to an Agreement and Plan of Merger dated June 24, 2019, Eldorado proposes to acquire Caesars in a cash and stock transaction valued at approximately $17.3 billion ("the Acquisition").

IV. THE RELEVANT MARKETS

5. The relevant line of commerce in which to analyze the effects of the Acquisition is casino services. Casino services include a combination of slot machine, video poker machine, and table gaming (*i.e.*, gambling) services, and associated amenities that are used to drive gaming revenue, which typically include some combination of hotel accommodations, food and beverages, entertainment, and other amenities.

6. The three relevant geographic markets in which to analyze the effects of the Acquisition are: (1) the South Lake Tahoe area, which approximately corresponds to, the area in and around the cities of Stateline, Nevada, and South Lake Tahoe, California; (2) the Bossier City- Shreveport, Louisiana area, which approximately corresponds to the Bossier City-Shreveport, Louisiana MSA; and (3) the Kansas City area, which approximately corresponds to the Kansas City, Missouri MSA.

V. THE STRUCTURE OF THE MARKETS

A.
Casino Services in the South Lake Tahoe Area

7. Casino services in the South Lake Tahoe area is a relevant market. The Acquisition will reduce the number of providers of casino services in the South Lake Tahoe area from three to two and result in a highly concentrated market.

B.
Casino Services in the Bossier City-Shreveport Area

8. Casino services in the Bossier City-Shreveport area is a relevant market. The Acquisition will reduce the number of providers of casino services in the Bossier City-Shreveport area from five to four and result in a highly concentrated market.

C.
Casino Services in Kansas City Area

10. Casino services in the Kansas City Area is a relevant market. The Acquisition will reduce the number of providers of casino services in the Kansas City area from five to four and result in a highly concentrated market.

VI. ENTRY CONDITIONS

A.
Entry Conditions in the South Lake Tahoe Area

11. Entry into the South Lake Tahoe area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The entry of any additional casino in the South Lake Tahoe area to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

B.
Entry Conditions in the Bossier City-Shreveport Area

12. Entry into the Bossier City-Shreveport area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The state of Louisiana allows for the licensing of 15 riverboat casinos across the state, only six of which may be located on the same designated waterway. All 15 licenses in the state have been awarded and six casinos currently operate along the Red River in Bossier City-Shreveport. The relocation of any existing riverboat casino in Louisiana to a designated waterway near Bossier City-Shreveport to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

C.
Entry Conditions in the Kansas City Area

13. Entry into the Kansas City area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The state of Missouri allows for the licensing of 13 riverboat casinos across the state, and all 13 licenses have been awarded. The state of Kansas limits the number of permitted casinos in the state to four, and all four licenses have been awarded. The relocation of any existing Missouri riverboat casino to the Missouri side of the Kansas City area to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

VII. EFFECTS OF THE ACQUISITION

14. The Acquisition, if consummated, is likely to substantially lessen competition in the relevant line of commerce in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents Eldorado and Caesars; and

b. by increasing the likelihood that Respondent Eldorado will unilaterally exercise market power.

15. The ultimate effect of the Acquisition would be to increase the likelihood that prices of casino services will increase, and that the quality associated with casino services will decrease, in the relevant geographic markets.

VIII. VIOLATIONS CHARGED

16. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on the twenty-fifth day of June, 2020, issues its Complaint against said Respondents.

By the Commission, Commissioner Chopra dissenting, Commissioner Slaughter not participating.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Eldorado Resorts, Inc. of Respondent Caesars Entertainment Corporation. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said

agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Hold Separate and Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its complaint, makes the following jurisdictional findings and issues the following Order to Hold Separate and Maintain Assets ("Hold Separate Order"):

1. Respondent Eldorado Resorts, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its headquarters and principal place of business located at 100 West Liberty Street, Suite 1150, Reno, Nevada 89501.

2. Respondent Caesars Entertainment Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at One Caesars Palace Drive, Las Vegas, Nevada 89109.

3. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Decision and Order" means:

   1. The proposed Decision and Order contained in the Consent Agreement in this matter, until issuance of a final Decision and Order by the Commission; and

   2. The final Decision and Order, once it is issued by the Commission in this matter.

B. "Hold Separate Businesses" means the Casino Assets and Casino Business relating to each of the Divested Casinos during the Hold Separate Period.

C. "Hold Separate Managers" means the persons designated by Paragraph II.B of this Order to manage each of the Hold Separate Businesses.

D. "Hold Separate Period" means the period during which each of the Hold Separate Businesses are to be held separate from Respondent Eldorado's other businesses pursuant to this Hold Separate Order, which shall begin on the Acquisition Date and terminate on the Divestiture Date.

E. "Orders" means the Decision and Order and this Hold Separate Order.

II. Hold Separate and Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until the Casino Assets have been fully transferred to the Acquirer, Respondent Eldorado shall ensure that the Casino Assets and Casino Business are operated and maintained in the ordinary course of business consistent with past practices, and shall:

1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Casino Assets and Casino Business, to minimize any risk of loss of competitive potential of the Casino Assets and Casino Business, to operate the Casino Assets and Casino Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Casino Assets and Casino Business, except for ordinary wear and tear. Respondent Eldorado shall not sell, transfer, encumber, or otherwise impair the Casino Assets and Casino Business (other than in the manner prescribed in this Order and the Hold Separate Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Casino Assets and Casino Business; and

2. Not terminate the operations of the Casino Assets and Casino Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Casino Assets and Casino Business. Included in the above obligations, Respondent Eldorado shall, without limitation:

a. Maintain all operations of the Casino Business in the regular course of business and in accordance with past practices (including regular repair and maintenance efforts), keep the organization and properties of the Casino Business intact, and not reduce operating hours, marketing and promotional efforts, customer programs, entertainment offerings, or other services, amenities, or offerings;

b. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Casino Business;

c. Provide the Casino Business with sufficient funds to operate in the ordinary course of business, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment (including gaming equipment), and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

d. Provide such other resources as may be necessary to respond to competition against the Casino Business, prevent diminution in sales of the Casino Business, and maintain the competitive strength of the Casino Business;

e. Provide support services at levels customarily provided by Respondent Eldorado, and as otherwise may be required;

f. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Casino Business, and operate the Casino Business in accordance and compliance with all laws and regulatory obligations and requirements (including compliance with requirements or requests of state gaming commissions, compliance with policies and standards concerning safety, health, and environmental regulations, and compliance with obligations regarding the integrity of financial controls);

g. Maintain the books and records of the Casino Business, including all customer databases, loyalty program databases, records relating to regulatory compliance, and financial records;

h. Maintain working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Casino Business, including:

    i. Providing employees with reasonable financial incentives to continue in their positions, including a continuation of all employee compensation and benefits offered by Respondent Eldorado, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional incentives as may be necessary;

ii. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

iii. Not transferring any employees from the Casino Business to any of Respondent Eldorado's assets or businesses that Respondent Eldorado will not divest;

i. Not display any signs or conduct any advertising or promotions (e.g., direct mailing, emails, social media postings) or do anything else visible to the public to indicate that Respondent Eldorado is moving its operations to another location or that indicates any Casino Business will close;

j. Not reduce, change, or modify in any material respect the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Casino Business (including Respondent Eldorado's customer loyalty programs), other than changes in the ordinary course of business consistent with changes made at Respondent Eldorado's other casino businesses that Respondent Eldorado will not divest; and

k. Not target, encourage, or convert customers of the Casino Business to become customers of Respondent Eldorado's other casino businesses in the same geographic area that will not be divested, or otherwise take actions to change the composition or makeup of the Casino Customer Database Records or the Retained Customer Database Records; *provided, however*, that nothing in this sub-paragraph shall prevent Respondent Eldorado from engaging in advertising, marketing, and promotion activities: (i) constituting general marketing and general advertising efforts to Respondent Eldorado's customer loyalty programs in effect at the Divested Casinos, or (ii) in the ordinary course of business and in accordance with past practice.

B. During the Hold Separate Period, Respondent Eldorado shall operate the Hold Separate Businesses as independent, ongoing, economically viable businesses, and shall:

1. Hold the Hold Separate Businesses separate, apart, and independent of Respondent Eldorado's other businesses and assets, and vest the Hold Separate Businesses with all rights, powers, and authority necessary to conduct business in a manner consistent with this Hold Separate Order;

2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Businesses or any of their operations, or the Hold

Separate Managers, except to the extent that Respondent Eldorado must exercise direction and control over the Hold Separate Businesses to assure compliance with the Orders and applicable laws and regulations (including compliance with requirements or requests of state gaming commissions). Respondent Eldorado shall have the right, in consultation with the Monitor and Hold Separate Managers, to defend any legal claims, investigations, or enforcement actions threatened or brought against the Hold Separate Businesses;

3. Provide the Hold Separate Businesses with sufficient financial resources and other resources to carry on operations in the ordinary course of business and to meet Respondent Eldorado's obligations as required by this Hold Separate Order, and continue to offer and provide any and all support services and goods (directly or through third-party contracts) as historically provided in the ordinary course of business, or as may be reasonably requested by the Hold Separate Managers;

4. Not permit:

   a. Any of its employees, officers, agents, or directors, other than: (i) the Hold Separate Managers; (ii) the Casino Employees; and (iii) Respondent Eldorado's employees providing support services to the Hold Separate Businesses, to be involved in the operations of the Hold Separate Businesses, except to the extent otherwise provided or allowed by this Hold Separate Order; or

   b. The Hold Separate Managers or any Casino Employees to be involved, in any way, in the operations of Respondent Eldorado's businesses other than the Hold Separate Businesses;

5. Prior to the commencement of the Hold Separate Period, appoint Hold Separate Managers to oversee the operations of the Hold Separate Businesses in a manner consistent with the requirements of this Hold Separate Order. Further to this obligation:

   a. James Bunyard shall serve as the Hold Separate Manager for Eldorado Shreveport and Timothy K. Tretton shall serve as the Hold Separate Manager for MontBleu;

   b. Respondent Eldorado shall enter into manager agreements with the Hold Separate Managers that shall become effective prior to the Acquisition Date and that, subject to the approval of the Monitor in consultation with the Commission staff, transfer all rights, powers, and authority necessary to permit the Hold Separate Managers to perform his or her duties and responsibilities pursuant to this Hold Separate Order. The manager agreements shall provide that:

i. Each Hold Separate Manager shall be responsible for managing the operations of the respective Hold Separate Business during the Hold Separate Period and shall manage the Hold Separate Business independently of the management of Respondent Eldorado and its other businesses; *provided, however,* the Hold Separate Managers will have the option to continue, consistent with past practices, receiving any support or shared services from Respondent Eldorado, including participating in marketing programs (including player's club programs, promotions and events), and may request, in his/her discretion, additional support services from Respondent Eldorado relating to the operation or marketing of the Hold Separate Businesses;

ii. The Hold Separate Managers shall make no material changes in the ongoing operations of the Hold Separate Businesses and shall continue the management and operation of the Hold Separate Businesses in the ordinary course of business and consistent with the obligations of Paragraph II.A of this Hold Separate Order;

iii. Respondent Eldorado shall continue to provide the Hold Separate Managers with all employee benefits, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law), and shall provide the Hold Separate Managers with additional financial incentives as may be necessary to undertake these positions and to assure the continued viability, marketability, and competitiveness of the Hold Separate Businesses and achieve the purposes of this Hold Separate Order;

iv. The Hold Separate Managers shall serve, without bond or other security, at the cost and expense of Respondent Eldorado, on such reasonable and customary terms as the Commission may set, and commensurate with the person's experience and responsibilities. The Hold Separate Managers shall have the authority to employ, at Respondent Eldorado's expense, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Manager's duties and responsibilities;

v. Respondent Eldorado shall indemnify the Hold Separate Managers and hold them harmless against any losses,

claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Managers' duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct;

vi. The Hold Separate Managers shall be in regular contact with the Monitor. Nothing shall preclude the Hold Separate Managers from contacting or communicating directly with the Monitor or the staff of the Commission, either at the request of the staff of the Commission or the Monitor, or in the discretion of the Hold Separate Managers;

vii. The Hold Separate Managers shall have the authority to staff the Hold Separate Businesses with sufficient employees to maintain the viability and competitiveness of the Hold Separate Businesses, including:

a) Replacing any departing or departed employee with a person who has similar experience and expertise, or determining not to replace such departing or departed employee;

b) Removing any employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order and replacing such employee with another person of similar experience or skills;

c) Ensuring that Casino Employees are not involved in the operations of Respondent Eldorado's other businesses and that Respondent Eldorado's other employees are not involved in the operation of the Hold Separate Businesses, unless allowed or required under the Orders;

d) Ensuring that the Casino Employees are provided with reasonable financial incentives to continue in their positions, including a continuation of all employee compensation and benefits offered by Respondent Eldorado, including regularly scheduled or merit raises and bonuses, regularly

scheduled vesting of pension benefits, and additional incentives as may be necessary;

viii. Respondent Eldorado shall cooperate with the Hold Separate Managers and take no action to interfere with or impede the ability of the Hold Separate Managers to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order; and

ix. If a Hold Separate Manager resigns, or if the Monitor, in consultation with Commission staff, determines that a Hold Separate Manager has ceased to act or failed to act diligently, then a substitute Hold Separate Manager shall be appointed. Respondent Eldorado shall, in consultation with the Monitor and Commission staff, select and appoint a substitute Hold Separate Manager as soon as is practicable, and enter into an agreement with the substitute Hold Separate Manager on similar terms, and grant the substitute Hold Separate Manager the same authority and responsibilities of the original Hold Separate Manager pursuant to this Paragraph; and

6. Prior to the Acquisition Date, implement written procedures, subject to the approval of the Monitor, regarding the operational independence of the Hold Separate Businesses, the independent management of the Hold Separate Businesses by the Hold Separate Managers, and restrictions on access and use of Confidential Business Information, consistent with the provisions of the Orders. Respondent Eldorado shall provide notice of those procedures to the Casino Employees, Respondent Eldorado's employees that may provide support services to the Hold Separate Businesses, and to Respondent Eldorado's employees who have responsibilities associated with businesses that compete with the Hold Separate Businesses.

Provided, however, that Respondent Eldorado and the Hold Separate Managers may operate the Casino Assets and Casino Business subject to restrictions imposed or recommended by any federal, state, or local governmental agency having jurisdiction over the property (including the Centers for Disease Control and Prevention) or otherwise as reasonable or necessary to respond to or mitigate any pandemic or public health emergency caused by COVID-19 and shall operate the Casino Assets and Casino Business in a manner consistent with Respondent Eldorado's efforts at its casino properties located in the same jurisdictions that are not being divested.

Provided further, however, that Respondent Eldorado and the Hold Separate Managers may take actions that the Acquirer has requested or agreed-to in writing and that has been approved in advance by the Monitor (in consultation with Commission staff), in all cases

to facilitate the Acquirer's acquisition of the Casino Assets and consistent with the purposes of this Order and the Hold Separate Order.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondent Eldorado has transferred all Business Information (including the Casino Customer Database Records) included in the Casino Assets, Respondent Eldorado shall ensure that the Business Information is maintained and updated in the ordinary course of business, and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondent Eldorado has not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondent Eldorado shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Casino Assets to the Acquirer and (ii) assist the Acquirer in operating the Casino Assets and Casino Business in all material respects to the manner in which Respondent Eldorado did so prior to the Acquisition, and shall:

1. Provide Transition Assistance:

   a. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date); and

   b. At the price set forth in a Divestiture Agreement, or if no price is set forth, at Direct Cost; and

   c. For a period sufficient to meet the requirements of this Paragraph IV.B, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date; and

2. Allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreements upon commercially reasonable notice and without cost or penalty.

3. Not cease providing Transition Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent Eldorado's breach of a Divestiture Agreement.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 1 year after the Divestiture Date, Respondent Eldorado shall cooperate with and assist the Acquirer of the Casino Assets to identify, evaluate independently, offer employment to, and hire the Casino Employees, with such cooperation and assistance including at least the following:

1. Not later than 5 business days after a request from the Acquirer, Respondent Eldorado shall, to the extent permitted by applicable law:

   a. Provide to the Acquirer a list of all Casino Employees, and provide Employee Information for each; and

   b. Allow the Acquirer a reasonable opportunity to interview any Casino Employees;

2. Within 10 days after a request from the Acquirer, Respondent Eldorado shall provide an opportunity for the Acquirer to:

   a. Meet, outside the presence or hearing of any employee or agent of Respondent Eldorado, with any of the Casino Employees; and

   b. Make offers of employment to any of the Casino Employees;

3. Respondent Eldorado shall not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Casino Employees, not offer any incentive to Casino Employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Casino Employees by a proposed Acquirer;

4. Respondent Eldorado shall remove any impediments within its control that may deter any Casino Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondent Eldorado that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to any Casino Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent Eldorado to terminate the employment of any employee or prevent Respondent Eldorado from continuing the employment of any employee;

5. Respondent Eldorado shall continue to provide Casinos Employees with all employee compensation and benefits offered by Respondent Eldorado

in the ordinary course of business, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of pension benefits;

6. Respondent Eldorado shall provide reasonable financial incentives for Casino Employees to continue in their positions and, as may be necessary, to facilitate the employment of such Casino Employees by the Acquirer; and

7. For a period of 1 year from the Divestiture Date, Respondent Eldorado shall allow the Acquirer to identify additional employees that should be designated as Key Employees and subject to the provisions of this Paragraph ("Additional Key Employees"); *provided, however*, that the number of Additional Key Employees so designated may be limited to 35 employees.

B. Respondent Eldorado Shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Casino Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer; and

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, Respondent Eldorado may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of the Casino Employees; or

3. Hire an employee who has applied for employment with Respondent Eldorado, as long as such application was not solicited or induced in violation of this Paragraph.

V. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondent, in consultation with the Acquirer, and for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Casino Assets and Casino Business by the Acquirer is not delayed or impaired;

2. Designate employees of Respondent Eldorado knowledgeable about the operation of the Casino Assets and Casino Business, who will be responsible for communicating directly with the Acquirer and the Monitor (if one has been appointed) for the purposes of assisting in the transfer to the Acquirer of the Casino Assets and Casino Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Casino Assets and Casino Business, and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effect the transition to the Acquirer in an efficient and timely manner.

B. Respondent Eldorado shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by the Orders or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by the Orders a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of Respondent Eldorado; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondent Eldorado's employees working at or supporting any of Respondent Eldorado's retained casino business, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of Paragraphs V.B.1 and V.B.2 above.

Provided, however, that nothing in this Paragraph V.B shall prevent Respondent Eldorado from retaining and using any tangible or intangible property (including

Retained Customer Database Records) that Respondent Eldorado retains the right to use pursuant to the Orders, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondent Eldorado shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Eldorado's obligations under the Orders.

C. Respondent Eldorado shall implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order, the Hold Separate Order, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondent Eldorado's computers or computer networks.

D. Not later than 10 days after the Acquisition Date, and no less than annually for 3 years after each Divestiture Date, Respondent Eldorado shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent Eldorado's personnel to all of its officers, directors, employees, or agents who may have possession or access to the Confidential Business Information. Respondent Eldorado shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

E. Notwithstanding this paragraph, Respondent Eldorado may use Confidential Business Information:

1. For the purpose of performing its obligations under the Orders or the Divestiture Agreements; and

2. To ensure compliance with legal and regulatory requirements, or as necessary to defend against legal claims.

VI. Monitor

IT IS FURTHER ORDERED that:

A. Jeffrey L. Gilbert shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Eldorado, and attached as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondent Eldorado's compliance with the terms of Orders and the Divestiture Agreements.

B. No later than 1 day after this Hold Separate Order is issued by the Commission, Respondent Eldorado shall, pursuant to the Monitor Agreement, confer on the

Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondent Eldorado's compliance with the terms of the Orders and the Divestiture Agreements, in a manner consistent with the purposes of the Orders.

C. Respondent Eldorado shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent Eldorado's compliance with the divestiture and other requirements of the Orders and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of Respondent Eldorado or of the Commission;

3. The Monitor shall serve until 30 days after Respondent Eldorado has satisfied all obligations under Paragraphs II and IV of the Decision and Order or until such other time as may be determined by the Commission or its staff; and

4. The Monitor shall report in writing to the Commission concerning Respondent Eldorado's compliance with the Orders: (i) 30 days after this Hold Separate Order is issued, and every 30 days thereafter until Respondent Eldorado has satisfied all of its obligations under Paragraphs II and IV of the Decision and Order; and (ii) at any other time requested by the staff of the Commission.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Eldorado's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Eldorado's compliance with its obligations under the Orders and the Divestiture Agreements.

E. Respondent Eldorado shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Eldorado's compliance with the Orders and the Divestiture Agreements.

F. The Monitor shall serve, without bond or other security, at the Respondent Eldorado's expense, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the Respondent Eldorado's expense, such consultants, accountants, attorneys, and

other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondent Eldorado shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VI.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VI.F of this Hold Separate Order.

H. Respondent Eldorado shall report to the Monitor in accordance with the requirements of the Orders, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by Respondent Eldorado with respect to the performance of Respondent Eldorado's obligations under the Orders.

I. Respondent Eldorado may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor who will have the same authority and responsibilities as the original Monitor pursuant to this Paragraph VI:

1. The Commission shall select the substitute Monitor, subject to Respondent Eldorado's consent, which consent shall not be unreasonably withheld. If Respondent Eldorado has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondent Eldorado of the identity of any proposed Monitor, Respondent Eldorado shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondent Eldorado shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers

necessary to permit the Monitor to monitor Respondent Eldorado's compliance with the relevant terms of the Orders and the Divestiture Agreements in a manner consistent with the purposes of the Orders and in consultation with the Commission.

L. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of the Orders.

M. The Monitor appointed pursuant to this Hold Separate Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

VII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent Eldorado has not fully complied with the divestiture and other obligations as required by Paragraphs II.A and II.B of the Decision and Order, the Commission may appoint one or more Divestiture Trustees to divest any or all of the Casino Assets, enter agreements for Transition Assistance, and perform Respondent Eldorado's other obligations in a manner that satisfies the requirements of the Decision and Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Eldorado shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Eldorado to comply with the Orders.

B. The Commission may select one or more Divestiture Trustees, subject to Respondent Eldorado's consent, which consent shall not be unreasonably withheld. The Commission may appoint one Divestiture Trustee or separate Divestiture Trustees to divest one or more of the Casino Assets, enter agreements for Transition Assistance, and perform Respondent Eldorado's other obligations in a manner that satisfies the requirements of the Decision and Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Eldorado has not opposed, in writing, and stated in writing its reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondent Eldorado of the identity of any proposed Divestiture Trustee, Respondent

Eldorado shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. Not later than 10 days after the appointment of a Divestiture Trustee, Respondent Eldorado shall execute a trust agreement for any divestitures required by this Order that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by the Decision and Order. Any failure by Respondent Eldorado to comply with a trust agreement approved by the Commission shall be a violation of the Orders.

2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII.B, Respondent Eldorado shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

    a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations (including obligations to provide Transition Assistance) imposed by, the Decision and Order.

    b. The Divestiture Trustee shall have 1 year after the date the Commission approves each trust agreement described herein to accomplish the divestitures required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the 1 year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of the Decision and Order or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only 2 times.

    c. Subject to any demonstrated legally recognized privilege, any Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by the Decision and Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Eldorado shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Eldorado shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by

Respondent Eldorado shall extend the time under this Paragraph VII for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. Any Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Eldorado's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by the Decision and Order; *provided, however,* if any Divestiture Trustee receives bona fide offers for any asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Eldorado from among those approved by the Commission; *provided further, however,* that Respondent Eldorado shall select such entity within 5 days after receiving notification of the Commission's approval.

e. Any Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Eldorado, on such reasonable and customary terms and conditions as the Commission or a court may set. Any Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Eldorado, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Eldorado, and the Divestiture Trustee's power shall be terminated. The compensation of any Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by the Decision and Order.

f. Respondent Eldorado shall indemnify any Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including

all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. Any Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by the Decision and Order.

h. Any Divestiture Trustee shall report in writing to Respondent Eldorado and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

i. Respondent Eldorado may require any Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

C. If the Commission determines that any Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph VII.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by the Decision and Order.

VIII. Compliance Reports

A. Respondent Eldorado shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Eldorado shall file verified written reports ("compliance reports") in accordance with the following:

1. Within 30 days after this Hold Separate Order is issued, and every 30 days thereafter until this Hold Separate Order terminates, and otherwise as the Commission or its staff may request, Respondent Eldorado shall submit to the Commission interim compliance reports;

2. Each compliance report shall set forth in detail the manner and form in which Respondent Eldorado intends to comply, is complying, and has complied with each provision of the Orders. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Eldorado is in compliance with the Orders. Conclusory statements that Respondent Eldorado has complied with its obligations under the Orders are insufficient. Respondent Eldorado shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondent Eldorado has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Orders, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted, and such supporting materials shall be retained and produced later if needed.

3. Respondent Eldorado shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Eldorado shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent Eldorado shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Hold Separate Order may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondent Eldorado pursuant to the Decision and Order.

IX. Change in Respondent

IT IS FURTHER ORDERED that Respondent Eldorado shall notify the Commission at least 30 days prior to:

A. The dissolution of Eldorado Resorts, Inc.;

B. The acquisition, merger, or consolidation of Eldorado Resorts, Inc.; or

C. Any other change in Respondent Eldorado, including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order

X. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with the Orders, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent Eldorado, made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters office, Respondent Eldorado shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent Eldorado and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent Eldorado related to compliance with the Orders, which copying services shall be provided by Respondent Eldorado at the request of the authorized representative of the Commission and at the expense of Respondent Eldorado; and

B. To interview officers, directors, or employees of Respondent Eldorado, who may have counsel present, regarding such matters.

XI. Purpose

IT IS FURTHER ORDERED that the purpose of this Hold Separate Order is to: (1) maintain and preserve the Casino Assets and Casino Business as independent, viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the divestitures and other relief required by the Decision and Order; and (3) remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Casino Assets and Casino Business in a manner equivalent in all material respects to the manner in which Respondent Eldorado operated the Casino Assets and Casino Business prior to the Acquisition.

XII. Term

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. 3 business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each of the Divested Casinos, the day after Respondent Eldorado (or a Divestiture Trustee) completes the divestiture of the Casino Assets required by Paragraph II of the Decision and Order;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Hold Separate Order shall terminate three business days after the Decision and Order becomes final;

Provided, further, however, that if the Commission, pursuant to Paragraph II.B of the Decision and Order, requires the Respondent to rescind any of the divestitures to Twin River, then, upon rescission, the requirements of this Hold Separate Order shall again be in effect until the day after Respondent Eldorado's (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission, Commissioner Chopra dissenting, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Eldorado Resorts, Inc. of Respondent Caesars Entertainment Corporation. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Hold Separate and Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Hold Separate and Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Eldorado Resorts, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its headquarters and principal place of business located at 100 West Liberty Street, Suite 1150, Reno, Nevada 89501.

2. Respondent Caesars Entertainment Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at One Caesars Palace Drive, Las Vegas, Nevada 89109.

3. The Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order, the following definitions apply:

A. "Eldorado" means Eldorado Resorts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Eldorado Resorts, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Eldorado includes Caesars after the Acquisition Date.

B. "Caesars" means Caesars Entertainment Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Caesars Entertainment Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Twin River" means Twin River Worldwide Holdings, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 100

Twin River Road, Lincoln, Rhode Island 02865, and including subsidiaries and affiliates controlled by Twin River Worldwide Holdings, Inc.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer(s)" means Twin River or any other person that the Commission approves to acquire the Casino Assets pursuant to this Decision and Order.

F. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger dated as of June 24, 2019, by and among Caesars Entertainment Corporation, Eldorado Resorts, Inc., and Colt Merger Sub, Inc.

G. "Acquisition Date" means the date Respondents consummate the Acquisition.

H. "Business Information" means books, records, data, and information, wherever located and however stored, including documents, written information, graphic materials, and data and information in electronic format, along with the knowledge of employees, contractors, and representatives. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers (including player databases, customer lists, win/loss data, spending data, player reinvestment information, and the Casino Customer Database Records), suppliers, research and development, and operations. For clarity, Business Information includes Respondents' rights and control over information and material provided to any other person.

I. "Casino Assets" means all of Respondent Eldorado's rights, title, and interests in and to all tangible and intangible assets relating to each of the Divested Casinos and the Casino Business, including but not limited to the following:

1. Real property interests, whether owned or leased, together with all easements, rights of way, buildings, improvements, facilities, parking lots, and appurtenances thereto, and including any options to acquire or lease additional properties for future use or development;

2. Tangible personal property, including but not limited to fixtures and equipment (including gaming equipment), machinery, vehicles, supplies, and inventories;

3. Intellectual Property;

4. Contracts and Governmental Authorizations;

5. Business Information;

6. Casino Customer Database Records;

7. All issued and outstanding equity interests in and to Eldorado Casino Shreveport Joint Venture and Columbia Properties Tahoe, LLC;

8. Trademarks and brand names used at MontBleu; and

9. All other assets available to, or reserved for use by, each Divested Casino, wherever located, including but not limited to off-site properties, facilities, or assets used or available to each Divested Casino for event hosting, parking, storage, office space, billboards, advertising, and employee training or administration.

10. *Provided, however,* the Casino Assets need not include:

    a. Retained Intellectual Property;

    b. Trademarks and brand names used at the Eldorado Shreveport;

    c. Respondent Corporate Contracts;

    d. Retained Customer Database Records;

    e. Enterprise software that Respondent Eldorado also uses to manage and account for businesses other than the Divested Casinos;

    f. Respondent Eldorado's corporate headquarters;

    g. The portion of any books and records that contains information about any other business that Respondent Eldorado is not required to divest and from which Confidential Business Information has been redacted; and

    h. Any original record that Respondent Eldorado has a legal, contractual, or fiduciary obligation to retain so long as Respondent Eldorado provides the Acquirer with a copy of the record and access to the original materials if a copy is insufficient for regulatory or evidentiary purposes.

J. "Casino Business" means the business of marketing, selling, and providing casino gaming and related amenity services to customers at the Divested Casinos, including gaming services such as slots, table gaming, poker, video poker, pari-mutuel wagering, video gaming terminals, sports betting, online gaming, and all other gaming services lawfully permitted in the jurisdiction where the casino is located (whether actually offered or which could be offered there), and amenities services such as hotel, restaurant, spa, retail, food, beverage, alcohol, entertainment, meetings and conferences, and other services typically provided by Respondent Eldorado at its casino facilities.

K. "Casino Customer Database Records" means Respondent Eldorado's data and information, wherever located and however stored, provided to the Acquirer in a format and in a manner acceptable to that Acquirer, relating to customers that visit a Divested Casino or activities by customers at a Divested Casino, including:

1. Each person's personal and demographic information;

2. Each person's transactional history at a Divested Casino and/or each person's patronage, purchase, and use of casino or amenity services during visits to a Divested Casino, including the dates, game types, average wager, times, length of visits, and hotel room reservation details (*i.e.,* room types, dates, booked rates for future reservations, payment method);

3. All data and information relating to the value spent or lost by a customer during his/her visits to a Divested Casino or value as a consumer of casino services at a Divested Casino, including information such as each customer's total actual win or loss, total theoretical win or loss value, average daily worth (ADW), average daily theoretical value (ADT or THEO), or other metrics related to customer's transaction history or purchases of casino or amenity services at a Divested Casino;

4. Each person's tier status in Respondent Eldorado's customer loyalty programs in effect at the Divested Casino and total point balance on or immediately prior to the Divestiture Date, based on each person's visits to all of Respondent Eldorado's casinos participating in the shared customer loyalty program in the aggregate (including both Divested Casinos and any other casino participating in the same shared customer loyalty program as of the Divestiture Date);

5. The identity of excluded or disassociated customers, along with any related information (including whether the exclusion or disassociation is voluntary or involuntary);

6. Incentives or offers extended (whether or not redeemed) to customers of any Divested Casino, including special event invitations, gaming incentives (including downloadable slot credits, table games match play, free bet offers and other similar incentives); and

7. Any other data and information customarily used by Respondent Eldorado at, or on behalf of, a Divested Casino to market or sell casino or amenity services to customers, including, but not limited to, survey data, Twitter accounts, and Facebook accounts.

Provided, however, Casino Customer Database Records does not include a copy of the Retained Customer Database Records.

L. "Casino Employees" means:

1. With respect to each Divested Casino, each of Respondent Eldorado's employees, agents, and contractors who were employed at, or under contract with, the Divested Casino at any time between June 24, 2019 and the Divestiture Date; and

2. Key Employees.

M. "Confidential Business Information" means any non-public Business Information relating to the Casino Assets and:

1. Obtained by Respondent Eldorado prior to the Divestiture Date; or

2. Obtained by Respondent Eldorado after the Divestiture Date, in the course of performing Respondent's obligations under this Order or any Divestiture Agreement (including any agreement to provide Transition Assistance).

Provided, however, that Confidential Business Information shall not include:

1. Information that is in the public domain when received by Respondent Eldorado;

2. Information that is not in the public domain when received by Respondent Eldorado and thereafter becomes public through no act or failure to act by Respondent Eldorado;

3. Information that Respondent Eldorado develops or obtains independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and

4. Information that becomes known to Respondent Eldorado from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

N. "Contract" means a contract, lease, sub-lease, license, and other agreement or obligation of any kind.

O. "Direct Costs" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transition Assistance. "Direct Cost" to a Commission-approved Acquirer for its use of any of Respondent's employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

P. "Divested Casino(s)" means, collectively or individually, Eldorado Shreveport and MontBleu.

Q. "Divestiture Agreement(s)" means:

1. The Equity Purchase Agreement by and among Respondent Eldorado and Twin River, dated as of April 24, 2020, and all amendments, exhibits, attachments, ancillary agreements (including agreements to provide Transition Assistance), and schedules thereto, attached to this Order as Non-Public Appendix I; or

2. Any agreement between Respondent Eldorado (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer to purchase some or all of the Casino Assets, and all amendments, exhibits, attachments, ancillary agreements (including any agreements to provide Transition Assistance), and schedules thereto.

R. "Divestiture Date" means the date on which Respondent Eldorado (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) consummates the divestitures required by Paragraph II of this Order.

S. "Eldorado Shreveport" means Respondent Eldorado's Resort Casino Shreveport located at 451 Clyde Fant Parkway, Shreveport, Louisiana, and including all casino, hotel, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

T. "Employee Information" means, for each Casino Employee, information prepared by Respondent Eldorado summarizing the employment history of each employee and including, as requested by the Acquirer and to the extent permitted by applicable law:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent Eldorado's last fiscal year, and current target or guaranteed bonus, if any;

5. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

6. Written performance reviews for the past three years, if any;

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

U. "Governmental Authorization" means any license, registration, approval, or permit issued, granted, given or otherwise made available by or under the authority of any governmental agency or pursuant to any legal requirement, and all applications and documents related thereto, related to or necessary for the operation of the Casino Business (and any other lawful business) at each of the Divested Casinos.

V. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.

W. "Intellectual Property" means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet websites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets and proprietary information.

X. "Isle of Capri Casino" means Respondent Eldorado's Isle of Capri Casino Kansas City located at 1800 East Front Street, Kansas City, Missouri, and including all casino, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

Y. "Key Employees" means:

1. The individuals listed on Non-Public Appendix II to this Order; and

2. Any additional employees designated by the Acquirer pursuant to Paragraph V.A.7 of this Order.

Z. "Monitor" means the person approved by the Commission to serve as a monitor pursuant to this Order and the Hold Separate Order issued by the Commission.

AA. "MontBleu" means Respondent Eldorado's MontBleu Resort Casino & Spa, located at 55 Highway 50, Stateline, Nevada, and including all casino, hotel, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

BB. "Respondent Corporate Contracts" means:

1. Contracts that are used solely by, or relate exclusively to, assets owned by Respondent Eldorado other than the Divested Casinos; or

2. Contracts that are used by or relate to multiple casinos owned by Respondent Eldorado, including but not limited to the Divested Casinos, and identified on Non-Public Appendix III to this Order.

CC. "Retained Customer Database Records" means the data and information, wherever located and however stored, relating to customers that visit Respondent Eldorado's properties other than the Divested Casinos or activities by customers at properties other than the Divested Casinos, including:

1. Each person's personal and demographic information;

2. Each person's transactional history at Respondent Eldorado's casinos or hotels other than a Divested Casino and/or each person's patronage, purchase, and use of casino or amenity services during visits to Respondent Eldorado's casinos or hotels other than a Divested Casino, including the dates, game types, average wager, times, length of visits, and hotel room reservation details (*i.e.,* room types, dates, booked rates for future reservations, payment method);

3. All data and information relating to the value spent or lost by customers during their visits to Respondent Eldorado's casinos or hotels other than a Divested Casino or value as a consumer of casino services at Respondent Eldorado's casinos or hotels other than a Divested Casino, including information such as each customer's total actual win or loss, total theoretical win or loss value, average daily worth (ADW), average daily theoretical value (ADT or THEO), or other metrics related to customer's transaction history or purchases of casino and amenity services at Respondent Eldorado's properties other than a Divested Casino;

4. With respect to customer loyalty programs that are shared between a Divested Casino and Respondent Eldorado's other casinos, each person's tier status and total point balance in the shared program on or immediately prior to the Divestiture Date based on each person's visits to all of Respondent Eldorado's casinos participating in the shared customer loyalty program in the aggregate (including the Divested Casino and any other casino participating in the shared customer loyalty program as of the Divestiture Date);

5. The identity of excluded and disassociated customers, along with any related information (including whether the exclusion or disassociation is voluntary or involuntary);

6. Incentives or offers from casinos other than the Divested Casinos (whether or not redeemed) extended to customers, including special event invitations, gaming incentives (including downloadable slot credits, table games match play, free bet offers and other similar incentives); and

7. Any other data and information customarily used by Respondent Eldorado at, or on behalf of, a casino or hotel other than a Divested Casino to market or sell casino or amenity services to customers, including, but not limited to, survey data, Twitter accounts, and Facebook accounts.

DD. "Retained Intellectual Property" means Intellectual Property owned or licensed by Respondent Eldorado that, prior to the Acquisition, was used by Respondent Eldorado solely or primarily for purposes other than the Divested Casinos.

EE. "Transition Assistance" means services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Casino Assets and Casino Business, including, but not limited to, accounting and finance; audits; human resources (employee benefits, payroll, etc.); information technology and systems; databases; technology transfer; operating permits and licenses; regulatory compliance; maintenance and repair of facilities and equipment; supply chain; maintaining or establishing relationships with vendors or other third-parties having business relations with the Divested Casinos; room reservation systems; food services; sales, marketing, and promotion (including customer service and customer transfer logistics); use of Retained Intellectual Property (including brand names and trademarks) for transitionary purposes; and other logistical, operational, and administrative support.

II. Divestiture

IT IS FURTHER ORDERED that:

A. By the earlier of (i) 12 months from the Acquisition Date, or (ii) 30 days from the date Twin River receives all necessary Governmental Authorizations to acquire the Casino Assets, Respondent Eldorado shall divest, absolutely and in good faith, the Casino Assets to Twin River pursuant to the Divestiture Agreements.

B. If Respondent Eldorado has divested the Casino Assets pursuant to Paragraph II.A before the Commission issues this Order, and the Commission subsequently notifies Respondent Eldorado that:

1. Twin River is not an acceptable Acquirer of any of the Casino Assets, then Respondent Eldorado shall, within 5 days of notification by the Commission, rescind the respective Divestiture Agreements, and shall instead divest the respective Casino Assets as an ongoing business, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within 12

months of the date the Commission notifies Respondent Eldorado that Twin River is not an acceptable Acquirer; or

2. The manner of a divestiture was not acceptable, then the Commission may direct Respondent Eldorado (or appoint a Divestiture Trustee pursuant to Paragraph IX of this Order) to modify the divestiture in the manner the Commission determines is necessary to satisfy the requirements of this Order, which may include entering into additional agreements or arrangements, or modifying a Divestiture Agreement.

C. No later than the Divestiture Date, Respondent Eldorado shall obtain at its sole expense all Governmental Authorizations and third-party consents necessary to divest the Casino Assets and for the Acquirer to operate the Divested Casinos in a manner that achieves the purposes of this Order. Respondent Eldorado shall assist the Acquirer in obtaining the transfer from Respondent Eldorado, or issuance to the Acquirer, of any Governmental Authorization, permit, license, asset, or right that Respondent Eldorado has no legal right to divest or transfer to the Acquirer.

D. Respondent Eldorado shall deliver the Business Information (including the Casino Customer Database Records) to the Acquirer as soon as practicable in a manner that ensures its completeness, accuracy, and usefulness and meets the reasonable requirements of the Acquirer.

E. Respondent Eldorado shall cooperate with and assist any person with whom Respondent Eldorado engages in negotiations to acquire the Casino Assets in a due diligence investigation, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process.

F. If Respondent Eldorado has not consummated the sale of the Isle of Capri Casino to Twin River by 60 days after the Acquisition Date, then the Commission may, at any time thereafter and in its sole discretion, require Respondent Eldorado to divest the Casino Assets relating to the Isle of Capri Casino as an ongoing business, absolutely and in good faith, and at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission. If the Commission notifies Respondent Eldorado of the requirement to divest the Casino Assets relating to the Isle of Capri Casino, the Isle of Capri Casino shall become a Divested Casino for purposes of this Order and the Hold Separate Order as of that date ("the Isle of Capri Casino Notification Date"), and Respondent Eldorado shall complete the divestiture of the relevant Casino Assets within 12 months of the Isle of Capri Casino Notification Date.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondent Eldorado to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that Respondent Eldorado cannot fully comply with both, Respondent Eldorado shall comply with this Order.

B. Respondent Eldorado shall not modify or amend the terms of the Divestiture Agreements after the Commission issues this Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondent Eldorado has transferred all Business Information (including the Casino Customer Database Records) included in the Casino Assets, Respondent Eldorado shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondent Eldorado has not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondent Eldorado shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Casino Assets to the Acquirer and (ii) assist the Acquirer in operating the Casino Assets and Casino Business in all material respects to the manner in which Respondent Eldorado did so prior to the Acquisition, and shall:

1. Provide Transition Assistance:

   a. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date); and

   b. At the price set forth in a Divestiture Agreement, or if no price is set forth, at Direct Cost; and

c. For a period sufficient to meet the requirements of this Paragraph IV.B, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date; and

2. Allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreements upon commercially reasonable notice and without cost or penalty.

3. Not cease providing Transition Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent Eldorado's breach of a Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 1 year after the Divestiture Date, Respondent Eldorado shall cooperate with and assist the Acquirer of the Casino Assets to identify, evaluate independently, offer employment to, and hire the Casino Employees, with such cooperation and assistance including at least the following:

1. Not later than 5 business days after a request from the Acquirer, Respondent Eldorado shall, to the extent permitted by applicable law:

a. Provide to the Acquirer a list of all Casino Employees, and provide Employee Information for each; and

b. Allow the Acquirer a reasonable opportunity to interview any Casino Employees;

2. Within 10 days after a request from the Acquirer, Respondent Eldorado shall provide an opportunity for the Acquirer to:

a. Meet, outside the presence or hearing of any employee or agent of Respondent Eldorado, with any of the Casino Employees; and

b. Make offers of employment to any of the Casino Employees;

3. Respondent Eldorado shall not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Casino Employees, not offer any incentive to Casino Employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Casino Employees by the Acquirer;

4. Respondent Eldorado shall remove any impediments within its control that may deter any Casino Employees from accepting employment with the Acquirer including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondent Eldorado that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to any Casino Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent Eldorado to terminate the employment of any employee or prevent Respondent Eldorado from continuing the employment of any employee;

5. Respondent Eldorado shall continue to provide Casino Employees with all employee compensation and benefits offered by Respondent Eldorado in the ordinary course of business, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of pension benefits;

6. Respondent Eldorado shall provide reasonable financial incentives for Casino Employees to continue in their positions and, as may be necessary, to facilitate the employment of such Casino Employees by the Acquirer; and

7. For a period of 1 year from the Divestiture Date, Respondent Eldorado shall allow the Acquirer to identify additional employees that should be designated as Key Employees and subject to the provisions of this Paragraph ("Additional Key Employees"); *provided, however*, that the number of Additional Key Employees so designated may be limited to 35 employees.

B. Respondent Eldorado shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Casino Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; and

2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, Respondent Eldorado may:

1. Hire a Casino Employee or Key Employee whose employment has ceased or been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of the Casino Employees; or

3. Hire an employee who has applied for employment with Respondent Eldorado, as long as such application was not solicited or induced in violation of this Paragraph.

VI. Asset Maintenance

IT IS FURTHER ORDERED that until the Casino Assets have been fully transferred to the Acquirer, Respondent Eldorado shall, subject to its obligations under the Hold Separate Order, ensure that the Casino Assets and Casino Business are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Casino Assets and Casino Business, to minimize any risk of loss of competitive potential of the Casino Assets and Casino Business, to operate the Casino Assets and Casino Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Casino Assets and Casino Business, except for ordinary wear and tear. Respondent Eldorado shall not sell, transfer, encumber, or otherwise impair the Casino Assets and Casino Business (other than in the manner prescribed in this Order and the Hold Separate Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Casino Assets and Casino Business; and

B. Not terminate the operations of the Casino Assets and Casino Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Casino Assets and Casino Business.

Provided, however, that Respondent Eldorado may operate the Casino Assets and Casino Business subject to restrictions imposed or recommended by any federal, state, or local governmental agency having jurisdiction over the property (including the Centers for Disease Control and Prevention) or otherwise as reasonable or necessary to respond to or mitigate any pandemic or public health emergency caused by COVID-19 and shall operate the Casino Assets and Casino Business in a manner consistent with Respondent Eldorado's efforts at its casino properties located in the same jurisdictions that are not being divested.

Provided further, however, that Respondent Eldorado may take actions that the Acquirer has requested or agreed-to in writing and that has been approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Casino Assets and consistent with the purposes of this Order and the Hold Separate Order.

VII. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondent Eldorado, in consultation with the Acquirer, and for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Casino Assets and Casino Business by the Acquirer is not delayed or impaired;

2. Designate employees of Respondent Eldorado knowledgeable about the operation of the Casino Assets and Casino Business, who will be responsible for communicating directly with the Acquirer and the Monitor (if one has been appointed) for the purposes of assisting in the transfer to the Acquirer of the Casino Assets and Casino Business;

3. Allow the Acquirer reasonable access to all Business Information related to the Casino Assets and Casino Business, and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effect the transition to the Acquirer in an efficient and timely manner.

B. Respondent Eldorado shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order, the Hold Separate Order, or a Divestiture Agreement;

2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order, the Hold Separate Order, or a Divestiture Agreement;

3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of Respondent Eldorado; and

4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondent Eldorado's employees working at or supporting any of Respondent Eldorado's retained casino business,

other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of Paragraphs VII.B.1 and VII.B.2 above.

Provided, however, that nothing in this Paragraph VII.B shall prevent Respondent Eldorado from retaining and using any tangible or intangible property (including Retained Customer Database Records) that Respondent Eldorado retains the right to use pursuant to this Order and the Hold Separate Order, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondent Eldorado shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Eldorado's obligations under this Order and the Hold Separate Order.

C. Respondent Eldorado shall implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order, the Hold Separate Order, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondent Eldorado's computers or computer networks.

D. Not later than 10 days after the Acquisition Date, and no less than annually for 3 years after each Divestiture Date, Respondent Eldorado shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent Eldorado's personnel to all of its officers, directors, employees, or agents who may have possession or access to the Confidential Business Information. Respondent Eldorado shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

E. Notwithstanding this paragraph, Respondent Eldorado may use Confidential Business Information:

1. For the purpose of performing its obligations under this Order, the Hold Separate Order, or the Divestiture Agreements; and

2. To ensure compliance with legal and regulatory requirements, or as necessary to defend against legal claims.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. Jeffrey L. Gilbert shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Eldorado, and attached as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondent Eldorado's compliance with the terms of this Order, the Hold Separate Order, and the Divestiture Agreements.

B. No later than 1 day after the Hold Separate Order is issued by the Commission, Respondent Eldorado shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondent Eldorado's compliance with the terms of this Order, the Hold Separate Order, and the Divestiture Agreements, in a manner consistent with the purposes of the orders.

C. Respondent Eldorado shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent Eldorado's compliance with the divestiture and other requirements of this Order, the Hold Separate Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of Respondent Eldorado or of the Commission;

3. The Monitor shall serve until 30 days after Respondent Eldorado has satisfied all obligations under Paragraphs II and IV of this Order or until such other time as may be determined by the Commission or its staff; and

4. The Monitor shall report in writing to the Commission concerning Respondent Eldorado's compliance with this Order and the Hold Separate Order: (i) 30 days after the Hold Separate Order is issued, and every 30 days thereafter until Respondent Eldorado has satisfied all of its obligations under Paragraphs II and IV of this Order; and (ii) at any other time requested by the staff of the Commission.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Eldorado's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably

request, related to Respondent Eldorado's compliance with its obligations under this Order, the Hold Separate Order, and the Divestiture Agreements.

E. Respondent Eldorado shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Eldorado's compliance with this Order, the Hold Separate Order, and the Divestiture Agreements.

F. The Monitor shall serve, without bond or other security, at Respondent Eldorado's expense, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at Respondent Eldorado's expense, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondent Eldorado shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VIII.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.F of this Order.

H. Respondent Eldorado shall report to the Monitor in accordance with the requirements of this Order and the Hold Separate Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by Respondent Eldorado with respect to the performance of its obligations under this Order and the Hold Separate Order.

I. Respondent Eldorado may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor, who will have the same authority and responsibilities as the original Monitor pursuant to this Paragraph VIII:

1. The Commission shall select the substitute Monitor, subject to Respondent Eldorado's consent, which consent shall not be unreasonably withheld. If Respondent Eldorado has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondent Eldorado of the identity of any proposed Monitor, Respondent Eldorado shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondent Eldorado shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondent Eldorado's compliance with the relevant terms of this Order, the Hold Separate Order, and the Divestiture Agreements in a manner consistent with the purposes of the orders and in consultation with the Commission.

L. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of this Order.

M. The Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent Eldorado has not fully complied with the divestiture and other obligations as required by Paragraphs II.A and II.B of this Order, the Commission may appoint one or more Divestiture Trustees to divest any or all of the Casino Assets, enter agreements for Transition Assistance, and perform Respondent's other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Eldorado shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Eldorado to comply with this Order.

B. The Commission may select one or more Divestiture Trustees, subject to Respondent Eldorado's consent, which consent shall not be unreasonably withheld. The Commission may appoint one Divestiture Trustee or separate

Divestiture Trustees to divest one or more of the Casino Assets, enter agreements for Transition Assistance, and perform Respondent Eldorado's other obligations in a manner that satisfies the requirements of this Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Eldorado has not opposed, in writing, and stated in writing its reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondent Eldorado of the identity of any proposed Divestiture Trustee, Respondent Eldorado shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. Not later than 10 days after the appointment of a Divestiture Trustee, Respondent Eldorado shall execute a trust agreement for any divestitures required by this Order that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by this Order. Any failure by Respondent Eldorado to comply with a trust agreement approved by the Commission shall be a violation of this Order.

2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph IX.B, Respondent Eldorado shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

   a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations (including obligations to provide Transition Assistance) imposed by, this Order.

   b. The Divestiture Trustee shall have 1 year after the date the Commission approves each trust agreement described herein to accomplish the divestitures required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the 1 year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of this Order or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only 2 times.

   c. Subject to any demonstrated legally recognized privilege, any Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request.

Respondent Eldorado shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Eldorado shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondent shall extend the time under this Paragraph IX for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. Any Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Eldorado's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however,* if any Divestiture Trustee receives bona fide offers for any asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Eldorado from among those approved by the Commission; *provided further, however,* that Respondent Eldorado shall select such entity within 5 days after receiving notification of the Commission's approval.

e. Any Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Eldorado, on such reasonable and customary terms and conditions as the Commission or a court may set. Any Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Eldorado, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Eldorado, and the Divestiture Trustee's power shall be terminated. The compensation of any Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

f. Respondent Eldorado shall indemnify any Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. Any Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. Any Divestiture Trustee shall report in writing to Respondent Eldorado and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

i. Respondent Eldorado may require any Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

C. If the Commission determines that any Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph IX.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

X. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent Eldorado shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Eldorado shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondent Eldorado shall submit interim compliance reports 30 days after this Order is issued, and every 30 days thereafter until Respondent Eldorado has fully complied with the provisions of Paragraph II; annual compliance reports 1 year after the date this Order is issued, and annually for the next 2 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall set forth in detail the manner and form in which Respondent Eldorado intends to comply, is complying, and has complied with this Order and the Hold Separate Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Eldorado is in compliance with this Order and the Hold Separate Order. Conclusory statements that Respondent Eldorado has complied with its obligations under this Order and the Hold Separate Order are insufficient. Respondent Eldorado shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondent Eldorado has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of this Order and the Hold Separate Order, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted, and such supporting materials shall be retained and produced later if needed.

3. Respondent Eldorado shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Eldorado shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent Eldorado shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XI. Change in Respondent

IT IS FURTHER ORDERED that Respondent Eldorado shall notify the Commission at least 30 days prior to:

A. The dissolution of Eldorado Resorts, Inc.;

B. The acquisition, merger, or consolidation of Eldorado Resorts, Inc.; or

C. Any other change in Respondent Eldorado, including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to Respondent Eldorado, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Respondent Eldorado shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent Eldorado and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent Eldorado related to compliance with this Order, which copying services shall be provided by Respondent Eldorado at the request of the authorized representative of the Commission and at the expense of Respondent Eldorado; and

B. To interview officers, directors, or employees of Respondent Eldorado, who may have counsel present, regarding such matters.

XIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Casino Assets and Casino Business in a manner equivalent in all material respects to the manner in which Respondent Eldorado operated the Casino Assets and Casino Business prior to the Acquisition.

XIV. Term

IT IS FURTHER ORDERED that this Order shall terminate on August 25, 2030.

By the Commission, Commissioner Chopra dissenting, Commissioner Slaughter not participating.

NON-PUBLIC APPENDIX I

Divestiture Agreements

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX II

Key Employees

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX III

Respondent Corporate Contracts

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX IV

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement"), entered into this 21st day of May, 2020, by and between Jeffrey L. Gilbert, who has been chosen to act as Monitor, and Eldorado Resorts, Inc. ("ERI" or "Respondent") (Monitor and Respondent are each individually referred to herein as a "Party" and collectively referred to herein as the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the Matter of Eldorado Resorts, Inc. and Caesars Entertainment Corporation, FTC File No. 191-0158, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the "Orders"), which, among other things, requires Respondent to divest certain casinos and casino hotel properties, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondent's compliance with its obligations under the Orders;

WHEREAS, the Commission is expected to accept the Agreement Containing Consent Orders and appoint Monitor pursuant to the Orders to monitor Respondent's compliance with the terms of the Orders, and Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to the prior approval of the Commission, conferring all the rights and powers necessary to permit Monitor to carry out its duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

WHEREAS, the Parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

ARTICLE I

1.1 Powers of the Monitor. Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring Respondent's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall serve as an independent third party and not as an employee or agent of Respondent or the Commission.

1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request,

related to Respondent's compliance with the obligations of Respondent under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondent shall cooperate with any reasonable request of Monitor. Monitor shall give Respondent reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations. At the request of the Monitor, Respondent shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondent who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. Respondent shall provide Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) business days after the date on which Respondent files such report with the Commission.

1.4 Confidentiality. Monitor shall:

1.5 maintain the confidentiality of all confidential information provided to the Monitor by Respondent, the acquirer of the assets to be divested, any supplier or customer of Respondent, or the Commission ("Confidential Information"), and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

(a) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which Respondent will provide if requested, that requires such third parties to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

(b) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(c) for a period of ten (10) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(d) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondent to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of

such request and, if the Commission's staff do not object, shall comply with Respondent's request.

(e) For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondent, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Respondent of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. Respondent shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the assets to be divested, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent shall pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification. Respondent shall indemnify and hold harmless Monitor and its employees and agents against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from Monitor's gross negligence or willful misconduct.

2.4 Disputes. In the event of a disagreement or dispute between Respondent and Monitor concerning Respondent's obligations under the Orders, and, in the event that such

disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform Respondent and the Commission of any such conflict or potential conflict.

ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondent and to the Commission, upon resignation of the Monitor; or (d) until 30 days after Respondent has satisfied all obligations under Paragraph II (Divestiture) and IV (Transition Assistance) of the Commission's Decision and Order; provided, however, that the Commission may require that Respondent extend this Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fails to act diligently and consistent with the purpose of the Orders, Respondent shall, upon written request of the Commission, terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of Nevada, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

3.4 Disclosure of Information. Nothing in this Agreement shall require Respondent to disclose any material or information that is subject to a legally recognized privilege or that Respondent are prohibited from disclosing by reason of law or an agreement with a third party.

3.5 Assignment. This Agreement may not be assigned or otherwise transferred by Respondent or Monitor without the consent of Respondent and Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

3.6 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all Parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the Parties and supersede any and all prior agreements and understandings between the Parties, written or oral, with respect to the subject matter hereof.

3.9 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

Monitor

Jeffrey L. Gilbert

Jeffrey L. Gilbert

Respondent

Eldorado Resorts, Inc.

Edmund L. Quatmann, Jr.
Senior Vice President and Chief Legal Officer

Dissenting Statement

NON-PUBLIC APPENDIX IV-1

Monitor Compensation

[Redacted From the Public Record Version, But Incorporated By Reference]

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- The Commission should not agree to merger settlements unless divestitures are completed promptly to a qualified buyer ready and willing to compete on day one.
- It is risky and makes little sense to propose a complex settlement with a prolonged divestiture period and unorthodox terms to justify a merger that has no meaningful benefits, particularly given the financial uncertainties stemming from the COVID-19 crisis.
- I am concerned that the Commission's standard process for vetting divestiture buyers minimizes or ignores major financial red flags. We should revamp our approach.

Caesars Entertainment (NASDAQ: CZR) is selling itself to one of its smaller competitors, Eldorado Resorts (NASDAQ: ERi). The transaction has no noteworthy benefits to customers, workers, suppliers, or competition. If anything, the transaction is risky for everyone involved.

The enormous amount of debt financing could materially increase the likelihood of financial distress of the combined casino conglomerate, and rating agencies have already started to downgrade Eldorado's debt.[1] Given the major financial uncertainties looming over the gaming industry stemming from the pandemic, as well as the industry's past experiences with leveraged buyouts, the proposed transaction might make conditions even more fragile and precarious.

The agreement is subject to review by state gaming regulators and the Federal Trade Commission. In comparison to state regulators, who must weigh a number of public interest factors, the Federal Trade Commission's mandate is more specific: to determine whether the transaction violates U.S. antitrust laws. Based on the Commission's investigation, I agree that the transaction is illegal and I support the complaint.

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1 *See e.g., Moody's downgrades Eldorado Resorts CFR to B2, rates new debt for Caesars acquisition; outlook,* MOODY'S INVESTOR SERVICE (June 17, 2020), https://www.moodys.com/research/Moodys-downgrades-Eldorado-Resorts-CFR-to-B2-rates-new-debt--PR426702?cid=7QFRKQSZE02l.

However, I have serious reservations about the terms of the settlement. As a policy matter, I disagree that the Commission should enter into risky, complicated settlements with delayed divestitures - like the resolution proposed here.

The Proposed Buyer Will Not Immediately Restore Competitive Intensity

To remedy an illegal transaction, the FTC should only agree to settlements when divestitures will quickly restore the competitive intensity killed off from a merger. It is not enough to have some of the competition restored; it must be fully restored. A new competitor should be able to step in on day one to compete.

For example, in 2015, the FTC prevailed in its challenge of the merger of Sysco and US Foods, the nation's two largest food distributors, when divestitures could not cure the harmful merger on "day one." The companies proposed to divest a lengthy list of US Foods' assets to an entity controlled by the Blackstone Group. The FTC argued this was insufficient, and the court agreed that the new competitor could not replicate the same level of competitive intensity of US Foods.[2]

The Commission's proposed remedy will definitely not cure this harmful casino merger on day one. Under the terms of the Commission's proposed settlement, Eldorado is required to divest one property in Nevada and another in Louisiana to Twin River Worldwide Holdings (NYSE: TRWH) - but after a prolonged period of time.[3] Allowing a lengthy divestiture only compounds the problems with this settlement, as it necessitates the addition of other risky settlement provisions.

To mitigate the anticompetitive harm from the prolonged divestiture schedule, the FTC's proposed settlement sets up a complex arrangement where some casinos will be operated separately by Commission-appointed casino property managers until a buyer is ready to take over the assets. I do not believe that the Commission should be in the business of appointing casino property managers here.[4]

The Commission will also appoint a monitor. It is particularly unclear how the Commission and the appointed monitor can remove or discipline the casino property managers. In addition, the casino property managers will operate under a similar compensation and bonus plan as provided by the prior owner, which could easily lead to anticompetitive distortions. The anticompetitive harms could grow if Twin River is rejected as a suitable buyer by state regulators.

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2 *Fed. Trade Comm'n v. Sysco Corp.,* 113 F. Supp. 3d 1, 73 (D.D.C. 2015).

3 The divestitures must be complete by the earlier of 12 months from the closing of the merger or within 30 days of state regulatory approval. In theory, the divestitures may be completed before 12 months. However, past experience suggests that the approval process requires significant due diligence over an extended period of time.

4 If the state gaming regulators had already approved the transaction (as well as the corresponding divestitures) and selected casino property managers, this would raise fewer concerns.

There may be rare circumstances where unusual settlement terms are warranted, but this isn't one of them. The proposed remedy is also a gamble on several other fronts.

First, the Commission's due diligence on Twin River did not adequately analyze the role of new investors exerting enormous control. The FTC must always consider the incentives and plans for those in control of a divestiture buyer. Sometimes, new investors can help a stagnant company change strategic direction. But too often, new investors find ways to buy, strip, and flip, rather than create a strong, long-term competitor. This is particularly true for certain private equity and hedge fund investors, so careful due diligence is critical.

In 2019, a Wall Street hedge fund, Standard General, accumulated a major ownership stake in Twin River. Standard General now has significant control over the company and is, by far, its largest shareholder. Its stake is roughly equivalent to the maximum amount allowable under state law.[5] Another hedge fund, HG Vora, has also emerged as a major holder of Twin River.[6] Standard General and similar funds often seek to accumulate board seats to implement their desired investment strategy. Indeed, just a few months ago, Twin River's longtime chairman "reluctantly" stepped down and was replaced by Standard General's managing partner, Soohyung Kim.[7]

By approving Twin River as the divestiture buyer, I am concerned that the Commission is relying on Twin River's past track record, rather than analyzing how changes in ownership and control of the company will impact their future business strategy.

Second, buyers of divested assets need to prioritize competing on day one, but they cannot if other high-priority mergers and acquisitions distract them. In this matter, Twin River is in the midst of a string of other takeovers.

In 2019, it completed an acquisition of Dover Downs Hotel and Casino in Delaware,[8] and then in January of this year, Twin River acquired three casinos in Colorado.[9] Several other

5 In a recent Schedule 13D securities filing, Standard General revealed that it was managing its holdings of Twin River, given Twin River's share repurchase plan that could lead to Standard General violating the Rhode Island casino ownership cap of 39%. *See* Twin River Worldwide Holdings, Inc., Amendment No. 6 to Schedule 13D at 4 (Feb. 20, 2020).

6 Recent securities filings reveal significant ownership of Twin River by HG Vora Capital Management. *See* HG Vora Capital Management, LLC, Form 13F Information Table (Form 13F) (Aug. 8, 2019). Standard General and HG Vora are currently on the same side of a major battle in another public company. *See* Svea Herbst-Bayliss, *EXCLUSIVE-Hedge fund HG Vora wants Tegna to consider a sale or merger - sources,* REUTERS (Jan. 21, 2020), https://www.reuters.com/article/tegna-hgvora/exclusive-hedge-fund-hg-vora-wants-tegna-to-consider-a-sale-or-merger-sources-idUKLlN29Q0KT.

7 Ted Nesi, John Taylor out at Twin River, 12 WPRI.COM (Dec. 9, 2019), https://www.wpri.com/business-news/john-taylor-out-at-twin-river/.

8Press Release, Twin River Worldwide Holdings, Inc., Dover Downs Stockholders Approve Merger with Twin River; Merger Set to Close on March 28, 2019 (Mar. 26, 2019), https://investors.twinriverwwholdings.com/news/news-details/2019/Dover-Downs-Stockholders-Approve-Merger-with-Twin-River-Merger-Set-to-Close-on-March-28-2019/default.aspx.

acquisitions are pending: in the last twelve months, it has inked deals to purchase casinos in Missouri and Mississippi.[10] Outside of this settlement, it has also struck a deal to purchase Bally's, its first foray into the large Atlantic City market.[11] These acquisitions will require significant management attention, and I did not find any compelling evidence that Twin River will prioritize the divested assets to fully restore competitive intensity in the markets that the Commission believes would suffer from killed-off competition.

Finally, the Commission should avoid acting without the benefit of a full review by the state gaming regulators. State regulatory agencies have unique insights and expertise into the industries they regulate; their findings inform the issues the Commission takes into consideration, and not just relating to the appointment of casino managers. Some states have a specific mandate to look at the ownership and financial conditions of the transacting firms, and we would benefit from that expertise. Their analysis is particularly important during this period of uncertainty, as the industry is roiling from closures due to the current COVID-19 pandemic. It is important that we consider all of the information and work across government bodies to protect competition. While the Commission does work with some of these authorities, I am not convinced that acting before state regulators have completed their analysis is the right approach.

Conclusion

The proposed resolution in this transaction offers a unique window into the assumptions and philosophy of the Federal Trade Commission. The merger is clearly anticompetitive in the markets where the Commission alleged a violation, and offers no meaningful benefits to the public. Since the Commission would not need to go to trial to block the transaction because the state regulators have yet to act, there is no immediate concern about limiting FTC resources or weighing the litigation risk. Given these facts, why would the Commission put the public at risk with delayed divestitures to a questionable buyer that has no guarantee of obtaining a license?

I am concerned that the Commission is rolling the dice with this complex settlement that will clearly not lead to an immediate restoration of lost competition. It is also clear that we must revamp our approach when it comes to vetting proposed divestiture buyers, particularly when a new financial investor is in charge in the boardroom.

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9 Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings Completes Acquisition of Three Colorado Casinos (Jan. 24, 2020), https://investors.twinriverwwholdings.com/news/news-details/2020/Twin-River-Worldwide-HoIdings-Completes-Acquisition-of-Three-Colorado-Casinos/default.aspx.

10 Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings Signs Definitive Agreement To Acquire Two Casinos From Eldorado Resorts (July 11, 2019), https://investors.twinriverwwholdings.com/news/news-details/2019/Twin-River-Worldwide-Holdings-Signs-Definitive-Agreement-To-Acquire-Two-Casinos-From-Eldorado-Resorts/default.aspx.

11 Press Release, Twin River Worldwide Holdings, Inc., Twin River Worldwide Holdings to Acquire Three Casinos from Eldorado and Caesars (Apr. 24, 2020), https://investors.twinriverwwholdings.com/news/news-details/2020/Twin-River-Worldwide-Holdings-to-Acquire-Three-Casinos-from-Eldorado-and-Caesars/default.aspx.

Our state partners will obviously need to scrutinize the financial aspects of the proposed transaction between Caesars and Eldorado, given the harms inflicted on the public and regional economies from past leveraged buyouts - and resulting bankruptcies - in the industry.[12] They will also need to carefully assess whether the restoration of competition will come too late, and whether Twin River can guarantee that it will actually accomplish this goal. The stakes are high right now. For these reasons, I dissent.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Eldorado Resorts, Inc. ("Eldorado") and Caesars Entertainment Corporation ("Caesars") . The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would likely result from Eldorado's acquisition of Caesars ("the Acquisition"). Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Eldorado is required to divest to Twin River Worldwide Holdings, Inc. ("Twin River"): (1) Eldorado's only casino in the South Lake Tahoe area, the MontBleu Resort Casino and Spa ("MontBleu") in Stateline, Nevada; and (2) Eldorado's only casino in the Bossier City-Shreveport, Louisiana, area, the Eldorado Casino Resort ("Eldorado Shreveport"). The divestitures must be completed by the earlier of (i) 12 months from the closing of the Acquisition; or (ii) 30 days from the date that Twin River receives all regulatory approvals. Additionally, if Eldorado does not consummate its sale of the Isle of Capri casino ("Isle of Capri") in Kansas City, Missouri, within 60 days from the closing of the Acquisition, the proposed Consent Agreement provides the Commission with the option (at its discretion) to require Eldorado to divest the Isle of Capri casino to a Commission-approved acquirer within 12 months. The Isle of Capri sale is independent from the Acquisition.

The proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

On June 24, 2019, Eldorado agreed to acquire Caesars for approximately $17.3 billion.

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12 *See, e.g.,* Sujeet Indap, *What happens in Vegas...the messy bankruptcy of Caesars Entertainment,* THE FIN. TIMES (Sept. 16, 2017), https://www.ft.com/content /a0ed27c6-a2d4-11e7-b797-b6l809486fe2.

By a vote of 3-1-1 on June 20, 2020, the Commission issued an administrative complaint alleging that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating meaningful and substantial competition between Eldorado and Caesars for casino services in the South Lake Tahoe, Bossier City-Shreveport, and Kansas City area markets. The elimination of this competition would likely have caused significant competitive harm, specifically higher prices and diminished quality and service levels in each of these markets. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture in the affected markets. The divestitures will establish a new independent competitor to Eldorado in each relevant area, replacing the competition that otherwise would be lost as a result of the Acquisition.

II. THE PARTIES

Eldorado is a publicly traded casino entertainment and hospitality services provider headquartered in Reno, Nevada. Founded in 1973, Eldorado operates 23 casino gaming properties in 11 states. Eldorado operates casinos under several brands, including Eldorado, Isle of Capri, and Tropicana. In the aggregate, Eldorado's properties feature approximately 23,900 slot machines, 660 table games, and more than 11,300 hotel rooms. In the South Lake Tahoe area market, Eldorado operates the MontBleu casino in Stateline, Nevada. In the Bossier City-Shreveport area market, Eldorado operates the Eldorado Shreveport casino in Shreveport, Louisiana. In the Kansas City area market, Eldorado operates the Isle of Capri casino in Kansas City, Missouri. Eldorado had approximately $2.5 billion in revenue in 2019.

Caesars is a publicly traded casino entertainment and hospitality services provider headquartered in Las Vegas, Nevada. It operates 53 properties in 14 states and five countries outside of the United States. Caesars' properties offer approximately 38,000 slot machines, 2,700 table games, and more than 36,000 hotel rooms. Caesars' gaming properties operate primarily under the Harrah's, Caesars, and Horseshoe brand names. In the South Lake Tahoe area, Caesars operates two facilities offering casino services: Harrah's Lake Tahoe Hotel and Casino, and Harveys Lake Tahoe Hotel and Casino, both in Stateline, Nevada. In the Bossier City-Shreveport area, Caesars operates two facilities offering casino services: Horseshoe Bossier City Hotel and Casino in Bossier City, Louisiana, and Harrah's Louisiana Downs, a gaming and racetrack facility located eight miles east in Shreveport, Louisiana. In the Kansas City area market, Caesars operates Harrah's Kansas City Hotel and Casino in Kansas City, Missouri.

Caesars had approximately $8.7 billion in revenue in 2019.

Twin River is a publicly traded casino entertainment and hospitality services provider headquartered in Providence, Rhode Island. It operates eight properties in four states, including the Twin River Casino Hotel in Lincoln, Rhode Island. Twin River's properties feature approximately 9,130 slot machines, 267 table games, and 1,200 hotel rooms. The company had approximately $524 million in revenue in 2019.

Analysis to Aid Public Comment

III. CASINO SERVICES IN SOUTH LAKE TAHOE, BOSSIER CITY-SHREVEPORT, AND KANSAS CITY

Eldorado's proposed acquisition of Caesars would likely result in substantial competitive harm in the markets for casino services in South Lake Tahoe, Bossier City-Shreveport and Kansas City. The relevant product market in which to assess the competitive effects of the proposed Acquisition is casino servicesThe casino services market consists of casino-based gaming services (e.g., slots and table games), as well as other amenities such as lodging, entertainment, and food and beverage services. Casino operators typically generate the vast majority of their revenues from gaming. Casino services differ significantly from other entertainment and leisure activities in a number of respects. For example, casinos are highly regulated, with a limited number of casinos licensed to operate in any given state and age restrictions on who can gamble. Consistent with prior Commission precedent, the evidence here supports a distinct relevant market consisting of casino services.

Local geographic markets are appropriate to assess the competitive effects of the proposed Acquisition. There are three relevant geographic markets in which to analyze the merger's effects: (1) the South Lake Tahoe area, which approximately corresponds to the area in and around the cities of Stateline, Nevada, and South Lake Tahoe, California; (2) the Bossier City-Shreveport, Louisiana area, which approximately corresponds to the Bossier City-Shreveport, Louisiana metropolitan statistical area; and (3) the Kansas City area, which approximately corresponds to the Kansas City, Missouri metropolitan statistical area.

Absent relief, the Acquisition would result in significant increases in concentration and lead to highly concentrated markets in all three markets, resulting in a presumption of the enhancement of market power under the Horizontal Merger Guidelines. Further, Eldorado and Caesars are close and vigorous competitors in the South Lake Tahoe, Bossier City-Shreveport, and Kansas City area markets. Absent relief, the Acquisition would substantially lessen the significant head-to-head competition between Eldorado and Caesars and would likely increase Eldorado's ability and incentive to raise prices post-Acquisition in the form of hold rates, rake rates, and table game rules and odds that are less favorable to customers, and lower player reinvestments. The proposed Acquisition also would likely diminish Eldorado's incentive to maintain or improve the quality of services and amenities to the detriment of casino customers in each of these markets.

New entry or expansion is unlikely to deter or counteract the likely anticompetitive effects of the Acquisition in the South Lake Tahoe, Bossier City-Shreveport, and Kansas City area markets. The affected markets are insulated from new entry or expansion by significant regulatory barriers, including limitations on the number of casino licenses available and the ability to expand existing gaming operations. In the South Lake Tahoe area market, entry or expansion is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals. In the Bossier City-Shreveport area market, Louisiana law limits the number of casino licenses and it has already issued all available licenses. Louisiana also has statutory restrictions that make significant expansion by current market participants unlikely absent legislative action. Similarly,

in the Kansas City area market, Missouri and Kansas law limit the total number of casino licenses available and both states have already issued all available licenses. Expansion in Missouri is unlikely and only limited expansion in Kansas is possible. Entry or repositioning would be unlikely to be sufficient to deter or counteract the anticompetitive effects of the Acquisition.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the likely anticompetitive effects in the South Lake Tahoe and Bossier City-Shreveport area markets by requiring divestitures of the MontBleu and Eldorado Shreveport casinos to Twin River by the earlier of (i) 12 months from the closing of the Acquisition; or (ii) 30 days from the date Twin River receives all regulatory approvals. Until the completion of each divestiture, the parties are required to abide by the Order to Hold Separate and Maintain Assets, which requires them to maintain the viability, marketability, and competitiveness of the divestiture assets until the divestitures are completed. The proposed Consent Agreement appoints a Monitor to ensure the parties' compliance with the Order to Hold Separate and Maintain Assets, Consent Agreement, and divestiture agreements between Eldorado and Twin River following the divestiture. The proposed Consent Agreement also remedies the likely anticompetitive effects in the Kansas City area market in the event that Eldorado's independent sale of the Isle of Capri casino does not close within 60 days from the closing of the Acquisition. In the event the Isle of Capri sale does not timely close as required, the proposed Consent Agreement provides the Commission with the option (at its discretion) to require Eldorado to divest the Isle of Capri casino to a Commission-approved acquirer within 12 months. Although these divestiture deadlines are longer than typically ordered by the Commission, they are appropriate in this matter to accommodate the lengthy state regulatory approval process, which may be subject to continued disruption from the COVID-19 pandemic.

Additionally, the proposed Consent Agreement requires the parties to provide transitional services to the approved acquirer for up to 12 months after the divestiture, as needed, to assist the acquirer with the transfer and operation of the divested assets. Finally, the proposed Consent Agreement contains standard terms regarding the acquirer's access to employees, protection of material confidential information, and compliance reporting requirements, among other things, to ensure the viability of the divested business.

A. South Lake Tahoe

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the South Lake Tahoe area market by requiring the divestiture of Eldorado's MontBleu. This remedy would preserve the status quo in the South Lake Tahoe area casino services market, maintaining three independent casino operators and resulting in no change in market concentration.

B. Bossier City-Shreveport

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the Bossier City-Shreveport area market by requiring Eldorado to divest

the Eldorado Shreveport. This remedy would preserve four independent casino operators and result in no change in market concentration.

C. Kansas City

In the Kansas City area market, the proposed Consent Agreement provides the Commission with the option (at its discretion) to require Eldorado to divest its Isle of Capri casino to a Commission-approved buyer within 12 months if its independent sale of the Isle of Capri fails to consummate within 60 days of closing the Acquisition. If a divestiture is required, the proposed Consent Agreement remedies the likely anticompetitive effects of the Acquisition by requiring Eldorado to divest the Isle of Capri. The proposed Consent Agreement would preserve four independent casino operators and result in no change in market concentration.

* * *

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement to aid the Commission in determining whether it should make the proposed Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

ELANCO ANIMAL HEALTH, INCORPORATED,
AND
BAYER AKTIENGESELLSCHAFT

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACTAND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4725; File No. 191 0198
Complaint, July 14, 2020 – Decision, September 1, 2020

This consent order addresses the $7.6 billion acquisition by Elanco Animal Health, Inc. of certain assets of Bayer Animal Health, GmbH. The complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the U.S. market for low-dose prescription treatments for canine otitis externa, fast-acting oral treatments that kill adult fleas on canines, and brand name cattle pour-on insecticides. Under the order respondent must divest its canine otitis externa treatment product, Osurnia, to Dechra Pharmaceuticals PLC, its fast-acting oral treatment that kills adult fleas on canines, Capstar, to PetIQ, Inc., and its brand name cattle pour-on product, StandGuard, to Neogen Corporation.

Participants

For the *Commission*: *Stuart Hirschfeld, Joe Lipinsky,* and *Connor Shively.*

For the *Respondents*: *Rick Rule, Paul, Weiss, Rifkind, Wharton & Garrison; Tom McGrath, Linklaters LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Elanco Animal Health, Inc. ("Elanco"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the assets of Bayer Animal Health, GmbH, a division of Bayer AG ("Bayer"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating it charges as follows:

I. RESPONDENTS

1. Respondent Elanco is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana with its principal executive offices located at 2500 Innovation Way, Greenfield, Indiana 46140.

2. Respondent Bayer is a corporation organized, existing, and doing business under and by virtue of the laws of the Federal Republic of Germany with its principal executive offices located at Kaiser-Wilhelm-Allee 1, Leverkusen, Germany 51368. Bayer's United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets solely in this matter is as follows: Bayer Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its executive offices and principal place of business at 100 Bayer Boulevard Whippany, NJ 07981.

3. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and engages in business that is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED TRANSACTION

4. Pursuant to a Share and Asset Purchase Agreement dated August 20, 2019, Respondent Elanco proposes to purchase all of the assets of Bayer Animal Health, GmbH, a division of Bayer, for approximately $7.6 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of low-dose prescription treatments for canine otitis externa. Canine otitis externa is an inflammation of the outer ear caused by bacteria and/or yeast. Bayer's prescription otitis externa treatment product, Claro, is a single-dose otic solution, while Elanco's product, Osurnia, is an otic gel given in two doses seven days apart. While older prescription products can be used to treat canine otitis externa, these products require numerous applications to the ear canal, up to twice daily for 14 consecutive days. Consequently, these older prescription products are not a reasonable substitute for the parties' low-dose prescription products for canine otitis externa.

6. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of fast-acting oral treatments that kill adult fleas on canines. Elanco's Capstar and Bayer's Advantus are tablets that start killing adult fleas quickly (within 30 minutes for Capstar, and within 60 minutes for Advantus) and eliminate all adult fleas within four hours. Medicated shampoos and sprays that can be used to kill adult fleas on canines are less convenient to administer and are slower-acting. Consequently, medicated shampoos and sprays are not a reasonable substitute for the parties' fast-acting oral treatments that kill adult fleas on canines.

7. A relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of brand name cattle pour-on insecticides. Cattle pour-on insecticides are liquid parasiticides administered directly to cattle's skin that kill and deter biting flies, lice and mites. Many customers trust and rely on brand name cattle pour-on

insecticides rather than generic products. Consequently, generic cattle pour-on insecticides are not a reasonable substitute for the parties' brand name cattle pour-on insecticides.

8. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in each relevant line of commerce.

IV. MARKET STRUCTURE

9. Bayer's Claro and Elanco's Osurnia are the only low-dose prescription products for the treatment of canine otitis externa. Consequently, the Acquisition would create a monopoly by combining the only two low-dose prescription products that treat canine otitis externa.

10. Elanco's Capstar and Bayer's Advantus are the only fast-acting oral treatments that kill adult fleas on canines. Consequently, the Acquisition would create a monopoly for fast-acting oral treatments that kill adult fleas on canines.

11. The market for brand name cattle pour-on insecticides is highly concentrated. Bayer, with its three brand name cattle pour-on insecticides products (Clean-Up II, Cylence, and Permectrin), is the market leader. The only other competitors with meaningful sales in the market are Merck & Co., Inc., which sells four products, and Elanco, which sells StandGuard. The Acquisition would allow the third largest competitor, Elanco, to acquire the market leader, greatly increasing concentration in brand name cattle pour-on insecticides.

V. ENTRY CONDITIONS

12. Entry into each relevant market described in Paragraphs 5 – 8 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. *De novo* entry would require significant investment to, among other things, develop products, obtain regulatory approval, where needed, and establish recognized brand names. Entry would be unlikely because the required investment would be difficult to justify given the sales opportunities in the affected markets. Entry would also not be timely because drug development times and U.S. Food and Drug Administration and U.S. Environmental Protection Agency approval requirements, where needed, would be lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VI. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by, among other things:

a. combining the only two providers of low-dose prescription treatments for canine otitis externa, thereby eliminating actual, direct, and substantial competition between Bayer and Elanco;

b. combining the only two providers of fast-acting oral treatments that kill adult fleas on canines, thereby eliminating actual, direct, and substantial competition between Bayer and Elanco;

c. combining the market leader and one of the only two other providers of brand name cattle pour-on insecticides, thereby eliminating actual, direct, and substantial competition between Bayer and Elanco;

d. increasing the likelihood that Elanco would unilaterally exercise market power in the relevant markets; and

e. increasing the likelihood that customers would be forced to pay higher prices for the relevant products.

VII. VIOLATIONS CHARGED

14. The Acquisition described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of July, 2020 issues its Complaint against said Respondents.

By the Commission, Commissioner Slaughter not participating.

DECISION

The Federal Trade Commission initiated an investigation of (i) the proposed acquisition by Respondent Elanco Animal Health Incorporated of certain assets and shares comprising the animal health business of Respondent Bayer Aktiengesellschaft, collectively "Respondents," and (ii) the proposed acquisition by Respondent Bayer of voting securities of Respondent Elanco. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the

Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Elanco Animal Health Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana with its executive offices and principal place of business located at 2500 Innovation Way, Greenfield, Indiana 46140.

2. Respondent Bayer Aktiengesellschaft is a corporation organized, existing, and doing business under and by virtue of the laws of the Federal Republic of Germany with its executive offices and principal place of business located at Kaiser-Wilhelm-Allee 1, Leverkusen, Germany 51368. Bayer's United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets solely in this matter is as follows: Bayer Corporation ("Bayer Corp"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its executive offices and principal place of business at 100 Bayer Boulevard Whippany, NJ 07981.

3. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

I. ORDER

Definitions

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "Elanco" means Elanco Animal Health Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint

ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Elanco Animal Health Incorporated, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Bayer" means Bayer Aktiengesellschaft, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Bayer Aktiengesellschaft, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Respondents" means Elanco and Bayer.

E. "Acquirer(s)" means:

1. A Person specified by name in this Order to acquire particular Divestiture Assets pursuant to this Decision and Order; or

2. Any other Person the Commission approves to acquire particular Divestiture Assets pursuant to this Decision and Order.

F. "Acquisition Agreement" means the *Share and Asset Purchase Agreement* between Bayer Aktiengesellschaft and Elanco Animal Health Incorporated, dated August 20, 2019. The Acquisition Agreement is contained in Non-Public Appendix IV.

G. "Acquisition Date" means the earlier of (i) the date on which Elanco acquires any ownership interest in any of the Persons or assets that are identified in the Acquisition Agreement for acquisition by Elanco, or (ii) the date on which Bayer acquires any ownership interest in the voting securities of Elanco pursuant to the Acquisition Agreement.

H. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes the FDA.

I. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, advertisement, importation, and sale of a Product.

J. "Business Information" means all written information, wherever located or stored, relating to or used in a Divestiture Product Business, including documents, graphic materials, and data and information in electronic format. Business Information includes records and information relating to research and

development (including Product Development Reports), manufacturing, process technology, engineering, product formulations, production, sales, marketing (including Product Marketing Materials), logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Divestiture Product Business. For clarity, Business Information includes Respondent's right and control over information and material provided to any other Person.

K. "Capstar Divestiture Agreement" mean the Asset Purchase Agreement between Elanco US Inc. and PetIQ, LLC, and, for the purposes of Section 9.16 only, PetIQ, Inc., dated as of January 13, 2020, and all amendments, exhibits, attachments, contracts, agreements, and schedules attached to and submitted to this Order and contained in Non-Public Appendix I.

L. "Capstar Divestiture Assets" mean all rights, title and interest in the Divestiture Product Business related to each of the Capstar Products, including all of the Divestiture Assets related to each of the Capstar Products, including the Capstar trademark.

M. "Capstar Products" mean the Products in Development or manufactured anywhere in the world for marketing or sale in the United States pursuant to the following FDA Authorization: NADA No. 141175, and any supplements, amendments, or revisions to this NADA.

N. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

O. "Confidential Business Information" means all Business Information that is not in the public domain.

P. "Customer" means any Person that is a direct purchaser of any Divestiture Product from a Respondent or an Acquirer.

Q. "Dechra" means: (i) Dechra Limited, a private limited company organized under the laws of England and Wales with its executive offices and principal place of business located at 24 Cheshire Avenue, Cheshire Business Park, Lostock Gralam, Northwich, UK, CW9 7UA; (ii) Dechra Veterinary Products LLC, a limited liability company organized under the laws of the State of Delaware, with its executive offices and principal place of business located at 7015 College Blvd., Suite 525, Overland Park, Kansas 66211; and (iii) any Person controlled by or under common control of either Dechra Limited and Dechra Veterinary Products LLC.

R. "Development" means all new chemical entity research, and all studies in animals of the safety or efficacy of a Product, including test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting studies in animals of the safety or efficacy of a Product for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, labeling, and sale of a Product (including any government price or reimbursement approvals); Product Approval and registration; and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

S. "Divestiture Agreement" means:

1. The Capstar Divestiture Agreement;

2. The Osurnia Divestiture Agreement;

3. The StandGuard Divestiture Agreement; or

4. Any other agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

T. "Divestiture Assets" mean Respondent Elanco's equitable and legal right, title, and interests in and to all tangible and intangible assets that are not Excluded Assets, wherever located, relating to a Divestiture Product Business, including the following:

1. All Product Approvals and authorizations for the Divestiture Products, including all FDA Authorizations;

2. All studies in animals of the safety or efficacy of the Product;

3. All Product Intellectual Property;

4. At the option of the Acquirer, Product Manufacturing Equipment;

5. All technological, scientific, chemical, biological, pharmacological, toxicological, regulatory materials and information, including studies in animals of the safety or efficacy of a Product;

6. All website(s), Domain Names, and social media sites related exclusively to the Divestiture Product and the content thereon related exclusively to the Divestiture Product, and the content related exclusively to the

Divestiture Product that is displayed on any website that is not dedicated exclusively to the Divestiture Product;

7. At the option of the Acquirer, Product Contracts;

8. All Business Information;

9. At the option of the Acquirer, all inventory and all ingredients, materials, or components used in the manufacture of the specified Divestiture Product in existence as of the Divestiture Date including, the active pharmaceutical ingredient(s), excipient(s), raw materials, packaging materials, work-in-process, and finished goods related to that Divestiture Product; and

10. At the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for the specified Divestiture Product as of the Divestiture Date.

U. "Divestiture Date" means, for each of the respective Divestiture Assets (*i.e.*, the Capstar Divestiture Assets, the Osurnia Divestiture Assets, or the StandGuard Divestiture Assets), the date on which a Respondent (or a Divestiture Trustee) closes on the sale of those Divestiture Assets to an Acquirer.

V. "Divestiture Product" means:

1. The Capstar Products;

2. The Osurnia Products; or

3. The StandGuard Products.

W. "Divestiture Product Business" means the Business related to a Divestiture Product.

X. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IX of this Order.

Y. "Domain Name" means the domain name(s) and the related uniform resource locator(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

Z. "Employee Information" means the following, for each Relevant Employee, as and to the extent permitted by law:

1. With respect to each such employee, the following information:

a. Name, job title or position, date of hire, and effective service date;

b. Specific description of the employee's responsibilities;

c. Base salary or current wages;

d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

e. Employment status (*i.e.,* active or on leave or disability; full-time or part-time); and

f. All other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

2. At the option of the proposed or approved Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employees.

AA. "Excluded Assets" mean:

1. Any real estate and the buildings and other permanent structures located on such real estate;

2. Corporate names or corporate trade dress of a Respondent or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which a Respondent can be identified or defined;

3. The portion of any Business Information that contains information about any of a Respondent's business other than a Divestiture Product Business, in those cases in which the redaction does not impair the usefulness of the information related to the Divestiture Product Business;

4. Any original document that a Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondent Elanco shall provide copies of the document to the Acquirer and shall provide the Acquirer access to the original document if copies are insufficient for regulatory or evidentiary purposes;

5. (i) Any tax asset relating to (a) the Divestiture Assets for pre-Divestiture Date tax periods or (b) any tax liability that any Respondent is responsible for arising out of the divestiture of the Divestiture Assets, (ii) all accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of any Respondent that are related to the Divestiture Product

Business and arising out of the operation of the Divestiture Product Business prior to the Divestiture Date, and (iii) all cash, cash equivalents, credit cards and bank accounts of any Respondent;

6. Any records or documents reflecting attorney-client, work product or similar privilege of any Respondent or otherwise relating to the Divestiture Assets as a result of legal counsel representing any Respondent in connection with the divestiture of the Divestiture Assets pursuant to this Order or the Divestiture Agreements; and

7. Assets specifically identified as excluded assets in Non-Public Appendix V.

BB. "FDA" means the United States Food and Drug Administration.

CC. "FDA Authorization(s)" means all of the following, as defined in the United States Federal Food, Drug and Cosmetic Act, as amended: "Investigational New Animal Drug Application ("INADA"), "New Animal Drug Application" ("NADA"), "Abbreviated New Animal Drug Application" ("ANADA"), or "Conditional New Animal Drug Application" ("CNADA") for a drug filed or to be filed with the FDA, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts, and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto.

DD. "Licensed Intellectual Property" means; (i) all Product Manufacturing Technology that is used (but not exclusively, predominantly, or primarily used) in the manufacture of a Divestiture Product, and (ii) copyrights used (but not exclusively, predominantly, or primarily used), to commercialize, distribute, market, advertise, or sell any Divestiture Product as of the applicable Divestiture Date.

EE. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.

FF. "Monitor" means any monitor appointed pursuant to this Decision and Order or the related Order to Maintain Assets issued by the Commission.

GG. "Neogen" means (i) Neogen Corporation, a corporation organized under the laws of the State of Michigan with its executive offices and principal place of business located at 620 Lesher Place, Lansing, Michigan 48912; and (ii) any Person controlled by or under common control of Neogen Corporation.

HH. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

II. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

JJ. "Orders" means this Decision and Order and the Order to Maintain Assets.

KK. "Osurnia Divestiture Agreement" means the Asset Purchase Agreement between Elanco Tiergesundheit AG and Dechra Limited, dated as of January 3, 2020, and all amendments, exhibits, attachments, agreements, and schedules attached to this Order and contained in Non-Public Appendix II.

LL. "Osurnia Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to each of the Osurnia Products, including all of the Divestiture Assets related to each of the Osurnia Products, including the Osurnia trademark.

MM. "Osurnia Products" means: the Products identified on Schedule 1.1.32 of the Osurnia Divestiture Agreement, including Product in Development, manufactured, marketed, or sold pursuant to the following FDA Authorization: NADA No. 141437, and any supplements, amendments, or revisions to this NADA.

NN. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

OO. "PetIQ" means (i) PetIQ, LLC, a limited liability company organized under the laws of the State of Idaho with its executive offices and principal place of business located at 923 South Bridgeway Place, Eagle, Idaho 83616; (ii) PetIQ, Inc., a corporation organized under the laws of the State of Delaware, with its executive offices and principal place of business located at 923 South Bridgeway Place, Eagle, Idaho 83616; and (iii) any Person controlled by or under common control of either PetIQ, LLC and PetIQ, Inc.

PP. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups, or affiliates thereof.

QQ. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound that is referenced as its pharmaceutically, biologically, or genetically active ingredient, or that is the subject of an FDA Authorization, or both.

RR. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other regulatory approvals, and pending applications and requests therefor, required by applicable Agencies, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any FDA Authorization related to that Product.

SS. "Product Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the Divestiture Product Business, including those:

1. Pursuant to which any Customer purchases, or has the option to purchase, a Product from a Respondent;

2. Pursuant to which a Respondent had, or has as of the Divestiture Date, the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), from any third party for use in connection with the manufacture of a Product;

3. Relating to any study in animals of the safety or efficacy of a Product;

4. With universities or other research institutions for the use of a Product in scientific research;

5. For the marketing of a Product or educational matters relating solely to the Products;

6. Pursuant to which a third party manufactures or plans to manufacture a Product as a finished dosage form on behalf of a Respondent;

7. Pursuant to which a third party provides or plans to provide any part of the manufacturing process, including, without limitation, the finish or packaging of a Product on behalf of a Respondent;

8. Pursuant to which a third party licenses any intellectual property related to a Product to a Respondent;

9. Pursuant to which a third party is licensed by a Respondent to use any of the Product Intellectual Property;

10. Constituting confidentiality agreements related to a Product;

11. Involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Product;

12. Pursuant to which a third party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Product to a Respondent including, consultation arrangements; or

13. Pursuant to which any third party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Product.

TT. "Product Development Reports" mean Business Information, as related to the Development of a Product, including:

1. Pharmacokinetic study reports;

2. Bioavailability study reports;

3. Bioequivalence study reports;

4. All correspondence, submissions, notifications, communications, registrations, or other filings made to, received from, or otherwise conducted with the FDA relating to the FDA Authorization(s);

5. Annual and periodic reports related to the above-described FDA Authorization(s), including any safety update reports;

6. FDA approved labeling or other Agency-approved labeling;

7. Currently used or planned product package inserts (including historical change of controls summaries);

8. FDA approved circulars for animal owners or breeders;

9. Adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy;

10. Summaries of complaints from veterinarians;

11. Summaries of complaints from Customers;

12. Product recall reports filed with the FDA or any other Agency, and all reports, studies, and other documents related to such recalls;

13. Investigation reports and other documents related to any out of specification results for any impurities or defects found in any Product;

14. Reports from any Person (e.g., any consultant or outside contractor) engaged to investigate or perform testing for the purposes of resolving any Product or process issues, including, without limitation, identification and sources of impurities or defects;

15. Reports from vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce any Product that relate to the specifications, degradation, chemical interactions, testing, and historical trends of the production of any Product;

16. Analytical methods development records;

17. Manufacturing batch or lot records;

18. Stability testing records;

19. Change in control history; and

20. Executed validation and qualification protocols and reports.

UU. "Product Intellectual Property" means intellectual property of any kind (other than Licensed Intellectual Property), that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date, including Patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, know-how, trade secrets, and proprietary information.

VV. "Product Manufacturing Equipment" means equipment that is being used, or has been used at any time since Respondents entered into the Acquisition Agreement to manufacture the specified Divestiture Product.

WW. "Product Manufacturing Technology" means all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of a Product, including the following: all product specifications, processes, analytical methods, product designs, plans, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the conformance of any Product Approvals, conformance with any Agency requirements, and cGMP compliance, labeling and all other information related to the manufacturing process, and supplier lists.

XX. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product as of the Divestiture

Date that are owned or controlled by a Respondent, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of dollars and units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, website content, artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

YY. "Product Releasee(s)" means any of the following Persons:

1. The Acquirer;

2. Any Person controlled by or under common control with that Acquirer;

3. Any Manufacturing Designee(s); and

4. Any licensees, sublicensees, manufacturers, suppliers, marketers, distributors, and Customers of that Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to each Divestiture Product acquired by that Acquirer.

ZZ. "Relevant Employees" means:

1. Manufacturing Employees - all employees of a Respondent who have participated at any time during the 3-year period immediately prior to the termination of any contract to provide Transition Manufacturing (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: (i) Developing and validating the commercial manufacturing process, (ii) formulating the manufacturing process performance qualification protocol, (iii) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, or (vii) managing the transfer of the Product Manufacturing Technology to a different facility;

2. Marketing Employees - all management-level employees of a Respondent who have participated (irrespective of the portion of working time

involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: sales management, brand management, sales training, market research, or marketing and contracting with any of the following: drug wholesalers or distributers, group purchasing organizations, pharmacy benefit organizations, managed care organizations, or hospitals, *excluding* administrative assistants within the 18 month period immediately prior to the Divestiture Date; and

3. Research and Development Employees - all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: research, Development, regulatory approval process, or studies in animals of the safety or efficacy of the Divestiture Product, within the 18 month period immediately prior to the Divestiture Date.

AAA. "Retained Product(s)" means any Product(s) other than a Divestiture Product that is manufactured, in Development, marketed, sold, owned, controlled, or licensed by a Respondent anywhere in the world on or before the Acquisition Date and that has not been discontinued or permanently withdrawn from the market.

BBB. "Shared Intellectual Property" means all Product Intellectual Property of any kind (other than trademarks, Domains Names, and FDA Authorizations related to a Divestiture Product) (i) that is primarily or predominantly used (but not exclusively used) in connection with a Divestiture Product Business as of the Divestiture Date, and (ii) that has been used, and continues to be used, in connection with the manufacture of any Retained Product.

CCC. "StandGuard Divestiture Agreement" mean the Asset Purchase Agreement by and between Elanco US Inc. and Neogen, dated as of February 20, 2020, and all amendments, exhibits, attachments, agreements, and schedules attached to this Order and contained in Non-Public Appendix III.

DDD. "StandGuard Divestiture Assets" mean all rights, title and interest in the Divestiture Product Business related to each of the StandGuard Products, including all of the Divestiture Assets related to each of the StandGuard Products, including the StandGuard trademark.

EEE. "StandGuard Products" mean the following Products in Development or manufactured anywhere in the world for marketing or sale in the United States:

1. The pour-on insecticide known as StandGuard (containing .50% gamma-cyhalothrin, corn oil, silicone fluid and butylated hydroxytoluene);

2. The gammacyhalothrin ear tag (containing 2.0% gamma-cyhalothrin); and

3. The controlled-release premised insecticide known as StandGuard Premise Insecticide (containing 5.9% gamma-cyhalothrin.

FFF. "Supply Cost" means the actual cost of materials, ingredients, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation in cases in which those costs are incurred by a Respondent.

GGG. "Technology Transfer Standards" mean requirements and standards sufficient to ensure that the information and assets required to be transferred and delivered to an Acquirer pursuant to this Order are delivered to that Acquirer in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, as related to the Divestiture Product(s) acquired by that Acquirer, *inter alia*:

1. Designating employees or other Persons working on behalf of a Respondent knowledgeable about the Product Manufacturing Technology who will be responsible for communicating directly with that Acquirer or its Manufacturing Designee, and the Monitor, for the purpose of effecting such delivery;

2. Preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Product that are acceptable to that Acquirer;

3. Preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology to that Acquirer or its Manufacturing Designee;

4. For any part of the manufacturing process that is performed by a Respondent, permitting employees of the Acquirer and/or its Manufacturing Designee to visit the Respondent's facility where that process occurs for the purposes of evaluating and learning that process or discussing the process with employees of the Respondent involved in that process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, and methods to ensure batch or lot consistency); and

5. Providing, in a timely manner, assistance and advice to enable that Acquirer or its Manufacturing Designee to:

a. Manufacture the Product in the quality and quantities achieved by a Respondent or the manufacturer or developer of the Product;

b. Obtain any Product Approvals necessary for that Acquirer or its Manufacturing Designee to manufacture, distribute, market, and sell the Product in commercial quantities and to meet all Agency-approved specifications for the Product; and

c. Receive, integrate, and use all Product Manufacturing Technology used in, and all Product Intellectual Property that is related to, the manufacture of the Product.

HHH. "Transition Manufacture" and "Transition Manufacturing" mean the following:

1. To manufacture, or to cause to be manufactured, a Capstar Product on behalf of the Acquirer (including, for the purposes of studies in animals or commercial sales); or

2. To provide, or to cause to be provided, any part of the manufacturing process including, the finish and packaging of a Capstar Product on behalf of the Acquirer.

III. "United States" means the United States of America, and its territories, districts, commonwealths, and possessions.

II. Divestitures

IT IS FURTHER ORDERED that:

A. Not later than 10 days after the Acquisition Date, Respondent Elanco shall divest the Capstar Divestiture Assets, and grant a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to use the related Licensed Intellectual Property in the related Divestiture Product Business, absolutely and in good faith, to PetIQ pursuant to, and in accordance with, the Capstar Divestiture Agreements;

provided, however, that, if within 12 months after the Order Date, the Commission determines, in consultation with the Acquirer and the Monitor, the Acquirer needs one or more Excluded Assets to operate the Capstar Divestiture Assets or the related Divestiture Product Business in a manner that achieves the purposes of the Order, Respondent Elanco shall divest, absolutely and in good faith, the needed Excluded Assets to the Acquirer.

B. Not later than 10 days after the Acquisition Date, Respondent Elanco shall divest the Osurnia Divestiture Assets, and grant a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to use the related Licensed Intellectual Property in the related Divestiture Product Business, absolutely and in

good faith, to Dechra pursuant to, and in accordance with, the Osurnia Divestiture Agreements;

provided, however, that, if within 12 months after the Order Date, the Commission determines, in consultation with the Acquirer and the Monitor, the Acquirer needs one or more Excluded Assets to operate the Osurnia Divestiture Assets or the related Divestiture Product Business in a manner that achieves the purposes of the Order, Respondent Elanco shall divest, absolutely and in good faith, the needed Excluded Assets to the Acquirer.

C. Not later than 10 days after the Acquisition Date, Respondent Elanco shall divest the StandGuard Divestiture Assets, and grant a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to use the related Licensed Intellectual Property in the related Divestiture Product Business, absolutely and in good faith, to Neogen pursuant to, and in accordance with, the StandGuard Divestiture Agreements;

provided, however, that, if within 12 months after the Order Date, the Commission determines, in consultation with the Acquirer and the Monitor, the Acquirer needs one or more Excluded Assets to operate the StandGuard Divestiture Assets or the related Divestiture Product Business in a manner that achieves the purposes of the Order, Respondent Elanco shall divest, absolutely and in good faith, the needed Excluded Assets to the Acquirer.

D. The Order does not prohibit Respondent Elanco from receiving a non-exclusive license from the relevant Acquirer of each of the Divestiture Products to use the Shared Intellectual Property in the manufacture of (i) any Product that is marketed, distributed, or sold that is not indicated for the same treatment in the same animal species as such Divestiture Products, or (ii) with respect to Shared Intellectual Property included in the Capstar Assets or the StandGuard Assets, any Product that is not commercialized, distributed, marketed, advertised, or sold within the United States.

E. If Respondent Elanco has divested any of the Divestiture Assets to an Acquirer who is named in this Order prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Elanco that:

1. The named Acquirer is not an acceptable purchaser of any of the Divestiture Assets, then Respondent Elanco shall immediately rescind the transaction with that Acquirer as directed by the Commission, and shall divest the respective Divestiture Assets within 180 days after the Order Date, absolutely and in good faith, at no minimum price, to a different Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture was accomplished is not acceptable, then Respondent Elanco shall make such modifications to the manner of divestiture of the Divestiture Assets to the Acquirer named in this Order (including, entering into additional agreements or arrangements) as the Commission determines are necessary to satisfy the requirements of this Order.

F. Prior to the Divestiture Date, Respondent Elanco shall provide the relevant Acquirer of each of the Divestiture Products with the opportunity to review each Product Contract related to such Divestiture Products so that the relevant Acquirer can determine whether to assume each Product Contract;

provided, however, that in cases in which any Product Contract also relates to a Retained Product the Respondent shall, at the option of the relevant Acquirer, assign or otherwise make available to the relevant Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product.

G. Respondent Elanco:

1. Prior to the Divestiture Date, shall secure all approvals, consents, ratifications, waivers, or other authorizations from all non-governmental third parties that are necessary to permit Respondent Elanco to divest the Divestiture Assets to each of the relevant Acquirers, and to permit the relevant Acquirer to continue in the related Divestiture Product Business in the United States without interruption or impairment; and

2. As related to the Product Manufacturing Technology and any ingredient, material, or component used in the manufacture of the Divestiture Product, shall not enforce any agreement against a third party or the relevant Acquirer to the extent that such agreement may limit or otherwise impair the ability of the relevant Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product. Such agreements include agreements that might limit the ability of a third party to disclose Confidential Business Information related to such Product Manufacturing Technology to the relevant Acquirer. Not later than 10 days after the Divestiture Date, Respondent Elanco shall grant a release to each third party that is subject to any such agreement that allows the third party to provide the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product to the relevant Acquirer. Within 5 days of the execution of each such release, Respondent Elanco shall provide a copy of the release to the relevant Acquirer;

provided, however, Respondent Elanco may satisfy this requirement by certifying that the relevant Acquirer has executed all such agreements directly with each of the relevant third parties.

H. Respondent Elanco shall deliver to the relevant Acquirer of each of the Divestiture Products the related Product Manufacturing Technology and shall deliver it in a manner consistent with the Technology Transfer Standards.

I. Not later than 10 days after the Divestiture Date, Respondent Elanco shall designate employees of Respondent Elanco knowledgeable about the marketing, distribution, warehousing, and sale of each of the Divestiture Products to assist the relevant Acquirer of each of the Divestiture Products to transfer and integrate the related Divestiture Product Business.

J. Not later than 10 days after the Divestiture Date, Respondent Elanco shall provide the following to the relevant Acquirer of each of the Divestiture Products:

1. A list of any finished batch or lot of the relevant Divestiture Product that any Respondent, any manufacturer for a Respondent, or regulatory Agency determined to be out-of-specification at any time during the three-year period immediately preceding the Divestiture Date, and, for each such batch or lot: (i) a detailed description of the known deficiencies or defects (e.g., impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (ii) the corrective actions taken to remediate any cGMP deficiencies in that Product; and (iii) to the extent known by any Respondent, the employees (whether current or former) responsible for taking such corrective actions;

2. A list by stock-keeping unit by Customer that contains the current net price per unit as packaged for sale (i.e., the price net of all customer-level discounts, rebates, or promotions) for the relevant Divestiture Product for each order sold to that Customer during the two-year period prior to the Divestiture Date;

3. A list of the inventory levels (weeks of supply) of the relevant Divestiture Product in the possession of each Customer to the extent known or available to any Respondent, as of the date prior to and closest to the Divestiture Date as is available;

4. A list of any pending reorder dates for the relevant Divestiture Product by Customer as of the Divestiture Date to the extent known by any Respondent; and

5. The quantity and delivery terms in all unfilled Customer purchase orders for the relevant Divestiture Product as of the Divestiture Date.

K. Respondents shall not:

1. Use any of the trademarks divested pursuant to this Order or any mark confusingly similar to those trademarks as a trademark, tradename, or service mark, except as may be agreed upon with the relevant Acquirer of each of the Divestiture Products for the purposes of selling inventory, finished goods, packaging or similar materials bearing the relevant trademarks for the benefit of the relevant Acquirer during a transition period;

2. Attempt to register the divested trademarks;

3. Attempt to register any mark confusingly similar to the divested trademarks;

4. Challenge or interfere with the use and registration of the divested trademarks by the relevant Acquirer of each of the Divestiture Products; or

5. Challenge or interfere with efforts to enforce its trademark registrations for, and trademark rights in, the divested trademarks against third parties by the relevant Acquirer of each of the Divestiture Products,

provided, however, the prohibitions in this paragraph II.K shall apply only to actions in the United States with respect to trademarks including in the Capstar Assets and the StandGuard Assets.

L. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Product Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair each Acquirer's freedom to research, Develop, or manufacture anywhere in the world the Divestiture Product(s) acquired by that Acquirer, or to distribute, market, sell, or offer for sale within the United States any such Divestiture Product.

M. Upon reasonable written request from an Acquirer, Respondent Elanco shall, in a timely manner, make available knowledgeable employees of Respondent Elanco (i.e., employees of Respondent Elanco that were involved in the Development of the Divestiture Products) to assist the Acquirer in defending against, responding to, or otherwise participating in any infringement action brought by a third party against the Acquirer related to the Product Intellectual Property acquired by that Acquirer from Respondent Elanco. Respondent Elanco shall make their employees available for the fee provided in the relevant Divestiture Agreement, or if no fee is provided, at no greater than the then-current average hourly wage rate for such employee.

N. For any patent infringement suit that is filed or to be filed within the United States that is (i) filed by, or brought against, a Respondent prior to the Divestiture Date

related to a Divestiture Product or (ii) any potential patent infringement suit that a Respondent has prepared, or is preparing, to bring or defend against as of the Divestiture Date that is related to a Divestiture Product, Respondents shall:

1. Cooperate with the relevant Acquirer of that Divestiture Product and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. Waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent that Acquirer in any such patent infringement suit; and

3. Permit the transfer to that Acquirer of all of the litigation files and any related attorney work product in the possession of the Respondents' outside counsel related to such patent infringement suit.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by a Respondent to comply with any term of the Divestiture Agreements shall constitute a violation of this Order; *provided however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that the Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall include in the Divestiture Agreements a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondents' obligations to the Acquirer pursuant to this Order.

C. Respondents shall not modify or amend any of the terms of any Divestiture Agreement without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

IV. Transition Services and Transition Manufacturing

IT IS FURTHER ORDERED that:

A. At the request of an Acquirer, in a timely manner, at no greater than the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service, or at such cost as provided in a Divestiture Agreement, Respondent Elanco shall provide transition services sufficient to enable the relevant Acquirer of each of the Divestiture Products to operate the related Divestiture Product Business in substantially the same manner that Respondent Elanco has operated that Business prior to the Acquisition Date.

B. Upon reasonable written notice and request by the Acquirer of the Capstar Products ("Capstar Acquirer") or the Acquirer of the StandGuard Products ("StandGuard Acquirer"), Respondent Elanco shall Transition Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, the requested supply of Capstar Products or StandGuard Products, as applicable. The requested Divestiture Products shall be provided at no greater than Supply Cost or at such cost as provided in a Divestiture Agreement and for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, (and, for the Capstar Products, in a manner consistent with cGMP), the finished dosage form of the Divestiture Product independently of Respondent Elanco, and to secure sources of supply of the active ingredients, excipients, other ingredients, and necessary components from Persons other than Respondent Elanco.

C. Respondent Elanco shall make representations and warranties to the Capstar Acquirer and StandGuard Acquirer that the Divestiture Products Elanco is supplying to each meet the relevant Agency-approved specifications.

D. For the Capstar Product(s), the supplying Respondent shall agree to indemnify, defend, and hold the relevant Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Capstar Product(s) supplied to that Acquirer pursuant to a Divestiture Agreement to meet cGMP, but the supplying Respondent may make this obligation contingent upon that Acquirer giving the supplying Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the supplying Respondent's responsibilities to supply the Capstar Products in the manner required by this Order;

provided further, however, that this obligation shall not require the supplying Respondent to be liable for any negligent act or omission of that Acquirer or for any representations and warranties, express or implied, made by that Acquirer that exceed the representations and warranties made by the supplying Respondent to that Acquirer in an agreement to Transition Manufacture.

E. Respondent Elanco shall agree to hold harmless and indemnify the Capstar Acquirer and the StandGuard Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of Respondent Elanco to deliver Divestiture Products to the requesting Acquirer in a timely manner *unless* (i) Respondent Elanco can demonstrate that the failure was beyond the control of Respondent Elanco and in no part the result of negligence or willful misconduct by Respondent Elanco, and (ii) Respondent Elanco is able to cure the supply failure not later than 30 days after the receipt of notice from that Acquirer of a supply failure.

F. Respondent Elanco shall give at least the same level of priority to supplying requested Divestiture Products to the Capstar Acquirer and the StandGuard Acquirer as Respondent Elanco gives to the manufacturing and supplying of Products for Respondent Elanco's own use or sale.

G. During the term of any agreement to Transition Manufacture, upon written request of the Capstar Acquirer, the StandGuard Acquirer, or the Monitor, Respondent Elanco shall make available to the requesting Acquirer and the Monitor all records generated or created after the Divestiture Date that relate directly to the manufacture of Divestiture Products for the Capstar Acquirer or StandGuard Acquirer, as applicable.

H. Respondent Elanco shall provide the following to the Capstar Acquirer regarding Capstar Products and to the StandGuard Acquirer regarding the StandGuard Products: the actual costs incurred or the price paid for active ingredients, components, and excipients Respondent Elanco uses to manufacture the relevant Divestiture Products supplied to the relevant Acquirer.

I. During the term of any agreement to Transition Manufacture, Respondent Elanco shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Capstar Products to the Capstar Acquirer and StandGuard Product to the StandGuard Acquirer.

J. Respondent Elanco shall not be entitled to terminate any agreement to Transition Manufacture due to (i) a breach by the relevant Acquirer of a Divestiture Agreement, or (ii) that Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law;

provided, however, that this Paragraph shall not prohibit Respondent Elanco from seeking compensatory damages from that Acquirer for that Acquirer's breach of its payment obligations to Respondent Elanco under the agreement.

K. Respondent Elanco shall permit the Capstar Acquirer or the StandGuard Acquirer to terminate its agreement with Respondent Elanco to Transition Manufacture at any time upon commercially reasonable notice and without cost or penalty (other than costs or penalties due by a Respondent to third parties pursuant to the termination of such agreement, which shall be the responsibility of that Acquirer).

L. During the term of any agreement to Transition Manufacture, Respondent Elanco shall provide consultation with knowledgeable employees of Respondent Elanco and training, at the written request of the Capstar Acquirer or the StandGuard Acquirer and at a facility chosen by the requesting Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the relevant Divestiture Products in final form in the same quality achieved by, or on behalf of, Respondent Elanco and in commercial quantities, (and, for the Capstar Products, in a manner consistent with cGMP), independently of Respondent Elanco and sufficient to satisfy management of the requesting Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the manufacture of the relevant Divestiture Products.

V. Asset Maintenance

IT IS FURTHER ORDERED that, until the Capstar Divestiture Assets, the Osurnia Divestiture Assets, and the StandGuard Divestiture Assets have been physically transferred to each of the relevant Acquirers, Respondent Elanco shall operate and maintain each of the respective Divestiture Assets and related Divestiture Product Businesses in the ordinary course of business consistent with past practices. Included in these obligations, Respondent Elanco shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses, to minimize the risk of loss of competitive potential of such Divestiture Product Businesses, to operate such Divestiture Product Businesses in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration the related Divestiture Assets, except for ordinary wear and tear.

B. Not sell, transfer, encumber, or otherwise impair such Divestiture Assets, or terminate any of the operations of such Divestiture Product Businesses, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with such Divestiture Product Businesses.

D. Provide such Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities for such Divestiture Product Businesses.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with such Divestiture Product Businesses.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with such Divestiture Product Businesses, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from such Divestiture Product Businesses to another of Respondent Elanco's businesses.

G. Maintain and preserve the Business Information of such Divestiture Product Businesses.

H. Provide the resources necessary for such Divestiture Product Businesses to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to such Divestiture Product Businesses.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of such Divestiture Product Businesses, and operate such Divestiture Product Businesses in accordance and compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with such Divestiture Product Businesses.

Provided, however, Respondents may take actions that an Acquirer has requested or agreed to in writing and that has been approved in advance by the Monitor (in

consultation with Commission staff), in all cases to facilitate the relevant Acquirer's acquisition of the Divestiture Assets and consistent with the purposes of the Orders.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until 2 years after the Divestiture Date, Respondent Elanco shall cooperate with and assist each Acquirer to evaluate independently and offer employment to the Relevant Employees for the Divestiture Products acquired by that Acquirer.

B. Respondent Elanco shall, for each Acquirer:

1. No later than 10 days after a request from an Acquirer, provide to that Acquirer a list of all Relevant Employees and provide Employee Information for each Relevant Employee;

2. No later than 10 days after a request from an Acquirer, provide that Acquirer or its Manufacturing Designee an opportunity to meet individually and outside the presence or hearing of any employee or agent of Respondent Elanco with any of the Relevant Employees, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondent Elanco that may deter Relevant Employees from accepting employment with the relevant Acquirer or its Manufacturing Designee, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondent Elanco that may affect the ability or incentive of those individuals to be employed by the Acquirer or its Manufacturing Designee, and shall not make any counteroffer to a Relevant Employee who receives an offer of employment from that Acquirer or its Manufacturing Designee; *provided, however*, that nothing in this Order shall be construed to require Respondent Elanco to terminate the employment of any employee or prevent Respondent Elanco from continuing the employment of any employee; and

4. Not interfere, directly or indirectly, with the hiring or employing by the relevant Acquirer or its Manufacturing Designee of any Relevant Employees, not offer any incentive to such employees to decline employment with that Acquirer or its Manufacturing Designee, and not otherwise interfere with the recruitment of any Relevant Employees by the Acquirer.

C. Respondent Elanco shall continue to provide Relevant Employees compensation and benefits, including regularly scheduled raises and bonuses, until the

Divestiture Date or as may be necessary to comply with the provisions of this Order to provide Transition Manufacturing or transition services.

D. Respondent Elanco shall provide reasonable financial incentives for Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by the relevant Acquirer.

E. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and the Monitor, determines in its sole discretion that the Acquirer or its Manufacturing Designee should have the ability to interview, make offers of employment to, or hire any of Respondent Elanco's employees who were not included as Relevant Employees, but who either (i) were involved with any of the Divestiture Products, or (ii) provided Transition Manufacturing or transition services to an Acquirer, then the Commission may notify Respondent Elanco that such employees are to be designated as Relevant Employees, and the provisions of this Paragraph V shall apply to such employees as of that notification date.

F. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer or its Manufacturing Designee to terminate his or her employment with the Acquirer or its Manufacturing Designee; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Relevant Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

VII. Business Information

IT IS FURTHER ORDERED that:

A. Respondent Elanco shall transfer and deliver all Business Information related to a Divestiture Product Business to the Acquirer of that Divestiture Product Business pursuant to the following:

1. Respondent Elanco shall deliver the Business Information to the Acquirer, at Respondent Elanco' expense, in good faith, in a timely manner (*i.e.* as

soon as practicable, avoiding any delays in transmission), and in a manner that ensures the completeness and accuracy of all information and ensures its usefulness;

2. Pending complete delivery of all Confidential Business Information, Respondent Elanco shall provide the Acquirer with access to all Business Information and to employees who possess or are able to locate this information for the purposes of identifying the Business Information that contains Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. Not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

   a. The requirements of the Orders;

   b. Respondent Elanco's obligations to that Acquirer under the terms of the related Divestiture Agreements; or

   c. Applicable law;

4. Not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except* (i) that Acquirer, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services, Transition Manufacturing, or who are engaged in the transfer and delivery of the Product Manufacturing Technology to that Acquirer), (iii) the Commission, or (iv) the Monitor or *except* as necessary to comply with applicable law;

5. Not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by a Respondent, other than those employees specifically authorized as described above;

6. Institute procedures and requirements to ensure that those employees of a Respondent that are authorized to have access to such Confidential Business information:

   a. Do not provide, disclose, or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and

   b. Do not solicit, access, or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. Take all actions necessary and appropriate to prevent access to, and the disclosure or use of, such Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such information pursuant to the terms of the Orders or the relevant Divestiture Agreements, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

   b. To the extent practicable, maintaining such Confidential Business Information separate from other data or information of a Respondent; and

   c. Ensuring by other reasonable and appropriate means that such Confidential Business Information is not shared with a Respondent's personnel engaged in any Business related to the same or substantially the same type of Business as the Divestiture Products (*e.g.*, commercialization of Products Developed, in Development, marketed, or sold for the same or similar indications and in the same geographic territory as the Divestiture Products).

B. As a condition of continued employment after the Divestiture Date, Respondent Elanco shall require each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Divestiture Products and for commercialization, in each case who have or may have had access to Confidential Business Information related to those Products, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all such Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of Respondent Elanco (other than as necessary to comply with the requirements of this Order).

C. Not later than 30 days after the Divestiture Date, Respondent Elanco shall provide written notification of the restrictions on the use and disclosure of the above-described Confidential Business Information by that Respondent Elanco's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent Elanco shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for 2 years after the Divestiture Date. Respondent Elanco shall provide a copy of the notification to the Acquirer. Respondent

Elanco shall maintain complete records of all such notifications at that Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent Elanco shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances in which copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. To assure such Respondent's compliance with any Divestiture Agreement, this Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable government entity, or any taxation requirements; or

2. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of an Divestiture Product, the Divestiture Assets, or the Divestiture Product Business;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however,* that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Francis J. Civille as the Monitor to observe and report on Respondents' compliance with the terms of the Orders. The Monitor shall serve pursuant to the agreement between the Monitor and Respondent Elanco contained in the Monitor Agreement Appendix to the Orders, *provided, however,*

such agreement shall not limit, or be construed to limit, the terms of the Monitor Paragraph of the Orders.

B. No later than one day after the Commission issues the Order to Maintain Assets, Respondent Elanco shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondent Elanco's compliance with the terms of the Orders as set forth in Monitor Paragraph of the Orders; and

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in the Monitor Paragraph of the Orders.

C. The Monitor:

1. Shall have the authority to monitor Respondent Elanco's compliance with the obligations set forth in the Orders;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondent Elanco or of the Commission;

4. Shall serve at the expense of Respondent Elanco, without bond or other security;

5. May employ, at the cost and expense of Respondent Elanco, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondent Elanco and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Within 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission regarding Respondent Elanco's compliance with its obligations under the Orders and, where relevant, each Acquirer's or its Manufacturing

Designee's progress toward obtaining the Product Approvals necessary to manufacture each Divestiture Product acquired by that Acquirer, independently of Respondent Elanco; and

9. Shall serve until 30 days after all Divestiture Agreements to provide Transition Manufacturing or transition services have expired or been terminated or until such other time as may be determined by the Commission or its staff.

D. Respondent Elanco shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the monitor to monitor Respondent Elanco's compliance with its obligations under the Orders; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.

E. Respondent Elanco shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, or expenses (including attorney's fees and out of pocket costs) that arise out of, or in connection with, any claim concerning the Monitor's performance of the Monitor's duties under the Orders, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor in the performance of his or her duties under the Orders.

F. Respondent Elanco may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement; *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

G. Respondent Elanco shall not require nor compel the Monitor to disclose to Respondent Elanco the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any Person with whom the Monitor communicates in the performance of the Monitor's duties.

H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and subject to all obligations of the Monitor Paragraph of the Orders:

1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Elanco which consent shall not be unreasonably withheld. Respondent Elanco shall be deemed to have consented to the selection of

the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor to Respondent Elanco, Respondent Elanco has not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 10 days after such notice; and

2. Not later than 5 days after the Commission appoints a substitute Monitor, Respondent Elanco shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement attached as Monitor Agreement Appendix to the Orders or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under the Monitor Paragraph of the Orders.

I. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent Elanco has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Elanco shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Elanco, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Elanco has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondent Elanco of the

identity of any proposed Divestiture Trustee, Respondent Elanco shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than 10 days after the appointment of a Divestiture Trustee, Respondent Elanco shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order. Any failure by Respondent Elanco to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent Elanco shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have 1 year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one- year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

   provided, however, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondent Elanco shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Elanco shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Elanco's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer that receives the prior approval of the Commission as required by this Order;

   provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent Elanco from among those approved by the Commission;

   provided further, however, that Respondent Elanco shall select such Person within 5 days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Elanco, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Elanco, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Elanco, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Elanco shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondent Elanco and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent Elanco may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

X. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of each of the Divestiture Dates no later than 5 days after the occurrence of each; and

2. Submit the complete copies of each of the Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Elanco shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondent Elanco shall:

   a. Submit interim Compliance Reports within 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter until Respondent Elanco has completed all of the following: (i) the transfer and delivery of the Capstar Divestiture Assets, the Osurnia Divestiture Assets and the StandGuard Divestiture Assets to each of the relevant Acquirers, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Divestiture Products to each of the relevant Acquirers, (iii) the transfer and delivery of all Business Information to each of the relevant Acquirers, and (iv) the provision of Transition Manufacturing to the Acquirer of the Capstar Divestiture Assets;

   b. Annual Compliance Reports one year after the Order Date and annually for the next 4 years on the anniversary of that date; and

   c. Additional Compliance Reports as the Commission or its staff may request.

2. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Elanco is in compliance with the Orders. Conclusory statements that Respondent Elanco has complied with its obligations under the Orders are insufficient. Respondent Elanco shall include in its Compliance Reports, among other information or documentation that may be necessary to demonstrate compliance:

   a. A detailed description of all substantive contacts, negotiations, or recommendations related to the transfer and delivery to each of the relevant Acquirers of (i) the Capstar Divestiture Assets, the Osurnia Divestiture Assets, and the StandGuard Divestiture Asset (ii) the related Product Manufacturing Technology, (iii) the related Business Information, and (iv) the provision of Transition Manufacturing to the Acquirer of the Capstar Divestiture Assets; and

   b. A detailed description of the timing for the completion of such obligations.

3. Respondent Elanco shall retain all material written communications with each party identified in the Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent Elanco's obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondent Elanco shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondent Elanco shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent Elanco shall provide a copy of each Compliance Report to the Monitor.

XI. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The dissolution of: Elanco Animal Health Incorporated or Bayer Aktiengesellschaft;

B. Any proposed acquisition, merger, or consolidation of Elanco Animal Health Incorporated or Bayer Aktiengesellschaft; or

C. Any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, subject to any legally recognized privilege, upon written request, and upon 5 days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of that Respondent related to compliance with the Orders, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. To interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy in a timely and sufficient manner the lessening of competition resulting from the proposed acquisition by Elanco of certain assets and shares comprising the animal health business of Bayer as alleged in the Commission's Complaint by:

A. Ensuring the continued use of the Capstar Divestiture Assets, Osurnia Divestiture Assets, and StandGuard Divestiture Assets for the purposes of each of the respective Divestiture Product Businesses within the United States; and

B. Creating viable and effective competitors that are independent of Respondents in the respective Divestiture Product Businesses within the United States.

XIV. Term

IT IS FURTHER ORDERED that this Order shall terminate on the date 10 years after the Order Date.

By the Commission.

NON-PUBLIC APPENDIX I

AGREEMENTS RELATED TO THE CAPSTAR DIVESTITURE

[cover page]

NON-PUBLIC APPENDIX II

AGREEMENTS RELATED TO THE OSURNIA PRODUCT DIVESTITURE

[cover page]

NON-PUBLIC APPENDIX III

AGREEMENTS RELATED TO THE STANDGUARD PRODUCT DIVESTITURE

[cover page]

NON-PUBLIC APPENDIX IV

THE ACQUISITION AGREEMENT

[cover page]

NON-PUBLIC APPENDIX V

excluded assets

[cover page]

NON-PUBLIC APPENDIX

MONITOR COMPENSATION

[cover page]

PUBLIC APPENDIX

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement") entered into this 24th day of June 2020 between Francis J. Civille and Elanco Animal Health Inc. ("Respondent"), provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission"), in connection with an Agreement Containing Consent Order incorporating an Order To Maintain Assets and a Decision and Order (the "Order"), relating to the Respondent's acquisition of certain assets comprising the animal health business of Bayer AG *(Commission File No. 191-0198*), has accepted or will shortly accept the Order for public comment, which, among other things, requires Respondent to divest or transfer certain defined assets and to ensure that Respondent complies with its obligations under the Order provides for the appointment of a Monitor;

WHEREAS, the Commission may appoint Francis J. Civille as such Monitor (the "Monitor") pursuant to the Order to monitor Respondent's compliance with the terms of the Order and with the Remedial Agreements referenced in the Order, and Francis J. Civille has consented to such appointment;

WHEREAS, the Order further provides or will provide that Respondent shall execute a Monitor Agreement, subject to the prior approval of the Commission, conferring all the rights, powers and authority necessary to permit the Monitor to carry out such duties and responsibilities pursuant to the Order;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or the Monitor under the Order, until it has been approved by the Commission; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order. The term "Monitored Assets" means the categorized assets, as defined in the Order, divested to each Commission-approved Acquirer.

2. The Monitor shall have all of the powers and responsibilities conferred upon the Monitor by the Order, including but not limited to:

   a. supervising the divestiture of the Monitored Assets;
   b. supervising compliance pertaining to the submission and delivery of Confidential Business Information to each Commission-approved Acquirer and the retention, non-disclosure, or use of Confidential Business Information by the Respondent as set forth in the Order; and

c. supervising the performance of any transition required by the Order.

3. Respondent hereby agrees that it will fully and promptly comply with all terms of the Order requiring them to confer all rights, powers, authority and privileges upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor hereunder.

4. Upon this Monitor Agreement becoming effective, the Monitor shall be permitted, and Respondent shall be required, to notify all Commission-approved Acquirers of his appointment as Monitor.

5. Respondent further agrees that:

a. it will use reasonable best efforts to ensure that each relevant Commission-approved Acquirer for their respective assets enters into a separate Monitor Agreement with the Monitor governing the facilitation of the Monitor's duties under the Order and the Remedial Agreements and the exchange of information between each Commission-approved Acquirer and the Monitor;

b. no later than ten (10) business days after the Commission approves this Monitor Agreement, it will provide the Monitor with the following, as applicable:

(1) a copy of the Remedial Agreements (or drafts thereof) relating to the Monitored Assets, including any exhibits, schedules and appendices;

(2) a copy of the offering or information memoranda (if any), or similar documents and information, provided to each Commission-approved Acquirer relating to the sale of the Monitored Assets;

(3) copies of relevant correspondence with and written reports or minutes of meetings of all substantive contacts and discussions with any Commission-approved Acquirer relating to the Monitored Assets or Remedial Agreements;

(4) an inventory and description of the Monitored Assets, including a complete inventory of any existing FDA approvals and pending FDA approvals for the products included in the Monitored Assets and identifying the person(s) responsible for taking such actions as are required to maintain or complete such approvals; and

(5) copies of any other relevant documents, as requested by the Monitor, including but not limited to significant product development

and manufacturing reports, FDA correspondence/minutes, marketing assessments, annual sales reports for current year-to-date and last year, related to the Monitored Assets.

c. it will designate a senior individual as a primary contact for the Monitor and provide a written list of the principal individuals to be involved in the transitioning of the Monitored Assets to each Commission-approved Acquirer, together with their locations, telephone numbers, electronic mail address, and responsibilities, and will provide the Monitor with written notice of any changes in such personnel occurring thereafter;

d. it will use reasonable efforts to provide the Monitor with prompt notification (but not later than such notification is available to other meeting participants) of significant meetings, included but not limited to transfer steering committee and project team meetings or their equivalent, with the date, time and venue or phone-in coordinates, scheduled after the execution of this Monitor Agreement, relating to the manufacture, registration, regulatory approvals, marketing, sale and divestiture of the Monitored Assets, and such meetings may be attended by the Monitor, at the Monitor's option, or at the request of the Commission or its staff;

e. it will provide the Monitor with the minutes, if any, of the above-referenced meetings as soon as practicable and, in any event, not later than when those minutes are available to any employee of the Respondent;

f. it will provide the Monitor with all relevant correspondence, meeting minutes, telephone summaries, reports, sent to or received from the Food and Drug Administration ("FDA") after the execution of this Monitor Agreement relating to the Monitored Assets, and will provide prompt notice of all meetings or communications with the FDA relating to or affecting the Monitored Assets;

g. it will provide the Monitor with electronic copies of all reports submitted to the Commission pursuant to the Order, simultaneous with the submission of such reports to the Commission, as well as any other significant written or oral communications with the Commission related to the Monitored Assets;

h. to the extent not reflected in the reports submitted to the Commission pursuant to the Consent Agreement and the Order, it will provide every three (3) months commencing one (1) month after the Consent Agreement is accepted by the Commission for public comment, or on a schedule as reasonably requested by the Monitor, full and detailed electronic reports to the Monitor reasonably describing all of Respondent's activities and obligations under the Order during that period concerning the Monitored Assets including, without limitation to the extent applicable:

(1) all significant activities concerning the assistance, advice and consultation provided to any Commission-approved Acquirer, as required in the relevant provisions of the Order and Remedial Agreements;

(2) as applicable, all significant activities and interactions concerned with the development, regulatory aspects, manufacture, supply and technology transfer of the products included in the Monitored Assets including, without limitation, negotiation and execution of any supply agreements and actual supply and inventory; and

(3) as applicable, all minutes and records of significant meetings, action plans and updates thereof, and follow-ups to action plans and meetings, with each Commission-approved Acquirer related to the research, development, regulatory aspects, manufacture and supply, and technology transfer of the products included in the Monitored Assets and, upon request, Respondent shall provide the Monitor with any records exchanged at such meetings, or such other information that the Monitor may reasonably require relating to the research, development, regulatory aspects, manufacture and supply, and technology transfer of the products included in the Monitored Assets for the Monitor's reporting to the Commission;

provided however, that, at the time the Order becomes final, the reports described in this paragraph shall be due to the Monitor either as requested by the Monitor, or within five (5) business days of the date that Respondent file their reports with the Commission as required pursuant to the relevant provision(s) of the Order;

i. it will comply with the Monitor's reasonable requests for onsite visits to Respondent's facilities (or to any contract manufacturer's facility) used to manufacture the products included in the Monitored Assets; and

j. it will comply with the Monitor's reasonable requests for follow-up discussions or supplementary information concerning any reports provided to or requested by the Monitor pursuant to this Monitor Agreement, including, as applicable: meetings and discussions involved in any activities relating to research, development, regulatory, manufacture, sale and/or divestiture of the Monitored Assets or any product comprised therein and, further including, actions necessary to maintain all necessary FDA approvals to develop, manufacture and sell any of the products included in the Monitored Assets in the United States and to prevent the destruction, removal, wasting, deterioration or impairment of the Monitored Assets, and will provide the Monitor with access to copies of all other data, records or other information that the Monitor reasonably believes are necessary to the proper discharge of his responsibilities under the Order.

6. Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and Respondent related to the Monitored Assets in the Order or this Monitor Agreement, together with electronic or hard copies (or, in the case of oral communications, summaries), as may be reasonably requested by the Monitor, of such communications.

7. Respondent agrees that to the extent authorized by the Order, the Monitor shall have the authority to employ, at the expense of the Respondent, and with the consent of Respondent, which will not unreasonably be withheld, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

8. The Monitor and any other parties employed pursuant to Paragraph 7 above (the "Designees") shall maintain the confidentiality of all information provided to the Monitor by Respondent. Such information shall be used by the Monitor and his Designees only in connection with the performance of the Monitor's duties pursuant to this Agreement. Such information shall not be disclosed by the Monitor or his Designees to any third party, other than:

   a. persons employed by, or working with, the Monitor under this Monitor Agreement and who have executed a confidentiality agreement consistent with the provisions of this Monitor Agreement; or
   b. persons employed at the Commission and working on this matter.

9. The Monitor shall maintain a record and inform the Commission and the Respondent of all persons (other than staff of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.

10. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall return, at Respondent's expense, to Respondent all material provided to the Monitor by Respondent that is confidential to Respondent and that it is entitled to have returned to them under the Order, or shall have it destroyed, at Respondent's request and expense. Monitor shall destroy any materials prepared by the Monitor and shall delete any electronic files that contain or reflect any confidential information of Respondent. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of ten (10) years after the termination of this Monitor Agreement;

11. The Monitor shall keep confidential for a period of ten (10) years all other aspects of the performance of his duties under this Monitor Agreement and shall not disclose any confidential or proprietary information relating thereto. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Order, the Monitor shall ensure that such persons have executed a confidentiality agreement in a form agreed upon by the Monitor and Respondent.

For the purpose hereof, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondent, when such source is entitled to make such disclosure to such recipient.

12. Nothing in this Monitor Agreement shall require Respondent to disclose any material or information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law, court order or an agreement with a third party.

13. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Order as it relates to Respondent.

14. Respondent will pay the Monitor the hourly fee, as listed and under the terms and conditions specified in the Fee Schedule in the attached "Exhibit to the Monitor Agreement" for the performance of the Monitor's duties and responsibilities under the Monitor Agreement and the Order.

15. Respondent hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Order. Respondent shall indemnify the Monitor and any subcontractor and their respective agents, partners, principals, officers and employees (the "Indemnified Parties") and hold the Indemnified Parties harmless (regardless of form of action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities or expenses arising out of or in connection with, the performance reasonably required under this Monitor Agreement of the Monitor's duties and obligations including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

16. The Monitor's maximum liability to the Respondent relating to services rendered pursuant to this Monitor Agreement (regardless of the form of the action, whether in contract, statutory law, tort, or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Respondent, except to the extent resulting from the misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor or any of his subcontractors, agents, partners, principals, officers or employees, in which case the liability is not so limited.

17. Respondent agrees that the Respondent's obligations to indemnify the Monitor extend to any agreement that is entered between the Monitor and any Commission-approved Acquirer and relates to the Monitor's responsibilities under the Monitor Agreement and/or the Order.

18. In the event of a disagreement or dispute between Respondent and the Monitor concerning Respondent's obligations under the Order and, in the event that such disagreement or dispute cannot be resolved by the parties, any party may seek the assistance of the responsible individual in the Commission's Compliance Division to resolve the issue. In the case of any disagreement or dispute between Respondent and the Monitor not relating to Respondent's obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration (before a single arbitrator) before the American Arbitration Association under its Commercial Arbitration Rules. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning the Respondent's obligations pursuant to the Order.

19. This Monitor Agreement shall be subject to the substantive law of the State of New Jersey (regardless of any other jurisdiction's choice of law principles).

20. This Monitor Agreement shall terminate no later than the date set forth in the relevant provision of the Order or the date on which the Commission has appointed a substitute monitor pursuant to the Order, provided however, that the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Order. The confidentiality obligations of this Monitor Agreement shall survive its termination.

21. In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor, or persons employed by, or working with, the Monitor, of any duty under this Monitor Agreement, the Monitor shall promptly inform both Respondent and the Commission of such conflict or potential conflict.

22. In the performance of his functions and duties under this Monitor Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs.

23. It is understood that the Monitor will be serving under this Monitor Agreement, in consultation with the Commission or its staff, as an independent third party contractor and not as an employee or agent of the Respondent or the Commission.

24. This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns and the Commission, and nothing herein express or implied

shall give or be construed to give any other person any legal or equitable rights hereunder.

25. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.

26. Any notices or other communications required to be given hereunder shall be deemed to have been properly given, if sent by mail, overnight courier, or fax (with acknowledgment of receipt of such fax having been received), to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party).

If to the Monitor, to:

Francis J. Civille
1 Corda Lane
Warren, New Jersey 07059

Telephone: (732) 428-7012
Facsimile: (732) 428-7240
Mobile: (973) 727-6832
Email: fjciville@aol.com

If to Respondent, to:

Michael-Bryant Hicks
EVP, General Counsel, Corporate Secretary
Elanco Animal Health
2500 Innovation Way, Greenfield, IN 46140

Telephone: (317) 651-9498
Email: hicksmb@elanco.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Attn.: David von Nirschl

Telephone: (202) 326-3213
Email: dnirschl@ftc.gov

27. This Monitor Agreement shall not become binding until it has been approved by

the Commission and the Order has been accepted for public comment.

28. This Monitor Agreement may be signed in counterparts.

[signature page follows; remainder of this page is blank]

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Francis J. Civille

Elanco Animal Health Inc.

By: Michael Bryant Hicks
Name: Michael Bryant Hicks
Title: EVP General Counsel

Decision and Order

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Francis J. Civille

Elanco Animal Health Inc.

By: _____
Name:
Title:

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") with Elanco Animal Health, Inc. ("Elanco"), and Bayer Animal Health, GmbH ("Bayer"). The proposed Consent Agreement is intended to remedy the anticompetitive effects that likely would result from Elanco's proposed acquisition of Bayer (the "Proposed Acquisition").

Pursuant to a Share and Asset Purchase Agreement dated August 20, 2019, Elanco proposes to acquire all of the Bayer Animal Health assets for approximately $7.6 billion. Both parties sell low-dose prescription treatments for canine otitis externa, fast-acting oral treatments that kill adult fleas on canines, and brand name cattle pour-on insecticides. The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the U.S. market for these three product categories.

The proposed Consent Agreement will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Proposed Acquisition. Specifically, under the terms of the proposed Consent Agreement, Elanco is required to divest its canine otitis externa treatment product, Osurnia, to Dechra Pharmaceuticals PLC ("Dechra"), its fast-acting oral treatment that kills adult fleas on canines, Capstar, to PetIQ, Inc. ("PetIQ"), and its brand name cattle pour-on product, StandGuard, to Neogen Corporation ("Neogen").

II. The Relevant Products and Competitive Effects

The Commission's Complaint alleges three relevant product markets within which to analyze the Proposed Acquisition.

The first relevant product market is low-dose prescription treatments for canine otitis externa. Canine otitis externa is an inflammation of the outer ear caused by bacteria and/or yeast. Common symptoms of otitis externa include pain, itching, redness, scaling, and swelling of the ear canal, and may result in serious complications if left untreated. Numerous prescription products treat canine otitis externa, but only the parties' products—Elanco's Osurnia and Bayer's Claro—require only one or two doses to treat the condition. Bayer's prescription otitis externa treatment product, Claro, is a single-dose otic solution, while Elanco's product, Osurnia, is an otic gel given in two doses seven days apart. While other prescription products can be used to treat canine otitis externa, these other products require numerous applications to the ear canal, up to twice daily for 14 consecutive days, and are thus not reasonable substitutes for the parties' products, which are considerably more convenient to use. As such, the Proposed Acquisition would create a monopoly by combining the only two low-dose prescription products that treat canine otitis externa.

A second relevant product market is fast-acting oral treatments that kill adult fleas on canines. While there are numerous products that kill and prevent fleas on dogs, most are slower-acting or preventative, targeting flea larvae. In contrast, Elanco's Capstar and Bayer's Advantus start killing adult fleas quickly (within 30 minutes for Capstar, and within 60 minutes for Advantus), and eliminate all adult fleas within four hours. Medicated shampoos and sprays that can be used to kill adult fleas are much less convenient to administer and are slower-acting. As Elanco's Capstar and Bayer's Advantus are the only fast-acting oral treatments that kill adult fleas on canines, the Proposed Acquisition would also create a monopoly for fast-acting oral treatments that kill adult fleas on canines.

A third relevant product market is brand name cattle pour-on insecticides. Cattle pour-on insecticides are liquid parasiticides administered directly to cattle's skin that kill and deter biting flies, lice, and mites. Many customers trust and rely on brand name cattle pour-on insecticides rather than generic products. As a result, generic cattle pour-on insecticides are not a reasonable substitute for the parties' brand-name cattle pour-on insecticides. The market for brand name cattle pour-on insecticides is highly concentrated. Bayer is the market leader, selling three cattle pour-on insecticide products (Clean-Up II, Cylence, and Permectrin). The only other competitors with meaningful sales in the market are Merck & Co., Inc., which sells four products, and Elanco, which sells StandGuard. Thus, the Proposed Acquisition would allow the third largest competitor, Elanco, to acquire the market leader, Bayer, significantly increasing concentration in brand name cattle pour-on insecticides. Moreover, to avoid insects becoming resistant to the active ingredients in insecticides, cattle producers typically cycle through different pour-on insecticides. Elanco's StandGuard and Bayer's Cylence have similar chemical structures and may compete for and occupy the same slot in cattle producers' pour-on insecticide rotation.

The United States is the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition. Each of these products must be approved by the FDA and/or EPA before being sold in the United States. Thus, products sold outside the United States, but not approved for sale in the United States, are not alternatives for U.S. consumers.

III. Entry

Entry into the U.S. market for low-dose prescription treatments for canine otitis externa, fast-acting oral treatments that kill adult fleas on canines, and brand name cattle pour-on insecticides would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Several major obstacles stand in the way of a prospective entrant. *De novo* entry would require significant investment to, among other things, develop products, obtain regulatory approval, where needed, and establish recognized brand names. Moreover, entry would be unlikely because the required investment would be difficult to justify given the sales opportunities in the affected markets.

IV. The Agreement Containing Consent Order

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the three relevant product markets by requiring the parties to divest the rights and assets related to Elanco's products in each of the markets. The proposed Consent

Agreement requires Elanco to divest Osurnia to Dechra, Capstar to PetIQ, and StandGuard to Neogen. The Order requires Elanco to divest the relevant rights and interests in these products no later than ten days after the consummation of the Proposed Acquisition.

Dechra, headquartered in Northwich, England, is a global animal health company and is publicly traded on the London Stock Exchange. Dechra has significant presence and experience in the United States, operating in the United States for over 15 years and offering more than 80 U.S. products, including both prescription and non-prescription companion animal products. Osurnia will complement Dechra's broad dermatology portfolio, which includes Animax Ointment, an antibacterial, antifungal, and anti-inflammatory skin application that is a daily-dose treatment and is indicated for multiple skin conditions, anal gland infections in dogs, as well as canine otitis externa. Although Animax can treat canine otitis externa, it is not a direct competitor to Osurnia given it is an older generation product requiring daily application to treat the condition.

PetIQ, headquartered in Boise, Idaho, is a rapidly growing pet health and wellness company. It has served as Elanco's exclusive distributor of Capstar to retailers since 2018. Capstar aligns well with the other products for dogs in PetIQ's portfolio. PetIQ's products include complementary flea and tick products for dogs that offer longer lasting treatments to kill eggs and larvae and are sold under the Sergeant's, Advecta, and Sentry brand names. PetIQ sells products through all the companion animal retail channels through which Elanco currently sells Capstar and also sells its current product lines to pet specialty retailers, mass merchandisers/grocers, club stores, and e-commerce sites.

Neogen, headquartered in Lansing, Michigan, is a global animal and food safety company offering a wide portfolio of solutions, including insecticides, diagnostic test kits to detect contamination in animal feed, animal pharmaceuticals, vaccines, and diagnostics for production animals. Neogen currently markets and sells its products through the same distribution channels Elanco uses for StandGuard. In addition, Neogen manufactures and sells liquid insecticides and aerosol products used both on livestock and for in-premise insect control, and it has the capability to manufacture StandGuard in-house.

Each of the divestitures requires Elanco to transfer all supply input and other manufacturing contracts, business information, product approvals (including relevant FDA marketing authorizations), intellectual property, and other related assets to the relevant divestiture buyer. The proposed Consent Agreement also contains provisions to ensure that the divestitures are successful and timely, including provisions that require Elanco to provide the purchasers the opportunity to review product contracts and to designate knowledgeable employees to assist each divestiture buyer in transferring and integrating the relevant divested product into its business.

The Commission will appoint an Interim Monitor to ensure that the parties comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to Dechra, PetIQ, and Neogen. The Commission's goal in evaluating possible purchasers of divested rights and assets is to maintain the competitive environment that existed prior to the Proposed Acquisition.

Analysis to Aid Public Comment

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

ABBVIE INC.,
AND
ALLERGAN PLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4713; File No. 191 0169
Complaint, May 5, 2020 – Decision, September 3, 2020

This consent order addresses the $63 billion acquisition by AbbVie Inc. of certain assets of Allergan plc. The complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for (1) prescription drugs for the treatment of exocrine pancreatic insufficiency ("EPI"); (2) Interleukin-23 ("IL-23") inhibitors for the treatment of moderate-to-severe Crohn's disease; and (3) IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis. The consent order requires Allergan to divest all rights and assets related to its Zenpep and Viokase products to Nestlé S.A. The Order also requires that Allergan return its rights and assets related to brazikumab to AstraZeneca plc.

Participants

For the *Commission*: *Catherine M. Sanchez* and *Kari A. Wallace.*

For the *Respondents*: *Emily Blackburn* and *Debbie Feinstein, Arnold & Porter Kaye Scholer LLP; Michael DeRita, Samantha Morelli,* and *Matthew Reilly, Kirkland & Ellis LLP; Natalie Hayes, Brianne Kucerik,* and *Ann Malester; Weil, Gotshal & Manges LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent AbbVie Inc. ("AbbVie"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the equity interests of Respondent Allergan plc ("Allergan"), a public limited company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent AbbVie Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 1 North Waukegan Road, North Chicago, Illinois 60064.

2. Respondent Allergan plc is a public limited company organized, existing, and doing business under, and by virtue of, the laws of the Republic of Ireland with its principal executive offices located at Clonshaugh Business and Technology Park, Coolock Dublin, D17 E400, Ireland. Allergan's United States address for service of process is, as follows: Chief Legal Officer, Allergan plc, 5 Giralda Farms, Madison, New Jersey 07940.

3. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and engages in business that is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to a Scheme of Arrangement under Irish law, AbbVie proposes to acquire all of the voting securities of Allergan for approximately $63 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. the sale of prescription drugs to treat exocrine pancreatic insufficiency ("EPI");

b. the development and sale of Interleukin-23 ("IL-23") inhibitor drugs for the treatment of moderate-to-severe Crohn's disease; and

c. the development and sale of IL-23 inhibitor drugs for the treatment of moderate-to-severe ulcerative colitis.

6. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant line of commerce.

IV. THE STRUCTURE OF THE MARKETS

7. EPI is a condition that results from a deficiency of pancreatic enzymes. Patients who have EPI cannot properly digest fats, proteins, and carbohydrates in the foods they eat and, as a result, may suffer from malnutrition and have uncomfortable gastrointestinal symptoms when they eat. Only four companies sell prescription drugs to treat EPI in the United States: AbbVie, Allergan, Vivus Inc. and Chiesi USA, Inc. AbbVie is the clear market leader with its product, Creon, and Allergan is the second-largest supplier, with its product, Zenpep. Together, AbbVie and Allergan account for more than 95 percent of the market for drugs to treat EPI.

8. Ulcerative colitis and Crohn's disease are the most common causes of chronic inflammation of the digestive tract. Though they are different diseases—the primary difference between them is the location of the inflammation in the digestive tract—the treatments are

similar. A variety of drugs are approved to treat ulcerative colitis and Crohn's disease, but the effectiveness of most drugs is limited. The IL-23 inhibitors are a new class of drugs to treat both diseases. Johnson & Johnson's Stelara is the only IL-23 inhibitor currently approved to treat moderate-to-severe Crohn's disease and ulcerative colitis in the United States. Stelara is both an IL-23 inhibitor and an Interleukin-12 inhibitor. Only three other companies—AbbVie, Allergan, and Eli Lilly and Company—have IL-23 inhibitors in late-stage development. Johnson & Johnson also has a second IL-23 inhibitor in clinical development for ulcerative colitis and Crohn's disease that is only an IL-23 inhibitor.

V. ENTRY CONDITIONS

9. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not be timely because the combination of drug development times and FDA approval requirements is lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VI. EFFECTS OF THE ACQUISITION

10. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the relevant lines of commerce, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between AbbVie and Allergan and reducing the number of independent significant competitors in the markets for prescription drugs to treat EPI, thereby increasing the likelihood that: (1) AbbVie would be able to unilaterally exercise market power in these markets; (2) the remaining competitors would engage in coordinated interaction between or among each other; and (3) customers would be forced to pay higher prices; and

b. by eliminating future competition between AbbVie and Allergan in the development and sale of (1) IL-23 inhibitors to treat Crohn's disease and (2) IL-23 inhibitors to treat ulcerative colitis.

VII. VIOLATIONS CHARGED

11. The Acquisition described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

12. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of May, 2020 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent AbbVie Inc. of all of the voting securities of Respondent Allergan plc. The Commission's Bureau of Competition prepared and furnished to each Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

The Commission considered the matter and determined to accept the executed Consent Agreement and to place it on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent AbbVie Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 1 North Waukegan Road, North Chicago, Illinois 60064.

2. Respondent Allergan plc is a public limited company, existing, and doing business under, and by virtue of, the laws of the Republic of Ireland with its principal executive offices located at Clonshaugh Business and Technology Park, Coolock Dublin, D17 E400, Ireland. Allergan's United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain

Assets is as follows: Chief Legal Officer, Allergan plc, 5 Giralda Farms, Madison, New Jersey 07940.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "AbbVie" means AbbVie Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by AbbVie Inc. (including, Venice Subsidiary LLC), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Allergan" means Allergan plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Allergan plc, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means AbbVie and Allergan.

D. "Monitor" means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph IX of the Decision and Order.

E. "Orders" means the Decision and Order and this Order to Maintain Assets.

II. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of each of the Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than in the manner prescribed in the Decision and

Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of each of the Divestiture Product Businesses.

B. Respondents shall maintain the operations of each of the Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business and as consistent with standard operating procedures to ensure professionalism, safety, and quality of any product or service offered by the business, to maintain all related information technology infrastructure and data contained therein, to maintain compliance with all applicable laws, and to maintain any licenses or approvals with any government entity) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: clients; patients; suppliers; licensors; licensees; advertisers; vendors and distributors; Customers; physicians and other health care providers; insurers; government entities; employees; and others having business relations with each of the Divestiture Product Businesses, respectively. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each Divestiture Product Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for that Divestiture Product Business;

2. continuing, at least at their scheduled pace, any expenditures for each of the Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by the Respondents;

3. providing such resources as may be necessary to respond to competition prior to the complete transfer and delivery of each of the Divestiture Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Product Businesses;

5. making available for use by each of the Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Divestiture Assets; and

6. providing such support services to each of the Divestiture Product Businesses as were being provided to such Divestiture Product Businesses by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Respondents shall maintain a work force that is (i) materially equivalent in size (as measured in full time equivalents) and (ii) comparable in training, professionalism, and expertise to what has been associated with each Divestiture Product Business for the respective Divestiture Product Business's last fiscal year.

III. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall not use, directly or indirectly, any Confidential Business Information related to the Divestiture Product Businesses other than as necessary to comply with the following:

1. the requirements of the Orders;

2. Respondents' obligations to the Acquirer of such Divestiture Product Business(es) under the terms of the related Divestiture Agreements; or

3. applicable law.

B. Except to the extent necessary to comply with applicable law, Respondents shall not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer of the relevant Divestiture Product Business, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services, Transition Packaging, or who are engaged in the transfer and delivery of the Product Manufacturing Technology to that Acquirer), (iii) the Commission, or (iv) the Monitor.

C. Respondents shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees specifically authorized as described above.

D. Respondents shall institute procedures and requirements to ensure that those employees of the Respondents that are authorized to have access to such Confidential Business Information:

1. do not provide, disclose, or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and

2. do not solicit, access, or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. Respondents shall take all actions necessary and appropriate to prevent access to, and the disclosure or use of, such Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

1. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

2. to the extent practicable, maintaining such Confidential Business Information separate from other data or information of the Respondents; and

3. ensuring by other reasonable and appropriate means that such Confidential Business Information is not shared with Respondents' personnel engaged in the business related to the same or substantially the same type of business as the Divestiture Product Businesses (*e.g.,* commercialization of Products Developed, in Development, marketed or sold for the same or similar indications as the Divestiture Products).

IV. Monitor

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Divestiture Agreements pursuant to the agreement between Monitor and Respondents in Appendix A and Non-Public Appendix B to the Decision and Order.

B. Not later than 1 day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. Respondents shall provide access to all information and facilities, and make such arrangements with third parties, as are necessary to allow the

Monitor to monitor compliance with the obligations to Transition Package and to transfer and deliver the Product Manufacturing Technology;

3. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

4. The Monitor shall serve until Respondents complete the Transition Packaging, transition services, and the transfer of the Clinical Trials, as applicable, for each Acquirer *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within 30 days after the date this Order to Maintain Assets is issued and every 90 days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor

shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. Among other things, the Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval (i) for indications on a Divestiture Product related to any Clinical Trials that were planned or ongoing on or before the Divestiture Date, and (ii) to manufacture in commercial quantities, in a manner consistent with cGMP, independently of Respondents, each Divestiture Product that was manufactured by a Respondent on or before the Divestiture Date.

I. Each Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent AbbVie, which consent shall not be unreasonably withheld. If Respondent AbbVie has not opposed, in writing, including the reasons for opposing, the selection of a substitute Monitor within 10 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, Respondents shall be deemed to have consented to the selection of the substitute Monitor; and

2. not later than 10 days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as the Monitor pursuant to the Decision and Order.

N. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

V. Compliance Reports

IT IS FURTHER ORDERED that:

A. Within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 90 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders ("Compliance Reports").

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to:

   a. the transfer and delivery to the relevant Acquirer of all of the following: (i) the Divestiture Assets; (ii) the Product Manufacturing Technology related to the Divestiture Products; (iii) the Clinical Trial(s) related to the Divestiture Products; (iv) the Confidential Business Information related to the Divestiture Product Business; and

   b. the provision of Transition Packaging and/or transition services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized

D. to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the

Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

E. After the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the Compliance Reports required to be submitted by Respondents pursuant to the Decision and Order.

VI. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. any proposed dissolution of AbbVie Inc. or Allergan plc;

B. any proposed acquisition, merger, or consolidation of AbbVie Inc. or Allergan plc; or

C. any other change in a Respondent including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five-days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of each of the Divestiture Product Businesses through its full transfer and delivery to an Acquirer; to minimize any risk of

loss of competitive potential for each of the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

IX. Term

IT IS FURTHER ORDERED that, unless the Commission directs otherwise, this Order to Maintain Assets shall terminate on the earlier of:

A. 3 days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after all of the Divestiture Assets, the Product Manufacturing Technology, and the Clinical Trials related to each of the Divestiture Products, have been transferred to and are in the physical possession of the relevant Acquirer, as required by and described in the Decision and Order.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent AbbVie Inc. of all of the voting securities of Respondent Allergan plc. The Commission's Bureau of Competition prepared and furnished to each Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public

record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent AbbVie Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 1 North Waukegan Road, North Chicago, Illinois 60064.

2. Respondent Allergan plc is a public limited company organized, existing, and doing business under, and by virtue of, the laws of the Republic of Ireland with its principal executive offices located at Clonshaugh Business and Technology Park, Coolock Dublin, D17 E400, Ireland. Allergan's United States address for service of process is as follows: Chief Legal Officer, Allergan plc, 5 Giralda Farms, Madison, New Jersey 07940.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions apply**:**

A. "AbbVie" means AbbVie, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by AbbVie, Inc. (including Venice Subsidiary, LLC), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Allergan" means Allergan plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Allergan plc, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer(s)" means:

1. a Person specified by name in this Order to acquire particular Divestiture Assets pursuant to this Decision and Order; or

2. any other Person that the Commission approves to acquire particular Divestiture Assets pursuant to this Decision and Order.

E. "Acquisition Date" means the date on which AbbVie acquires 50 percent or more of the voting securities of Allergan.

F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes the FDA.

G. "AstraZeneca" means AstraZeneca PLC, a public limited company, organized, existing, and doing business under and by virtue of the laws the United Kingdom with its executive offices and principal place of business located at 1 Francis Crick Avenue, Cambridge Biomedical Campus, Cambridge CB2 0AA, United Kingdom, and any Person controlled by or under common control of AstraZeneca PLC.

H. "Brazikumab Divestiture Agreement" means the Termination Agreement by and among AstraZeneca Collaboration Ventures, LLC, Allergan Pharmaceuticals International Limited, Allergan Therapeutics LLC, and Allergan Finance, LLC, dated as of January 25, 2020; and all amendments, exhibits, attachments, agreements, attached to this Order and contained in Non-Public Appendix I.

I. "Brazikumab Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Brazikumab Products, including all of the Transferred Assets related to the Brazikumab Products.

J. "Brazikumab Products" mean:

1. brazikumab (an investigational product), with International Nonproprietary Name ID #10425, and a development code MEDI2070; and

2. any other Product manufactured by or for Respondent Allergan, or in Development, marketed, or sold by Respondent Allergan prior to the Divestiture Date that is a human monoclonal antibody that targets Interleukin-23.

K. "Business" means (i) the research, Development, or manufacture of a Product wherever located throughout the world, and (ii) the commercialization, distribution, marketing, advertisement, and sale of a Product within the United States, including, the importation of a Product into the United States.

L. "Business Information" means all originals and all copies of any operating, financial, or other information, books, records, documents, data computer files (including files stored on a computer hard drive or other storage media), electronic files, ledgers, papers, instruments, and other materials, wherever located and however stored (*i.e.*, whether stored or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media).

M. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

N. "Clinical Plan" means a written clinical plan setting forth the protocol for the conduct of a Clinical Trial, preparation and filing of each Clinical Regulatory Package related to such Clinical Trial, and the activities to be conducted by each Person that is a party to conducting such Clinical Trial in support of such Clinical Trial, including the timelines for such Clinical Trial.

O. "Clinical Regulatory Package" means, with respect to each Divestiture Product, all INDs and other regulatory applications submitted to any Agency, Product Approvals, pre-clinical and clinical data and information, regulatory materials, drug dossiers, master files (including Drug Master Files, as defined in 21 C.F.R. 314.420 (or any non-United States equivalent thereof)), and any other reports, records, regulatory correspondence, and other materials relating to Product Approvals of such Divestiture Product or required to Develop, manufacture, distribute, or otherwise commercialize such Divestiture Product, including information that relates to pharmacology, toxicology, chemistry, manufacturing and controls data, batch records, safety and efficacy, and any safety database, in each case that is necessary or reasonably useful to the Clinical Trial(s).

P. "Clinical Trial" means a controlled study in humans of the safety, efficacy, or bioequivalence of a Product, and includes such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.

Q. "Clinical Trial Research Organization Designee" means any Person other than the Respondents that has been designated by an Acquirer to conduct a Clinical Trial related to a Divestiture Product for an Acquirer.

R. "Confidential Business Information" means all Business Information relating to the Divestiture Product Business that is not in the public domain.

S. "Customer" means any Person that is a direct purchaser of any Divestiture Product from a Respondent or the Acquirer.

T. "Development" means all preclinical and clinical drug development activities, including test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals); Product Approval and registration; and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

U. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees shall not exceed then-current average hourly wage rate for such employee.

V. "Divestiture Agreements" mean:

1. the Brazikumab Divestiture Agreement;

2. the Pancrelipase Divestiture Agreement; and

3. any other agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

W. "Divestiture Assets" mean:

1. the Brazikumab Divestiture Assets; and

2. the Pancrelipase Divestiture Assets.

X. "Divestiture Date" means, for each of the respective Divestiture Assets, the date on which a Respondent (or a Divestiture Trustee) close on the sale of those Divestiture Assets to an Acquirer.

Y. "Divestiture Products" mean:

1. the Brazikumab Products;

2. the Viokace Products; and

3. the Zenpep Products.

Z. "Divestiture Product Business" means the Business related to a Divestiture Product.

AA. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph X of this Order.

BB. "Domain Name" means the domain name(s) and the related uniform resource locators(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

CC. "Drug Master File" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

DD. "Excluded Assets" mean:

1. any real estate and the buildings and other permanent structures located on such real estate;

2. corporate names or corporate trade dress of a Respondent or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which a Respondent can be identified or defined;

3. the portion of any Business Information that contains information about any of a Respondent's business other than a Divestiture Product Business, in those cases in which the redaction does not impair the usefulness of the information related to the Divestiture Product Business;

4. any original document for which a Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that the Respondents shall provide copies of the document to the Acquirer and shall provide the Acquirer access to the original document if copies are insufficient for regulatory or evidentiary purposes;

5. (i) any tax asset relating to (a) the Divestiture Assets for pre-Divestiture Date tax periods or (b) any tax liability that any Respondent is responsible for arising out of the divestiture of the Divestiture Assets, (ii) all accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of any Respondent that are related to the Divestiture Product Business and arising out of the operation of the Divestiture Product Business prior to the Divestiture Date, and (iii) all cash, cash equivalents, credit cards and bank accounts of any Respondent; and

6. any records or documents reflecting attorney-client, work product or similar privilege of any Respondent or otherwise relating to the Divestiture Assets as a result of legal counsel representing any Respondent in connection with the divestiture of the Divestiture Assets pursuant to this Order or the Divestiture Agreements.

EE. "FDA Authorization(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes any Biologic License Application ("BLA") filed or to be filed with the FDA pursuant to 21 C.F.R. 601.2, et seq., and Section 351 of the Public Health Service Act, and any NDA deemed to be a Biologic License Application by the FDA, and all supplements, amendments, revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between the Respondents and the FDA or other Agency relative thereto.

FF. "Good Clinical Practice" means the current standards and practices promulgated or endorsed by (i) International Conference on Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use; (ii) the FDA; and (iii) any applicable laws for the country(ies) within which a Clinical Trial is being conducted.

GG. "Manufacturing Designee" means any Person other than a Respondent that has been designated by an Acquirer to perform any part of the manufacturing process, including the finish and/or packaging, of a Divestiture Product on behalf of an Acquirer.

HH. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Order or Paragraph IV of the related Order to Maintain Assets.

II. "Nestlé" means Nestlé S.A., a Société Anonyme, organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation with its executive offices and principal place of business located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland, and any Person controlled by or under common control of Nestlé S.A.

JJ. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

KK. "Orders" means this Decision and Order and the related Order to Maintain Assets.

LL. "Pancrelipase Divestiture Agreement" means the Asset Purchase Agreement between Allergan Therapeutics LLC, Allergan Sales, LLC, Aptalis Pharma Canada ULS, as the Sellers, and Société des Produits Nestlé S.A., as Purchaser, dated as of January 25, 2020, and all amendments, exhibits, attachments, agreements, attached to this Order and contained in Non-Public Appendix II.

MM. "Pancrelipase Divestiture Assets" mean:

1. the Zenpep Divestiture Assets; and

2. the Viokace Divestiture Assets.

NN. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

OO. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups, or affiliates thereof.

PP. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an FDA Authorization.

QQ. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other regulatory approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product within the United States, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any FDA Authorization related to that Product.

RR. "Product Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the Divestiture Product Business, including those:

1. pursuant to which any third party purchases, or has the option to purchase, a Divestiture Product from a Respondent;

2. pursuant to which a Respondent had, or has as of the Divestiture Date, the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), from any third party for use in connection with the manufacture of a Divestiture Product;

3. relating to any Clinical Trial involving a Divestiture Product;

4. with universities or other research institutions for the use of a Divestiture Product in scientific research;

5. for the marketing of a Divestiture Product;

6. for educational matters relating solely to the Divestiture Products;

7. pursuant to which a third party manufactures or plans to manufacture a Divestiture Product as a finished dosage form on behalf of a Respondent;

8. pursuant to which a third party provides or plans to provide any part of the manufacturing process, including, without limitation, the finish and/or packaging of a Divestiture Product on behalf of a Respondent;

9. pursuant to which a third party licenses any of the Product Manufacturing Technology related to a Divestiture Product to a Respondent;

10. pursuant to which a third party is licensed by a Respondent to use any of the Product Manufacturing Technology related to a Divestiture Product;

11. constituting confidentiality agreements involving a Divestiture Product;

12. involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Divestiture Product;

13. pursuant to which a third party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Divestiture Product to a Respondent including, consultation arrangements; and

14. pursuant to which any third party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Divestiture Product or the Divestiture Product Business.

SS. "Product Core Employees" mean the Product Marketing Employees, Product Manufacturing Employees, Product Research and Development Employees and Product Sales Employees.

TT. "Product Development Reports" mean Business Information, as related to the Development of a Product, including:

1. pharmacokinetic study reports;

2. bioavailability study reports (including Reference Listed Drug information);

3. bioequivalence study reports (including Reference Listed Drug information);

4. all correspondence, submissions, notifications, communications, registrations, or other filings made to, received from, or otherwise conducted with the FDA relating to the FDA Authorization(s);

5. annual and periodic reports related to the above-described FDA Authorization(s), including any safety update reports;

6. FDA approved labeling;

7. currently used or planned product package inserts (including historical change of controls summaries);

8. FDA approved patient circulars and information;

9. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy;

10. summaries of complaints from physicians or clinicians;

11. summaries of complaints from Customers;

12. Product recall reports filed with the FDA, and all reports, studies, and other documents related to such recalls;

13. investigation reports and other documents related to any out of specification results for any impurities or defects found in any Product;

14. reports from any Person (e.g., any consultant or outside contractor) engaged to investigate or perform testing for the purposes of resolving any Product or process issues, including, without limitation, identification and sources of impurities or defects;

15. reports from vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce any Product that relate to the specifications, degradation,

chemical interactions, testing, and historical trends of the production of any Product;

16. analytical methods development records;

17. manufacturing batch or lot records;

18. stability testing records;

19. change in control history; and

20. executed validation and qualification protocols and reports.

UU. "Product Employee Information" means the following, for each Product Core Employee, as and to the extent permitted by law:

1. with respect to each such employee, the following information:

   a. direct contact information for the employee, including telephone number;

   b. the date of hire and effective service date;

   c. job title or position held;

   d. a specific description of the employee's responsibilities related to the Divestiture Product Business; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

   e. base salary or current wages;

   f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

   g. employment status (*i.e.,* active or on leave or disability; full-time or part-time);

   h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

2. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Product Core Employees.

VV. "Product Intellectual Property" means intellectual property of any kind, that is owned, licensed, held, or controlled by a Respondent related to the specified Divestiture Product as of the Divestiture Date, including:

1. Patents;

2. Product Manufacturing Technology;

3. copyrights;

4. trademarks;

5. trade dress;

6. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and

7. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a third party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing.

WW. "Product Manufacturing Employees" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: (i) Developing and validating the commercial manufacturing process, (ii) formulating the manufacturing process performance qualification protocol, (iii) controlling the manufacturing process to assure performance Product quality, (iv) assuring that during routine manufacturing the process remains in a state of control, (v) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vi) managing the operation of the manufacturing process, (vii) managing the technological transfer of any part of the manufacturing process to a different facility or (viii) providing any assistance to a third party that provides any part of the manufacturing process to a Respondent, within the 3 year period immediately prior to the Divestiture Date.

XX. "Product Manufacturing Equipment" means equipment that is being used, or has been used at any time since Respondents entered into the Acquisition Agreement to manufacture the specified Divestiture Products.

YY. "Product Manufacturing Technology" means all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of the Product, including the following: all

product specifications, processes, analytical methods, product designs, plans, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA, FDA Authorization(s) conformance and cGMP compliance, labeling, packaging, and all other information related to the manufacturing process, and supplier lists.

ZZ. "Product Marketing Employee(s)" means all management-level employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product in the United States: sales management, brand management, sales training, market research, patient support programs, health insurer marketing and contracting, pharmacy benefit management marketing and contracting, managed care marketing and contracting, hospital marketing and contracting, or specialty pharmacy marketing and contracting, *excluding* administrative assistants within the eighteen-month period immediately prior to the Divestiture Date.

AAA. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of any Divestiture Product in the United States as of the Divestiture Date that are owned or controlled by a Respondent, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, website content, artwork for the production of packaging components, television masters, and other similar materials related to the Divestiture Products

BBB. "Product Releasee(s)" means any of the following Persons:

1. the Acquirer;

2. any Person controlled by or under common control with an Acquirer;

3. any Manufacturing Designee(s);

4. any Clinical Trial Research Organization Designee(s); and

5. any licensees, sublicensees, manufacturers, suppliers, distributors, and Customers of the Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to the Divestiture Products acquired by that Acquirer.

CCC. "Product Research and Development Employees" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to a specified Divestiture Product: research, Development, regulatory approval process, or Clinical Trials of the Divestiture Products, within the eighteen-month period immediately prior to the Divestiture Date.

DDD. "Product Sales Employee(s)" means all employees of a Respondent who have participated (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Products in the United States: the detailing, marketing, or promotion of the Products directly to physicians, pharmacists, professional distributors, managed care or other insurance providers, hospitals, employers, or governmental entities within the eighteen-month period immediately prior to the Divestiture Date.

EEE. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and Clinical Trial materials and information related to a Product.

FFF. "Proposed Acquirer" means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission as the acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order.

GGG. "Retained Product(s)" means any Product(s) other than a Divestiture Product that is manufactured, in Development, marketed, sold, owned, controlled, or licensed by a Respondent anywhere in the world on or before the Acquisition Date and that has not been discontinued or permanently withdrawn from the market.

HHH. "Shared Intellectual Property" means all Product Intellectual Property of any kind (other than trademarks, Domain Names, and FDA Authorizations related to a Divestiture Product) (i) that is used in connection with a Divestiture Product Business as of the Divestiture Date, and (ii) that has been used, and continues to be used in connection with any Retained Product.

III. "Supply Cost" means the actual cost of materials, ingredients, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation where those costs are incurred by the Respondents.

JJJ. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to that Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

1. designating employees or other Persons working on behalf of a Respondent knowledgeable about the Product Manufacturing Technology who will be responsible for communicating directly with that Acquirer and/or its Manufacturing Designee, and the Monitor, for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Product that are acceptable to that Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology related to that Acquirer;

4. for any part of the manufacturing process (including packaging) that is performed by a Respondent, permitting employees of the Acquirer and/or its Manufacturing Designee to visit the Respondent's facility where that process occurs for the purposes of evaluating and learning that process or discussing the process with employees of Respondents involved in that process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, methods to ensure batch or lot consistency); and

5. providing, in a timely manner, assistance and advice to enable the Acquirer to:

    a. manufacture the Product in the quality and quantities achieved by a Respondent, or the manufacturer and/or developer of the Product;

    b. obtain any Product Approvals necessary for the Acquirer to manufacture, distribute, market, and sell the Product in commercial quantities and to meet all Agency-approved specifications for the Product; and

    c. receive, integrate, and use all Product Manufacturing Technology used in, and all Product Intellectual Property that is related to, the manufacture of the Product.

KKK. "Transferred Assets" means all right, title, and interest in and to the assets, properties, and rights, wherever located in the world, relating to the Business of the specified Divestiture Product, as such assets, properties, and rights shall exist at the date the Respondents sign the Consent Agreement, including the following:

1. all FDA Authorizations;

2. all Clinical Trials;

3. all Product Intellectual Property;

4. all Product Approvals;

5. at the Acquirer's option, all Product Manufacturing Equipment;

6. all Product Marketing Materials;

7. all Product Scientific and Regulatory Material;

8. all website(s) and Domain Names related exclusively to the Divestiture Product and the content thereon related exclusively to the Divestiture Product, and the content related exclusively to the Divestiture Product that is displayed on any website that is not dedicated exclusively to the Divestiture Product;

9. at the option of the Acquirer, all Product Contracts;

10. all Business Information, which includes the Product Development Reports;

11. a list of any finished Divestiture Product batch or lot determined to be out-of-specification during the three-year period immediately preceding the Divestiture Date, and, for each such batch or lot: (i) a detailed description of the known deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (ii) the corrective actions taken to remediate the cGMP deficiencies in the Divestiture Product; and (iii) to the extent known by any Respondent, the employees (whether current or former) responsible for taking such corrective actions;

12. for each Divestiture Product:

    a. to the extent known or available to the Respondents, a list of the inventory levels (weeks of supply) in the possession of each Customer as of the date prior to and closest to the Divestiture Date as is available; and

b. to the extent known by the Respondents, any pending reorder dates for a Customer as of the Divestiture Date;

13. at the option of the Acquirer, all inventory and all ingredients, materials, or components used in the manufacture of the Divestiture Products in existence as of the Divestiture Date including, the active pharmaceutical ingredient(s), excipient(s), raw materials, packaging materials, work-in-process, and finished goods related to the Divestiture Products;

14. the quantity and delivery terms in all unfilled Customer purchase orders for the Divestiture Products as of the Divestiture Date, to be provided to the Acquirer of the Divestiture Products not later than 5 days after the Divestiture Date; and

15. at the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for the Divestiture Products as of the Divestiture Date;

provided, however, that "Transferred Assets" does not include the Excluded Assets.

LLL. "Transition Package" and "Transition Packaging" mean to provide, or to cause to be provided, any part of the packaging of a finished dosage form of a Divestiture Product that is being packaged by Respondents at the time of the Consent Agreement on behalf of an Acquirer (including for the purposes of Clinical Trials and/or commercial sales).

MMM. "United States" means the United States of America, and its territories, districts, commonwealths and possessions.

NNN. "Viokace Divestiture Assets" mean all rights, title and interest in the Divestiture Product Business related to the Viokace Products, including all of the Transferred Assets related to the Viokace Products, including the Viokace trademarks.

OOO. "Viokace Products" mean the Products manufactured, in Development, marketed, or sold pursuant to the following FDA Authorization: NDA No. 022542 (now deemed by the FDA a BLA), and any supplements, amendments, or revisions to this NDA or BLA.

PPP. "Zenpep Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Zenpep Products, including all of the Transferred Assets related to the Zenpep Products, including the Zenpep trademarks.

QQQ. "Zenpep Products" mean:

1. the Products manufactured, in Development, marketed, or sold pursuant to the following FDA Authorization: NDA No. 022210 (now deemed by the

FDA a BLA), and any supplements, amendments, or revisions to this NDA or BLA; and

2. any Product, other than the Viokace Products, manufactured by or for Respondent Allergan, or in Development by Respondent Allergan for commercialization, distribution, marketing, advertisement or sale within the United States, and any other Product marketed or sold by Respondent Allergan within the United States prior to the Divestiture Date that contains lipase as an active pharmaceutical ingredient.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Brazikumab Divestiture Assets, absolutely and in good faith, to AstraZeneca pursuant to, and in accordance with the Brazikumab Divestiture Agreement;

provided, however, the Respondents may need to divest Excluded Assets if the Commission, in its sole discretion and within 12 months of the date this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Brazikumab Divestiture Assets or the relevant Divestiture Product Business in a manner that achieves the purposes of this Order.

B. No later than 10 days after the Acquisition Date, Respondents shall divest the Pancrelipase Divestiture Assets, absolutely and in good faith, to Nestlé pursuant to, and in accordance with the Pancrelipase Divestiture Agreement;

provided, however, the Respondents may need to divest Excluded Assets if the Commission, in its sole discretion and within 12 months of the date this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Pancrelipase Divestiture Assets or the relevant Divestiture Product Business in a manner that achieves the purposes of this Order.

C. Respondents may receive a non-exclusive license from each Acquirer to use the Shared Intellectual Property in the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement, and sale of any Retained Product that is either (i) not indicated for the same treatment of disease as the Divestiture Products being acquired by that Acquirer, or (ii) not for commercialization, distribution, marketing, advertisement, or sale within the United States.

D. If Respondents have divested any of the Divestiture Assets to an Acquirer prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. the named Acquirer is not an acceptable purchaser of any of the Divestiture Assets, then Respondents shall immediately rescind the transaction with that Acquirer as directed by the Commission, and shall divest the Divestiture Assets within 180 after the Order Date, absolutely and in good faith, at no minimum price, to a different Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission; or

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Assets to Acquirer named in this Order (including, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

E. Prior to the Divestiture Date, Respondents shall provide the relevant Acquirer with the opportunity to review all Product Contracts related to the Divestiture Products being acquired by that Acquirer for the purposes of that Acquirer's determination of whether to assume such Product Contracts;

provided, however, that in cases in which any Product Contract also relates to a Retained Product, a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product.

F. Prior to the Divestiture Date, Respondents:

1. shall secure all approvals, consents, ratifications, waivers, or other authorizations from all non-governmental third parties that are necessary to permit Respondents to divest the Divestiture Assets to an Acquirer, and to permit each Acquirer to continue the Divestiture Product Business in the United States without interruption or impairment; and

2. as related to licensed Product Manufacturing Technology, shall not enforce any agreement against a third party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology related to such Divestiture Products. Such agreements include agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than 10 days after the Divestiture

Date, Respondents shall grant a release to each third party that is subject to such agreements that allows the third party to provide the Product Manufacturing Technology related to the Acquirer. Within 5 days of the execution of each such release, Respondents shall provide a copy of the release to the relevant Acquirer;

provided, however, Respondents may satisfy this requirement by certifying that the relevant Acquirer has executed all such agreements directly with each of the relevant third parties.

G. Respondents shall deliver to the Acquirer the Product Manufacturing Technology – either divested or licensed by a third party – related to the Divestiture Products being acquired by or licensed to that Acquirer in a manner consistent with the Technology Transfer Standards.

H. Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale related to the Divestiture Products to assist each Acquirer to transfer and integrate the Divestiture Product Business(es) acquired by that Acquirer.

I. Respondents shall not:

1. use any of the trademarks divested pursuant to this Order or any mark confusingly similar to those trademarks as a trademark, tradename, or service mark, *except* as may be agreed upon with the relevant Acquirer for the purposes of selling inventory, finished goods, packaging or similar materials bearing the relevant trademarks for the benefit of the relevant Acquirer during a transition period;

2. attempt to register the divested trademarks;

3. attempt to register any mark confusingly similar to the divested trademarks;

4. challenge or interfere with an Acquirer's use and registration of the divested trademarks; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for, and trademark rights in, the divested trademarks against third parties.

J. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Product Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to research, Develop, or manufacture the Divestiture Product(s) acquired

by that Acquirer anywhere in the world, or to distribute, market, sell, or offer for sale within the United States any such Divestiture Product.

K. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost or at such cost as provided in a Divestiture Agreement, assistance of knowledgeable employees of Respondents (*i.e.*, employees of Respondents that were involved in the Development of the Divestiture Products) to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a third party related to the Product Intellectual Property related to the Divestiture Products acquired by that Acquirer.

L. For any patent infringement suit that is filed or to be filed within the United States that is (i) filed by, or brought against, a Respondent prior to the Divestiture Date related to any Divestiture Products or (ii) any potential patent infringement suit that a Respondent has prepared, or is preparing, to bring or defend against as of the Divestiture Date that is related to any Divestiture Products, Respondents shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent the Acquirer in any such patent infringement suit; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of the Respondents' outside counsel related to such patent infringement suit.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of either of the Divestiture Agreements shall constitute a violation of this Order; *provided, however,* that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Packaging and Services by Respondents

IT IS FURTHER ORDERED that:

A. At the request of an Acquirer, in a timely manner, at no greater than Direct Cost or at such cost as provided in a Divestiture Agreement, Respondents shall provide transition services sufficient to enable the Acquirer to operate each Divestiture Product Business acquired by that Acquirer in substantially the same manner that Respondents have operated that Business prior to the Acquisition Date.

B. Upon reasonable written notice and request from an Acquirer of a Divestiture Product to Respondents, Respondents shall Transition Package and deliver, or cause to be packaged and delivered, to a facility(ies) designated by that Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Divestiture Products at no greater than Supply Cost or at such cost as provided in a Divestiture Agreement, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all of the relevant Product Approvals necessary to package in commercial quantities, and in a manner consistent with cGMP, the finished dosage form drug product independently of Respondents, and to secure sources of supply of the necessary packaging components from Persons other than the Respondents.

C. Respondents shall make representations and warranties to the relevant Acquirer that any Transition Packaging provided by Respondents for the packaged finished dosage form of any Divestiture Product meet the relevant Agency-approved specifications.

D. For the Divestiture Products to be marketed or sold in the United States, Respondents shall agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the packaging the of the Divestiture Product(s) supplied to the Acquirer pursuant to Divestiture Agreements by Respondents to meet cGMP, but the Respondents may make this obligation contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the supplying Respondent's responsibilities to supply the Divestiture Products in the manner required by this Order;

provided further, however, that this obligation shall not require such Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the supplying Respondent to the Acquirer in an agreement to Transition Package.

E. Respondents shall give at least the same level of priority to packaging and supplying a Divestiture Product to the relevant Acquirer as Respondents give to the packaging and supplying of Products for Respondents' own use or sale.

F. Respondents shall agree to hold harmless and indemnify that Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of the Respondents to package and supply the Divestiture Product(s) in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (ii) Respondents are able to cure the supply failure not later than 30 days after the receipt of notice from that Acquirer of a supply failure;

provided however, the Divestiture Agreements attached to this Order may contain limits on Respondents' aggregate liability for any penalty incurred by an Acquirer from a Customer directly related to the Acquirer's inability to supply a Divestiture Product to that Customer that was the result of Respondent's failure to supply the Divestiture Product to the Acquirer.

G. During the term of any agreement to Transition Package, upon written request of the relevant Acquirer or the Monitor, Respondents shall make available to that Acquirer and the Monitor all records that relate directly to the packaging of the relevant Divestiture Products that are generated or created after the Divestiture Date.

H. For each Divestiture Product for which a Respondent purchases the packaging component(s) from a third party, Respondents shall provide the Acquirer with the actual price paid by that Respondent for the packaging components used to manufacture that Divestiture Product.

I. During the term of any agreement to Transition Package, Respondents shall take all actions as are reasonably necessary to ensure that the packaging of the Divestiture Product(s) is uninterrupted.

J. Respondents shall not be entitled to terminate any agreement to Transition Package due to (i) a breach by an Acquirer of the relevant Divestiture Agreement, or (ii) an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law.

provided, however, that this Paragraph shall not prohibit Respondents from seeking compensatory damages from the Acquirer for the Acquirer's breach of its payment obligations to the Respondents under the agreement.

K. Respondents shall permit the Acquirer to terminate any agreement to Transition Package at any time upon commercially reasonable notice and without cost or penalty (other than costs or penalties due by Respondents to third parties pursuant to the termination of such agreement, which shall be the responsibility of the Acquirer).

L. During the term of any agreement to Transition Package, Respondents shall provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all Product Approvals to package the Divestiture Products in final dosage form in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the packaging of the Divestiture Products.

V. Employees

IT IS FURTHER ORDERED that:

A. Respondents shall for a period of 2 years after the Divestiture Date, or until Respondents have completed their obligations to Transition Package pursuant to Paragraph IV. of the Order, whichever occurs later:

1. cooperate with and assist any Proposed Acquirer or Acquirer of the Divestiture Assets to evaluate independently and offer employment to the Product Core Employees relating to each of the Divestitures;

2. provide the Proposed Acquirer or Acquirer with a complete and accurate list containing the name of each Product Core Employee (including former employees who were employed by a Respondent in the 90 days preceding the execution date of the related Divestiture Agreement);

3. not later than 10 days after written request by a Proposed Acquirer or Acquirer, provide the Product Employee Information related to the Product Core Employees;

4. Provide a reasonable opportunity for the Proposed Acquirer or Acquirer:

   a. to interview any Product Core Employee;

   b. to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Product Core Employees; and

c. to make offers of employment to any of the Product Core Employees.

provided, however, that the provision of such information may be conditioned upon the Proposed Acquirer's or Acquirer's written confirmation that it will (i) treat the information as confidential; (ii) use the information solely in connection with considering whether to provide, or providing, to Product Core Employees the opportunity to enter into employment contracts; and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

5. not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Product Core Employees, and remove any impediments within the control of a Respondent that may deter or prevent these employees from accepting employment with the Acquirer or its Manufacturing Designee, including any noncompete or nondisclosure provisions of employment;

6. not make any counteroffer to any Product Core Employee who has received a written offer of employment from the Acquirer or its Manufacturing Designee;

provided, however, that this Paragraph shall not prohibit a Respondent from continuing to employ any Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee.

B. Until the Divestiture Date, provide all Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product Businesses and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Divestiture Date(s) for the divestiture of the Divestiture Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law).

C. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and the Monitor, determines in its sole discretion that the Acquirer should have the ability to interview, make offers of employment to, or hire any of Respondents' employees who were not included as Product Core Employees, but who either (i) were involved with any of the Divestiture Products at Allergan, or (ii) provided Transition Packaging or transition services to an

Acquirer, then the Commission may notify Respondents that such employees are to be designated as Product Core Employees, and the provisions of this Paragraph V shall apply to such employees as of that notification date.

D. From the Divestiture Date until the date that is 1 year after the Divestiture Date, Respondents shall not, directly or indirectly, solicit any employee of an Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to leave the service or employment of the Acquirer or its Manufacturing Designee;

provided, *however*, that such prohibitions do not apply to: (i) general solicitations for employment through advertisements or similarly directed efforts; (ii) general solicitations by third parties (such as recruiters); (iii) any such employee that has been terminated by the Acquirer or its Manufacturing Designee; or (iv) any Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

VI. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall, for the Confidential Business Information that is related to the Divestiture Product Business(es) acquired by a particular Acquirer:

1. transfer and deliver to that Acquirer, at Respondents' expense, all Confidential Business Information;

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

2. pending complete delivery of all such Confidential Business Information to that Acquirer, provide the Acquirer with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the Business Information that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

a. the requirements of the Orders;

b. Respondents' obligations to that Acquirer under the terms of the related Divestiture Agreement; or

c. applicable law;

4. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person *except* (i) that Acquirer, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services or Transition Packaging for Acquirer), (iii) the Commission, or (iv) the Monitor and *except* to the extent necessary to comply with applicable law;

5. not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees providing transition services or Transition Packaging to the Acquirer or who are engaged in the transfer and delivery of the Product Manufacturing Technology related to the Divestiture Products or the ongoing Clinical Trials related to the Divestiture Products to the Acquirer;

6. institute procedures and requirements to ensure that those employees of the Respondents that are authorized by the Acquirer to have access to Confidential Business information:

a. do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and

b. do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

b. to the extent practicable, maintaining Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that the Confidential Business Information is not shared with Respondents' personnel engaged in the Business related to the same or substantially the same type of Business as the Divestiture Products (*e.g.*, Products Developed or in Development for the same or similar indications as the Divestiture Products).

B. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Assets, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

C. Not later than 30 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by that Respondents' personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for 2 years after the Divestiture Date. Respondents shall provide a copy of the notification to the Acquirer. Respondents shall maintain complete records of all such notifications at that Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances

where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. to assure such Respondent's compliance with any Divestiture Agreement, this Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable government entity, or any taxation requirements; or

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of a Divestiture Product, the Divestiture Assets, or the Divestiture Product Business;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however,* that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VII. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until Respondents fully transfer and deliver the Divestiture Assets to the Acquirer and fully provide, or cause to be provided, the related Product Manufacturing Technology related to the Divestiture Products and Clinical Trials related to the Divestiture Products to the Acquirer, Respondents shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Divestiture Assets;

2. prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets;

3. ensure that the Divestiture Assets are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Divestiture Product Business; and

4. ensure the completeness of the transfer and delivery of such Product Manufacturing Technology and Clinical Trials.

B. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Assets.

VIII. Clinical Trials

IT IS FURTHER ORDERED that, with respect to any ongoing Clinical Trial(s) as of the Divestiture Date related to the Divestiture Products, Respondents shall:

A. designate employees of the Respondents that have worked on such Clinical Trial(s) who will be responsible for communicating directly with the Acquirer and/or its Clinical Research Organization Designee(s), and the Monitor, for the purpose of effecting any transition agreed upon between the Respondents and the Acquirer for the purposes of ensuring the continued prosecution of such Clinical Trials in a timely manner;

B. coordinate with the Acquirer to prepare any protocols necessary to transfer the Clinical Trials to the Acquirer or the Acquirer's Clinical Research Organization Designee(s);

C. assist the Acquirer to prepare and implement any Clinical Plan(s) and Clinical Regulatory Package(s) for the current phase of the Clinical Trial (*i.e.*, the phase as of the Divestiture Date) until such time or specified event as agreed upon with the Acquirer in the relevant Divestiture Agreement occurs;

D. prepare and implement a detailed transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such information related to such Clinical Trial(s) to the Acquirer and/or its Clinical Research Organization Designee(s); and

E. provide, in a timely manner, assistance and advice to enable the Acquirer and/or its Clinical Research Organization Designee(s) to continue such Clinical Trial in its phase as of the Divestiture Date in the same quality, scope, and pace as was being achieved by the Respondents and in a manner consistent with Good Clinical Practice.

IX. Monitor

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Divestiture Agreements pursuant to the agreement between Monitor and Respondents in Appendices A and B to this Order.

B. Not later than 1 day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. Respondents shall provide access to all information and facilities, and make such arrangements with third parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Transition Package and to transfer and deliver the Product Manufacturing Technology;

3. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

4. The Monitor shall serve until Respondents complete the Transition Packaging, transition services, and the transfer of Clinical Trials, as applicable, for each Acquirer;

provided, however, that the Monitor's service shall not extend more than 4 years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably

request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty 30 days after the Order Date and every 90 days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. Among other things, the Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval (i) for indications on a Divestiture Product related to any Clinical Trials that were planned or ongoing on or before the Divestiture Date, and (ii) to manufacture in commercial quantities, in a manner consistent with cGMP, independently of Respondents, each Divestiture Product that was manufactured by a Respondent on or before the Divestiture Date.

I. Each Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent AbbVie, which consent shall not be unreasonably withheld. If Respondent AbbVie has not opposed, in writing, including the reasons for opposing, the selection of a substitute Monitor within 10 days after notice by the staff of the Commission to Respondent AbbVie of the identity of any substitute Monitor, Respondents shall be deemed to have consented to the selection of the substitute Monitor; and

2. not later than 10 days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

X. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or

any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed; and

2. the Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

provided, however, the Commission may extend the divestiture period only two (2) times.

E. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and

shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

F. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer that receives the prior approval of the Commission as required by this Order;

provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission;

provided further, however, that Respondents shall select such Person within 5 days after receiving notification of the Commission's approval.

G. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

H. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

I. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;

provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

J. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

K. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

L. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

M. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

N. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Not later than 5 days after the Acquisition Date, Respondents shall notify Commission staff of the Acquisition Date, including electronic copies of the notification to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Not later than 5 days after the Divestiture Date, Respondents shall notify Commission staff of the Divestiture Date, including electronic copies of the notification to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Not later than 30 days after the Divestiture Date, Respondents shall submit complete copies of all of the Divestiture Agreements to the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

D. Within 30 days after the Order Date, and every 90 days thereafter until Respondents have completed all of the following: (i) the transfer and delivery of all of the Divestiture Assets to an Acquirer, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Divestiture Products to an Acquirer, (iii) the transfer and delivery of all Confidential Business Information to an Acquirer, and (iv) the provision of Transition Packaging and/or transition services to an Acquirer, Respondents shall submit to the Commission and, at the same time, to the Monitor, a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with the requirements of the Orders ("Compliance Reports").

E. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to:

   a. the transfer and delivery to an Acquirer of all of the following: (i) the Divestiture Assets, (ii) the Product Manufacturing Technology related to the Divestiture Products, (iii) the Clinical Trial(s) related to the Divestiture Products, (iv) the Confidential Business Information related to the Divestiture Product Business; and

   b. the provision of Transition Packaging and/or transition services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

F. One year after the Order Date, annually for the next 4 years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

G. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an

original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

XII. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. any proposed dissolution of AbbVie Inc. or Allergan plc;

B. any proposed acquisition, merger, or consolidation of AbbVie Inc. or Allergan plc; or

C. any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, subject to any legally recognized privilege, upon written request, and upon five-days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purposes of the divestiture of the Divestiture Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order are:

A. to ensure the continued use of such assets for the purposes of each of the Divestiture Product Businesses within the United States;

B. to create a viable and effective competitor that is independent of Respondents in the Divestiture Product Businesses within the United States; and

C. to remedy the lessening of competition resulting from the proposed acquisition of Respondent Allergan by Respondent AbbVie as alleged in the Commission's Complaint in a timely and sufficient manner.

XV.Term

IT IS FURTHER ORDERED that this Order shall terminate on September 3, 2030.

By the Commission, Commissioner Chopra dissenting and Commissioner Slaughter not participating.

NON-PUBLIC APPENDIX A

NON-PUBLIC APPENDIX B

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS, COMMISSIONER NOAH JOSHUA PHILLIPS, AND COMMISSIONER CHRISTINE S. WILSON CONCERNING THE PROPOSED ACQUISITION OF ALLERGAN PLC BY ABBVIE INC.

AbbVie Inc. ("AbbVie"), the seventh largest pharmaceutical company in the world by revenue, proposes to acquire Allergan plc ("Allergan"), the twentieth largest.[1] The parties' portfolios are largely complementary, as AbbVie primarily develops and markets products in the immunology, oncology, and virology areas, while Allergan is focused on aesthetics and eye care. This transaction poses competitive concerns in three relevant markets: (1) drugs for the treatment of exocrine pancreatic insufficiency ("EPI"); (2) Interleukin-23 ("IL-23") inhibitors for the treatment of moderate-to-severe Crohn's disease; and (3) IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis. In these areas, the parties are two of a limited number of firms with products on the market or in development.

The Commission has voted 3-2 to issue a complaint and accept a settlement resolving every substantial threat to competition uncovered by FTC staff and supported by the evidence, after a thorough investigation lasting ten months and involving more than forty interviews and the review of more than 430,000 documents. The proposed order remedies the competitive concerns by requiring the merging parties to divest Allergan's EPI drugs Zenpep and Viokace to Nestlé,

S.A. ("Nestlé") and to transfer Allergan's assets related to the IL-23 inhibitor brazikumab back to AstraZeneca plc ("AstraZeneca"), the drug's original developer, by terminating the AstraZeneca license to Allergan. These divestitures fully remedy any potential loss of competition from the proposed transaction.

To challenge a merger successfully under the Clayton Act, the Commission must have proof that its likely effect is "substantially to lessen competition." We cannot meet this burden of proof just by surmising there might be harm. Likewise, when the Commission pursues divestitures to replace competition otherwise lost by a merger, we also must rely on proof. For this reason, our decisions, as to the determination of harm and the quality of both divestitures, are based on what actual evidence shows, following an extensive investigation by the Commission staff.

Our colleagues Commissioners Chopra and Slaughter, who in the past have expressed[2] and today reiterate their general opposition to pharmaceutical mergers, have come to a different

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1 *See* RankingtheBrands.com, Top 50 Global Pharma Companies 2019, https://www.rankingthebrands.com/The-Brand-Rankings.aspx?rankingID=370.

2 Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Bristol-Myers Squibb/Celgene* (Nov. 15, 2019),https://www.ftc.gov/system/files/documents/public_statements/1554293/dissenting_statement_of_commissioner_chopra_in_the_matter_of_bristol-myers-celgene_1910061.pdf (hereinafter "Chopra Bristol-Meyers Dissent "); Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Bristol-Myers Squibb /Celgene* (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf.

conclusion about the proposed settlement and have voted against accepting it. We respect their independent assessment of the proposed settlement. Differences of opinion facilitate healthy debate within the Commission. We value the exchange of ideas and policy perspectives, which enhances the Commission's ability to protect competition and consumers.

However, we disagree with Commissioner Chopra's characterization of the proposed settlement and of staff's investigation in this case. While we share his commitment to preserving competition in the pharmaceutical industry, we are concerned by his dissent's disregard for facts and law and its dismissal of the work of the dedicated and hardworking FTC staff. His dissent makes misleading claims about the staff's investigation, the state of competition in the pharmaceutical industry, and the Commission's enforcement record in this industry. It relies on false assertions, misapplication of law, and specious logic. It appears to have fully embraced the adage to "never let the truth get in the way of a good story" and engages in unbounded speculation, while criticizing forecasts based on rigorous investigation and grounded in evidence. Where facts conflict with theory, we follow the facts, even if they lead to an outcome we do not like.

In this statement, we attempt to set the record straight. We provide the perspective, context, logic, and facts missing from Commissioner Chopra's dissent. We also provide a response to the points raised in Commissioner Slaughter's dissent.

As occurs in every transaction, and despite the suboptimal working conditions created by the COVID-19 response, staff conducted a comprehensive and meticulous investigation of the proposed transaction and proposed divestiture buyers. As is typical, the identified competitive overlaps and required divestitures do not reflect the full scope of the Commission staff's investigation. Staff also investigated numerous other potential overlapping products and considered other possible effects that might result from the proposed combination of these companies. In addition, staff conducted extensive due diligence to evaluate the proposed divestiture buyers and the divestiture asset packages. Any assertion that the Commission did not consider every plausible theory or impact actionable under the antitrust laws is incorrect.

1. Divestiture of brazikumab to AstraZeneca

The point of a structural remedy is to replace the competition threatened by the merger. In the case of brazikumab, the IL-23 inhibitor still under development, the question is whether AstraZeneca, the drug's original developer and one of the largest pharmaceutical companies in the world, suffices to replace Allergan, a company that licensed brazikumab from AstraZeneca in 2016, has not yet brought it to market, and is about half the size of AstraZeneca.

Commissioner Chopra's dissent argues that AstraZeneca lacks Allergan's incentives to bring brazikumab to market. The evidence in this matter supports the opposite conclusion. While the dissent characterizes the drug as "Allergan's" IL-23, AstraZeneca (in cooperation with Amgen, Inc.) developed the drug, and then licensed it to Allergan. The consent terminates that license and returns the product to AstraZeneca. The structure of the divestiture incentivizes AstraZeneca to continue to develop the drug and bring it to market. The role of a divestiture is to position the divestiture buyer, here the original drug developer, to move the drug forward in the

same fashion as would have occurred absent the merger. No drug development is without risk and there is no guarantee today that Allergan will successfully commercialize this product. The Commission can, however, ensure that AstraZeneca has the appropriate incentives to push forward with development and bring the drug to market, in the same manner Allergan would have done absent the merger. We have required specific terms to accomplish this goal.

Under the terms of the settlement, the merged firm will fund up to an agreed amount: the *total* estimated cost expected to be incurred by AstraZeneca until completion of development for brazikumab in both Crohn's disease and ulcerative colitis indications, including the development of a companion diagnostic. The specified payments are contingent on AstraZeneca's continuing to develop brazikumab in each indication. That is, AstraZeneca gets paid to develop the drug, even before it profits from its sale. Furthermore, other than a pre-existing royalty payment to the inventor ofbrazikumab, AstraZeneca will own all rights to revenues generated by brazikumab.

Commissioner Chopra argues that the divestiture's structure weakens AstraZeneca's incentives to bring brazikumab to market because AstraZeneca will obtain the development rights without paying anything. That is a fallacy. AstraZeneca's incentive to develop brazikumab does not depend on how much AstraZeneca paid for those rights but how much money it can make going forward. What is more, consistent with divestitures the Commission has ordered in past pharmaceutical transactions, the settlement here affirmatively pays AstraZeneca to continue to develop brazikumab.

Commissioner Chopra's dissent criticizes staff for not doing a "rigorous analysis" of whether AstraZeneca "may find it worthwhile to prioritize" the development of brazikumab over other projects. This critique is without merit. A divestiture designed to restore competition does not require absolute certainty that AstraZeneca will develop brazikumab. There is always a risk that a product in development will fail, a reality that every pharmaceutical company faces daily.

Instead, restoring competition requires that AstraZeneca's incentive for developing brazikumab be at least as strong as Allergan's. In fact, AstraZeneca has a *stronger* financial incentive to develop brazikumab than does Allergan because, under the proposed settlement, AstraZeneca will receive significant payments from Allergan that are contingent on AstraZeneca's continuing to develop the drug, and, other than a pre-existing royalty payment to the inventor of brazikumab, AstraZeneca will keep the profits for itself.

Commissioner Chopra's description of the arrangement as an "option" does nothing to support his point. What is more, the structure of the divestiture agreement is modeled on similar past arrangements, which have *succeeded* in bringing drugs to market. To resolve concerns following its investigation of Novartis's acquisition of GSK, the Commission required the divestiture of Braf-Mek Inhibitors to Array. Array was Novartis's development partner for the divested assets. As part of the divestiture, Novartis provided substantial financial support in the form of reimbursement to Array. At designated points for each trial, Novartis transitioned responsibility and provided continuing financial support to Array for completing the trials. The clinical trial for Braf-Mek Inhibitors was a success and the drug is now on-market.

The dissent also argues that AstraZeneca is not an appropriate acquirer of Allergan's brazikumab assets because, the dissent claims, AstraZeneca has demonstrated a lack of commitment to develop brazikumab. We have seen no evidence to support that assertion.[3] The only basis the dissent offers is the fact that AstraZeneca licensed the drug for development to Allergan in 2016. As a threshold matter, we reject the notions that any company that once licensed an interest in a developmental drug is inherently and forever a weaker competitor and that it must be excluded categorically from reentering the market through a government-compelled divestiture. Neither notion would make for sound policy. But leaving that policy issue aside, the point–again–is that the evidence about AstraZeneca's plans for the products and the firm's incentives to promote continued development uncovered by the investigation provide no basis for Commissioner Chopra's claim.

AstraZeneca is one of the largest pharmaceutical companies in the world (approximately 50 percent larger than Allergan is today), with total revenues exceeding $22 billion in 2018. It has a robust portfolio with many successful products, and identifies "Respiratory and Immunology" among its three focus areas in its public financial reporting.[4] While Commissioner Chopra makes much of AstraZeneca's decision to sell off rights to various immunology drugs four to five years ago, AstraZeneca publicly told the market just last week that it had, consistent with plans announced last year, renamed the focus area to include immunology because of the significant number of immunology products in its pipeline.[5] That effort includes not just brazikumab, but also a number of other pipeline products.[6] Commissioner Chopra omits these facts. While the insinuation that AstraZeneca is not interested in immunology may suit his chosen narrative, it simply is not borne out by facts.

AstraZeneca's history with brazikumab makes it a better candidate to be a divestiture buyer, not a worse one. AstraZeneca still employs the key team members, including the clinical lead, who were responsible for brazikumab during this earlier period of development. In sum, and contrary to our colleagues' fears, AstraZeneca has ample resources, significant in-house expertise, and strong financial incentives to develop brazikumab.

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3 AstraZeneca's business plans, documents and presentations do not indicate that AstraZeneca has any current or future plans to relicense or flip the divestiture assets. The basis for the dissent's speculative concern is unclear.

4 *See* AstraZeneca, First Quarter 2020 Results (Apr. 29, 2020) at pp. 8, 28, https://1_www.astrazeneca.com/content/dam/az/PDF/2020/q1-2020/Ql_2020_results_presentation.pdf.

5 *See* AstraZeneca Earnings Call Transcript (Apr. 29, 2020), https://seekingalpha.com/symbol/AZN/earnings/transcripts. AstraZeneca also announced an agreement with the University of Oxford for the global development and distribution of a potential COVID-19 vaccine. *See* AstraZeneca Press Release, *AstraZeneca and Oxford University announce landmark agreement for COVID-19 vaccine* (Apr. 30, 2020), https://www.astrazeneca.com/media-centre/press-releases/2020/astrazeneca-and-oxford-university-announce-landmark-agreement-for-covid-19-vaccine.html.

6 AstraZeneca's current Respiratory & Immunology pipeline lists 29 projects and includes Fasenra (on market for severe eosinophilic asthma, but being investigated for other indications), anifrolumab (in clinical development for lupus indications), and tezepulmab (in clinical development for atopic dermatitis and other indications). *See* AstraZeneca's Respiratory & Immunology Pipeline, https://www.astrazeneca.com/our-science/pipeline.html (last visited May 5, 2020).

Commissioner Chopra's dissent raises concerns regarding the potential that the merged firm could use rebating practices to disadvantage AstraZeneca in bringing brazikumab to the market. In the context of a merger investigation, the role of a divestiture is to restore competition to the state that it would have been absent the merger, not to provide the divestiture buyer with advantages that Allergan would not have had. Commissioner Chopra's theory is that AbbVie could use bundled rebating practices involving its Humira and Skyrizi drugs to inhibit AstraZeneca, but we lack evidence, including from AstraZeneca, that these bundling practices threaten brazikumab's ability to compete in the market. Moreover, AstraZeneca is a sophisticated company and capable of its own strategic responses to defeat any such actions by AbbVie.

2. Nestlé as a Divestiture Buyer of Zenpep and Viokace Assets

Commissioner Chopra also takes issue with the divestiture buyer of the EPI drugs, arguing that Nestlé lacks experience in the pharmaceutical industry. Commissioner Chopra's concern appears to be based on the fact that Nestlé is a food and beverage company. According to Commissioner Chopra, "[i]t strains the bounds of credulity" that Nestlé, the "maker of KitKats and Tidy Cats ... whose core business is selling packaged consumer products like candy and cat litter" could be seen as "a formidable, committed competitor for a drug that patients with pancreatic cancer, cystic fibrosis, and other serious conditions depend on." This argument, while long on alliteration, is both wrong and misleading. A company can both sell consumer products and be a formidable competitor in the pharmaceutical industry. For example, Johnson & Johnson sells Band-Aids and baby powder and is, at the same time, a major player in pharmaceutical industry. Ironically, Nestlé seems to be exactly the type of buyer Commissioner Chopra has *encouraged* in previous dissenting statements, urging the Commission to consider divestitures to new innovators, not just established pharmaceutical companies.[7]

It is true that Nestlé is the world's largest food and beverage company, with tremendous financial resources and a substantial U.S. sales infrastructure. But – and contrary to Commissioner Chopra's assertions – Nestlé is no stranger to the healthcare space. Nestlé operates Nestlé Health Science ("NHSc"), an integrated multi-billion dollar health company that focuses on nutrition products, including medical nutrition products that physicians order or recommend for patients who have certain digestive health conditions. Many of these patients use Zenpep.

The claim that Nestlé lacks significant pharmaceutical experience is simply false. Nestlé has been involved in the pharmaceutical industry for over 40 years, in various iterations. From 1977 to 2010, Nestlé owned Alcon, one of the largest eye care pharmaceutical companies in the world. It bought the company in 1977 for $280 million and, when it finally exited the company in 2010, Nestlé stated that it "realised in excess of USD 40 billion in cash" through its gradual divestment of the company.[8] Moreover, the dissent neglects to mention that Nestlé and L'Oreal

7 *See* Chopra Bristol-Meyers Dissent, *supra* n.2 at n.4.

8 Nestlé Press Release, *Nestlé to sell remaining Alcon shares to Novartis* (Jan. 4, 2010), https://www.nestle.com/media/pressreleases/allpressreleases/alcon.

began the Galderma joint venture in 1981, and that Nestlé's sold Galderma in 2019, for approximately $10.1 billion, established the largest independent global dermatology company in the world, with approximately $2.8 billion in revenue and approximately 5,000 employees.[9] The dissent also criticizes Nestlé for an alleged failure to bring products to market. Even assuming this criticism were accurate, this is the nature of pharmaceutical development. Not all projects succeed, and, in fact, most fail.[10]

Commissioner Chopra argues that, under Nestlé, Zenpep will not be able to compete against AbbVie's EPI drug Creon and that Zenpep's sales share will shrink. His dissent suggests that Zenpep will suffer the same fate as Pancreaze and Pertzye, two EPI drugs that "have less than 2% market share, even though they work just as well for most patients that use Creon and Zenpep." He argues that Pancreaze and Pertzye have low shares of sales because these drugs have little "bargaining leverage" and that Zenpep under Nestlé will likewise have little "bargaining leverage." This argument is without basis. Many factors account for differences in drugs' sales shares of a therapeutic category, including a drug's efficacy, patient experiences with the drug, and the order of introduction to the market. His dissent claims that: [redacted] But this fails to explain why Nestlé could not follow the same strategy to maintain or even increase Zenpep's share of EPI drug sales. Nestlé certainly has the resources to [redacted].

Commissioner Chopra's questioning of Nestlé's ability to be a formidable competitor in pharmaceuticals also fails to acknowledge the significant pharmaceutical industry experience of Nestlé's executives. In fact, Nestlé's CEO, Mark Schneider, was previously the CEO of Fresenius Group, a global health care and pharmaceutical company. Nestlé's Chief Financial Officer, François-Xavier Roger, worked at pharmaceutical companies Takeda and Sanofi-Aventis before joining Nestlé. More importantly, the dissent ignores the leadership of NHSc, the company that will actually sell the Zenpep product. NHSc executives have significant experience running U.S. and global pharmaceutical companies, and developing and marketing branded pharmaceutical products, having held leadership roles at major pharmaceutical firms like Boehringer Ingelheim, Novartis, Pfizer, Eli Lilly, and Sanofi-Aventis.

In vetting proposed buyers, the Commission staff interview the proposed acquirer's executives, sales personnel, and corporate leadership, as well as third parties. The vetting of NHSc was no different. The investigation, including numerous interviews of doctors and health plans, found that Zenpep and Viokace are highly complementary to NHSc's existing products, as

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9 Galderma Press Release, *Galderma to become the world's largest independent global dermatology company after completion of CHF 10.2 billion carve-out of Nestlé Skin Health* (Oct. 2, 2019), https://www.galderma.com/news/galderma-become-worlds-largest-independent-global-dermatology-company-after-completion-chf-l02.

10 Stuart A. Thompson, N.Y. Times Opinion, *How Long Will a Vaccine Really Take?* (Apr. 30, 2020), https://www.nytimes.com/interactive/2020/04/30/opinion/coronavirus-covid-vaccine.html?searchResultPosition=2 ("less than 10 percent of drug trials are ultimately approved").

both products treat gastrointestinal ("GI") conditions that hinder the body's ability to extract nutrients from food. NHSc's current products target the same patients who require EPI treatments like Zenpep, including patients with cystic fibrosis. While NHSc's nutrition products are not pharmaceuticals, they are prescribed by doctors, used in hospitals and clinics, and covered by health insurance. Thus, NHSc already has substantial experience marketing to and interacting with the same group of healthcare providers and payors, and it has developed important relationships with these key decision-makers. But the experience does not end there. NHSc has an ongoing research and development partnership with Codexis, a protein engineering company that works with pharmaceutical firms. Building on NHSc's established expertise in medical nutrition, this partnership seeks to develop high-performing enzymes to help patients suffering from rare metabolic and GI-related conditions. Several therapeutic enzyme candidates from this collaboration are currently in preclinical development. In addition to NHSc's experience, its plans indicate it will commit more resources to the drugs than Allergan does today. The proposed divestiture of the Zenpep and Viokace assets will transfer Allergan's EPI sales force and other significant assets, augmenting NHSc's already strong capabilities and positioning it for success. NHSc plans, which staff scrutinized thoroughly, involve growing the sales team for these products substantially, and investing tens of millions of dollars to expand commercial, marketing, staffing, clinical studies and research and development activities related to Zenpep.

Commissioner Chopra claims that the divesture of Zenpep to Nestlé will fail to restore competition in EPI drugs because Zenpep will "have little impact on Nestlé's overall financial results" and therefore "Nestlé's top management and board directors will not have an incentive to devote significant energy to make sure this divestiture is successful." This claim lacks any plausible basis. As a factual matter, the Zenpep assets represent significant value even for a company of Nestlé's size. In 2018, NHSc generated global sales of $2.7 billion out of the total revenue of Nestlé S.A.'s worldwide sales of $94 billion *(i.e.,* approximately 3% of Nestlé S.A.'s global sales). Approximately 47% of NHSc's 2018 sales were in the United States. NHSc's Strategic Advisory Committee and Management Team includes four of Nestlé's most senior executives, including the Chairman and CEO of Nestlé S.A. Moreover, purchasing assets generating sales of $288 million in 2019[11] can hardly be described as a "minor" investment. In fact, the Nestlé Board had to approve the purchase here, given the significant initial investment it required. Ultimately, NHSc will be a well-financed entrant into the pharmaceutical space.

Moreover, Commissioner Chopra appears to claim that a large company cannot be successful at selling a product unless the product will "materially impact" the company's overall earnings. Commissioner Chopra offers no support for this claim. Like large pharmaceutical companies, large consumer products companies such as Nestlé and Procter & Gamble achieve success in selling hundreds of products in many countries around the world, even if individual products represent small shares of the company's overall sales.

11 Allergan plc, 2019 Form 10-K at 57, https://www.sec.gov/Archives/edgar/data/1578845/000156459019003111/agn-10k_20181231.htm.

For all of these reasons, we are confident that Nestlé is an appropriate divestiture buyer of the Zenpep and Viokace assets.

3. The Commission's Divestiture Process

Commissioner Chopra's dissent criticizes the Commission's remedy process, arguing that the staff followed a flawed process for identifying Nestlé as a divestiture buyer for the Zenpep and Viokace assets by letting the parties pick the divestiture buyer. The Commission does ask parties requiring divestitures to do the work of supplying options, though the parties do not get their pick. Our 2017 Merger Remedies Study confirmed that this practice, together with others related to designing, drafting and implementing the agency's merger remedies, generally yields effective outcomes. Indeed, with respect to the 50 orders examined using the case study methodology, which included Hertz, more than 80 percent of the Commission's orders across a wide variety of industries maintained or restored competition.

The dissent takes particular issue with the Commission's approach to remedies in pharmaceutical mergers. In citing to unsuccessful divestitures, the dissent noticeably fails to mention any pharmaceutical divestitures. That omission is material, because the findings from the pharmaceutical portion of the 2017 Merger Remedies Study support the consent in this case. The study found that when remedies entailed the divestiture of on-market pharmaceuticals produced by a contract manufacturer and did not require transferring manufacturing capability, the buyers continued to sell the divested product in every instance. This result confirms the Commission's long-standing practice of requiring divestiture of the overlap product that can be transferred to its purchaser most seamlessly and with fewest hurdles. Products made at a third-party manufacturing site, rather than those requiring a technology transfer, fall into this category. That is precisely the situation here. Currently, Allergan's products are made at a third-party manufacturing facility and those arrangements will transfer to Nestlé. Similarly, the 2017 Remedy Study also found that for all in-development products, assets were successfully transferred to the buyers. Here, AstraZeneca is uniquely familiar with the brazikumab assets as it previously developed the technology itself and, therefore, is well positioned to reintegrate the assets into its operations.

The 2017 Study also showed that respondents were now more likely to propose buyers that fully satisfy the Commission's criteria for strong, viable competitors, compared to findings from the 1999 Divestiture Study that revealed respondents sometimes proposed buyers that were marginally acceptable. The Commission made several changes in response to the 1999 findings. For example, the Commission began requiring an upfront buyer for divestitures of less than an ongoing business, thereby aligning the incentive to propose a Commission-approvable buyer with the respondents' interest in receiving Commission clearance for their deal.

In addition, staff began a more in-depth review of proposed buyers, including requiring prospective buyers to submit detailed written business and financial plans for divested assets. While the 2017 Study indicated that these measures were working, the Commission has

continued to refine its process, including by closely examines the buyer's sources of financing, contingency planning, and ability to conduct adequate due diligence, among other factors.[12]

Staff applied its established practices to evaluate potential merger remedies in this case. Staff analyzed business plans, supply chain management and transition plans, the strategic fit of the assets with the buyers' existing business, financial projections, deal financing and incentives, experience and management expertise. The 2017 Study found that buyers that "had a complementary product line into which the divested assets could easily fit" tended to succeed. Here, the evidence we studied, including extensive consultation with experts, buyers, and prescribers, indicated that NHSc's line of medical nutrition products is a natural fit for Zenpep and Viokace as these divestiture products target the same patients and providers as its existing product line, and that brazikumab will fit nicely back into AstraZeneca's "Respiratory and Immunology" focus area.

4. Scope of the Investigation

Commissioner Chopra's claim that the Commission has a "myopic" focus on product overlaps misrepresents the scope of the investigation that staff conducted in this matter, and in other merger investigations. Commissioner Slaughter's dissent does acknowledge the scope of the investigation, but nevertheless raises concerns that it failed to investigate enough. She does not specify what additional evidence she would have sought, or how it would have informed her theory of harm.

The Commission brings cases based on evidence, not beliefs. As the Commission has stated publicly, both the Commission and its staff look well beyond product overlaps in every pharmaceutical merger review; this case was no different. The Commission staff proactively sought information from the merging parties and third parties to facilitate exploration of a wide range of theories of competitive harm, including every one mentioned in the dissents. But the evidence did not support a reason to believe that the merger would lead to competitive harms beyond the overlaps that are being remedied via divestitures. It is simply untrue to claim that theories of harm other than straightforward overlaps were ignored, and untoward to suggest they were not investigated with adequate rigor. That the dissenters may not like the result is no reason to object, much less mischaracterize the comprehensive and meticulous merger review process.

Consistent with the Horizontal Merger Guidelines, staff investigated whether the "merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction."[13] Other than the harm the

12 FTC Competition Blog, *Looking back (again) at FTC merger remedies* (Feb. 3, 2017), https://www.ftc.gov/news-events/blogs/competition-matters/2017/02/looking-back-again-ftc-merger-remedies.

13 Horizontal Merger Guidelines§ 6.4. In Commissioner Slaughter's dissent, she raises concerns about whether the Commission analyzes and addresses innovation competition issues in pharmaceutical merger investigations. The dissent ignores the Commission's long record of addressing innovation competition concerns in pharmaceutical transactions. In recent years, for example, the Commission has taken enforcement actions to address harm to innovation competition in the Mallinckrodt, GSK/Novartis, and BMS/Celgene matters, as well as in several generic pharmaceutical mergers. See FTC Press Release, FTC Requires Bristol-Myers Squibb Company and Celgene

merger would create related to the parties' ongoing development of IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis and Crohn's disease, the investigation yielded no evidence that other ongoing product development efforts would likely be altered because of a desire to diminish competition in any relevant market. Staff also evaluated in which therapeutic areas, as well as narrower disease areas and specific conditions, the parties were currently investing in research and development. A wide array of evidence gathered and reviewed by staff, including party forecasts and market analyses created in the ordinary course of business, interviews with third parties, and review of publicly available information, indicated that there is no therapeutic area, disease, or condition where the parties are two of a limited number of competitors. To the contrary, evidence indicates the parties face considerable competition in each area. The staff also investigated whether the merger eliminated competitive restraints on either AbbVie or Allergan that would allow for rebating practices that otherwise had failed due to the independence of the two companies, and did not find evidence to support such a theory.

As to other non-merger specific conduct that some have argued should be remedied through the merger review and order process, Section 7 does not afford the agency the authority to extract remedies unrelated to a proposed merger.

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We are committed to preserving competition in pharmaceutical and medical treatment markets. Sometimes, that means blocking a merger outright. Earlier this year, for example, staff recommended that the Commission block Johnson & Johnson's proposed acquisition of Takeda's surgical patch, TachoSil, and the parties subsequently abandoned the transaction.[14] But

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Corporation to Divest Psoriasis Drug Otezla as Condition of Acquisition (Nov. 15, 2019), https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristo1-myers-squibb-company-celgene-corporation (alleging the acquisition would substantially lessen competition by eliminating future competition between BMS and Celgene in developing, manufacturing and selling oral products to treat moderate-to-severe psoriasis); FTC Press Release, FTC, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges lt illegally Maintained its Monopoly of Specialty Drug Used to Treat infants (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-l00-million-settle-ftc-state-charges-it (blocking acquisition because Questcor "acquired the rights to its greatest competitive threat, a synthetic version of Acthar, to forestall future competition"); FTC Press Release, FTC Puts Conditions on Generic Drug Maker Lupin Ltd.'s Proposed Acquisition of Gavis Pharmaceuticals LLC (Feb. 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-generic-drug-marketer-lupin-ltds-proposed (requiring divestitures to ensure continued development of generic mesalimine ER capsules, which Lupin and Gavis were developing independently at the time of the merger); FTC Press Release, FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs (Feb. 23, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition (requiring divestitures of in-development BRAF and MEK inhibitor drugs to ensure development of the BRAF and MEK inhibitors continues uninterrupted, and competition in BRAF and MEK inhibitor markets is not reduced). For an overview of the many other pharmaceutical mergers the Commission has challenged to protect innovation competition, see FTC Health Care Division Staff, Overview of FTC Actions in Pharmaceutical Products and Distribution (Sept. 2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/20190930_overview_pharma_final.pdf.

14 The dissent asserts that the Commission has not challenged a proposed pharmaceutical merger or acquisition, but it ignores past Commission enforcement actions challenging entire transactions and FTC attempts to challenge acquisitions in court. For example, in 2017, the Commission challenged the consummated acquisition of Synacthen by Questcor Pharmaceuticals, Inc. and required its parent company, Mallinckrodt plc, to pay $100 million to settle

we are also committed to predicating enforcement decisions on evidence – not just some of the evidence, but all of the evidence. Our merger challenges must stay within the scope of the law and the facts of the case in front of us. Here, the law and the facts overwhelmingly support the proposed divestiture, not the dissenters' critiques.

In his conclusion, Commissioner Chopra proposes a long list of actions the Commission should undertake to overhaul its process for reviewing mergers and divestiture proposals. Most of those steps appear unrelated to any issue involving the transaction and divestiture currently before us. Nonetheless, as Chairman Simons has indicated on numerous occasions, the Commission has been and remains willing to engage in self-critical examination.[15] In fact, the Commission's predisposal to rigorous and routine self-assessment is demonstrated by the many merger retrospectives it has conducted, to determine retroactively its accuracy in calling balls and strikes; its willingness to assess with frankness and candor the efficacy of its merger remedies, as chronicled by the 2017 Mergers Remedy Study; and its no-holds-barred review of dozens of policy positions and enforcement approaches during the agency's Hearings on Competition and Consumer Protection in the 21st Century, which featured no shortage of voices critical of the FTC. While the Commission continues to strive for improvement, its empirically-based reviews do not reveal the kind of systemic failure to merger reviews and divestitures that would justify Commissioner Chopra's proposals. That said, we will continue to support the self-critical examination that typifies the agency's approach to all enforcement and policy issues.

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charges that the acquisition violated the antitrust laws. *FTC et al. v. Mallinckrodt Ard Inc. et al.,* No. 1:17-cv-120 (D.D.C. Jan. 30, 2017), https: //www.ftc.gov/enforcement/cases-proceedings/1310172/mallinckrodt-ard-inc-questcor-pharmaceuticals. In 2008, the Commission filed a complaint in federal district court challenging Ovation Pharmaceuticals, Inc.'s acquisition of the drug NeoProfen. FTC Press Release, *FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition* (Dec. 6, 2008), https://www.ftc.gov/news-events/press-releases/2008/12/ftc-sues-ovation-pharmaceuticals-illegally-acquiring-drug-used. The recommendation to challenge Johnson & Johnson's Tachosil acquisition is only the most recent evidence of this effort. FTC Press Release, *Federal Trade Commission Closes Investigation of Johnson & Johnson's Proposed Acquisition of TachoSil from Takeda Pharmaceutical Company* (Apr. 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-closes-investigation-johnson-johnsons. As noted above, the Commission also has required extensive product divestitures in dozens of pharmaceutical company mergers. Moreover, the Commission has conducted a twenty-five year campaign to stop anticompetitive conduct in the pharmaceutical industry, resulting in a seminal Supreme Court case, and settlements that well exceed $1 billion. For a more extensive discussion of the FTC's vast array of efforts to maintain competition in the pharmaceutical industry, *see* Statement of Commissioner Christine S. Wilson, *In the Matter of Bristol-Myers Squibb/Celgene* (Nov. 15, 2019), https://www.ftc.gov /system/files/documents/public_statements/1554278/bms-celgene_-_wilson_statement.pdf.

15 *See, e.g.,* Joseph J. Simons, Keynote Address at American University Washington College of Law Conference on Themes of Professor Jonathan Baker's New Book, *The Antitrust Paradigm: Restoring a Competitive Economy* (Mar. 8, 2019), https://www.ftc.gov/public-statements/2019/03/prepared-keynote-address-chairman-joseph-j-simons-american-university.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Executive Summary

- The Federal Trade Commission is settling charges regarding AbbVie's unlawful takeover of Allergan. For the first time, the FTC is ordering drug divestitures to a company that does not offer any prescription drugs: Nestlé. This is risky and concerning.

- I have been unable to identify any time in the agency's history where the FTC has filed a lawsuit to block an unconsummated drug company merger. The agency's default strategy of requiring merging parties to divest overlapping drugs is narrow, flawed, and ineffective. It misses the big picture, allowing pharmaceutical companies to further exploit their dominance, block new entrants, and harm patients in need of life-saving drugs.

- Divesting assets is only an appropriate remedy if the buyer will fully replace the competition lost by a merger. But, merging parties have little incentive to sell to a strong competitor and, in fact, succeed more when the buyer fails. New entrants face high hurdles even with well-capitalized buyers. The agency must always closely vet divestiture buyers and conduct careful financial due diligence to determine whether they can or will aggressively compete. If no suitable buyers exist, the FTC should sue to block the merger outright, rather than settling.

- The Commission is too confident that Nestlé can cure this merger. Nestlé is not a pharmaceutical company. Its core focus is on food, beverages, and other grocery store items. While it has a nutrition subsidiary, this line of business does not match the capability and capacity of Allergan, which currently owns the rights to drugs that treat patients with serious pancreatic conditions. In addition, Nestlé has a checkered record in its past experiments with pharmaceuticals. If this new venture into pharmaceuticals does not succeed, it will not have a meaningful impact on Nestlé's financial results.

- To address other harmful effects of this proposed merger, the FTC is not ordering a traditional sale of assets. Instead, the agency is ordering AbbVie and Allergan to give back the rights to a major drug development project to AstraZeneca. This is a windfall for AstraZeneca, who will pay nothing for a valuable drug development project and is free to re-license the business to another company. It is unclear where this project falls in AstraZeneca's development priorities and whether the company is committed to the project over the long-term.

- The FTC should take concrete steps to move forward from this unfortunate decision and its troubling outcome. The Commission should improve its approach to analyzing mergers where new market entrants drive innovation, enhance our divestiture buyer evaluation process by including staff with financial and technical expertise, strengthen our coordination and cooperation with state attorneys general in merger investigations, and provide greater transparency to the public about the scope of merger reviews and remedies.

I. Introduction

The current coronavirus outbreak and resulting public health and economic emergency are rightfully leading many government officials to question status quo approaches to policy, regulation, and enforcement. At the Federal Trade Commission, we should be doing the same.

I have been unable to identify any time in the agency's history where the FTC has filed a lawsuit to block an unconsummated drug company merger.[1] Instead, the FTC examines whether or not the two merging drug companies offer any competing products. If not, the agency clears the deal unconditionally, like in Takeda's recent $62 billion takeover of Shire. If companies do have competing products, the agency requires them to divest overlapping drug product offerings to another company, like in Bristol Myers-Squibb's recent $74 billion takeover of Celgene.

Over the years, individual Commissioners and FTC officials have questioned whether this fully remedies competitive harms.[2] However, the agency continues to defend its work, and, in my view, largely believes the status quo is working just fine. But, it isn't. The FTC's strategy of focusing on whether pharmaceutical companies have any overlaps in their drug product lineup is narrow, flawed, and ineffective. This strategy fails to account for how executives make decisions about their drug product portfolios, how larger portfolios can suppress new entry, and how companies use portfolios to increase bargaining leverage across the supply chain. The approach has contributed to a shrinking number of Big Pharma giants that increasingly prioritize maintaining patent monopolies over discovering new medicine.

Drug prices are exorbitant and continue to climb, price-gouging patients in life or death situations. And too many new innovators can't get off the ground to break through the barriers to entry that incumbents have created to defend their drug turf.

Today's proposed resolution to the latest pharma megamerger, AbbVie's (NYSE: ABBY) $63 billion takeover of Allergan (NYSE:AGN), is a stark display of the agency's myopic approach. The FTC has given the green light to a merger that offers no meaningful benefits, but raises many alarm bells.

For the first time, the FTC is proposing a pharmaceutical merger settlement that divests a prescription drug business to a buyer that isn't a drug company. The settlement requires Allergan to divest drugs used to treat patients with pancreatic cancer, cystic fibrosis, and other serious pancreatic disorders. The Commission is putting its full faith in Nestlé (SIX: NESN), the maker of KitKats and Tidy Cats, to take Allergan's place in the market. The Commission is confident it

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1 The FTC has filed lawsuits in other non-drug pharmaceutical markets, such as medical instruments and technology. However, those markets are distinctly different from small molecule drugs and biologics. They do not share any of the dynamics at issue in drug mergers such as the one here. As I discuss in this statement, these dynamics make the industry fraught with competitive problems not easily resolved by one-off divestitures.

2 *See e.g.,* Interview with Commissioner Thomas B. Leary, 19 (3) A.B.A. Antitrust Health Care Chronicle 1, 5 (2005), https://www.ftc.gov/public-statements/2005/09/health-care-interview-commissioner-thomas-b-leary.

can restore competition by divesting essential medicine to a company whose core business is selling packaged consumer products like candy and cat litter.

Without a doubt, Nestlé is a large company with many capabilities – in food and beverages. Currently, the company does not offer a single prescription drug product. It strains the bounds of credulity that the Commission feels so certain that this company will be a formidable, committed competitor for a drug that patients with pancreatic cancer, cystic fibrosis, and other serious conditions depend on.

In a separate provision, AbbVie and Allergan will pull out of a licensing and development deal for a pipeline immunology drug with AstraZeneca (NYSE:AZN). AstraZeneca will pay nothing for this "divestiture" and is free to re-license the product. The FTC has put its faith in a proposal that AstraZeneca, who publicly reported a few years ago that it was retreating from immunology, will follow Allergan's path to bring this drug to market.

Commissioners should always rely on evidence and examination, rather than ideology or intuition. We are accountable for agency decisions and for giving appropriate direction to staff. This is particularly true when it comes to merger enforcement. FTC merger settlements are supposed to restore the competition killed off from a transaction. Looking for product overlaps and then accepting risky or questionable buyers to eliminate them is not sound competition policy.

There are a number of problematic aspects with the FTC's investigative approach to pharmaceutical industry mergers and to proposed remedies. In this statement, I will focus primarily on the issue of divestiture buyers. Accepting risky buyers that are unlikely to fully restore competition does a disservice to patients and worsens the out-of-control drug costs in our country. If no buyers are capable of restoring competition, the FTC should take steps to block the merger outright.

Below, I discuss some background information on divestiture remedies. I then describe why Nestlé and AstraZeneca are no cure for this proposed merger. I conclude with a set of concrete steps that the Commission should include in its work going forward.

II. Divestiture Remedies and Supporting Conduct Provisions

Before discussing the specific divestiture buyers approved by Chairman Simons, Commissioner Phillips, and Commissioner Wilson, we must bear in mind the challenges and distorted incentives that are inherent in the divestiture process.

Divestiture remedies to address a harmful merger can only succeed if the buyer fully restores the competition that existed prior to the merger. FTC merger settlements typically require the merging parties to divest a line of business, usually tied to specific products or geographies, to one or more approved buyers. But, given the incentives of merging parties and buyers of divested assets, the entire process can be fraught. The FTC must be especially careful.

These practices are likely even more prevalent in industries rife with anticompetitive abuses, such as the pharmaceutical industry.[3]

A. Merging companies want to sell assets to weak buyers, because these buyers will be their competitors.

When merging companies need to divest an asset, a set of assets, or a line of business to address a reduction in competition stemming from the transaction, the combined entity is actually selling to its future competitor. The merging companies may not want to sell to the highest bidder. They have an incentive to also consider who is likely to be the weakest buyer and the easiest to dominate once the buyer takes full ownership of the divested product.

A 1999 analysis confirmed this concern, noting that merging companies "recommended marginally acceptable buyers and, on some occasions, engaged in post-divestiture strategic behavior aimed at minimizing the competitive impact of the buyer's entry into the market."[4]

B. Buyers might find a bargain, but they may not have the same incentives or ability to fully restore competition.

When merging parties are eager to consummate their transaction in as little time as possible, they often look to satisfy concerns of antitrust enforcers by quickly finding buyers for specific assets in markets where a merger would cause competitive harm. This allows prospective buyers to purchase divested assets more cheaply than they otherwise might be able to. If the asset is already generating significant cash flow, the investment may still be worthwhile even if sales decline significantly post-transfer.

Sometimes, companies may simply want to purchase an "option." In other words, buyers might find it worthwhile to purchase an asset because it could become useful sometime in the future, even if they don't have concrete plans to focus on it immediately.

There are many other problems that make for a bad divestiture buyer. For example, as I noted in *Praxair/Linde,* the buyer might be loading up the asset with debt, making it less likely

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3 The pharmaceutical industry has long been the focus of anticompetitive conduct enforcement by the FTC, state attorneys general, and private litigants. Challenged conduct includes pay-for-delay settlements, anticompetitive product hopping, fraudulent orange book listings, and sham litigation. Both AbbVie and Allergan have been the subject of these enforcement efforts. *See, e.g., Fed. Trade Comm'n v. AbbVie Inc. et al.,* No. 14-5151, WL 8623076 (E.D. Pa. July 18, 2018); *Fed. Trade Comm'n v. Allergan plc et al.,* No. 17-cv-00312 (N.D. Cal. Feb. 22, 2019); *Fed. Trade Comm'n v. Actavis, Inc. et al.,* 570 U.S. 136 (2013); *Fed. Trade Comm'n v. Reckitt Benckiser Group plc,* No. 1:19-cv-00028 (W.D. Va. July 11, 2019); *State of California ex rel. v. Allergan plc et al.,* No. 3:17-cv-00562, WL 3251470 (N.D. Cal. June 6, 2019); *In the Matter of Biovail Corp.,* FTC File No. 011-0094 (Oct. 2, 2002); *In the Matter of Bristol-Myers Squibb Company,* FTC File No. 011-0046 (Mar. 7, 2003); *see generally,* Public Citizen, *By Any Means Necessary: How Allergan Gamed the System to Raise Drug Prices and Flood the Country with Pill* (Jan. 27, 2019), https://www.citizen.org/news/how-allergan-gamed-the-system-to-spike-prices-and-sell-opioids/.

4 FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012, A REP. OF THE BUREAUS OF COMPETITION AND ECONOMICS at 10 (2017) (referencing WILLIAM J. BAER, FED. TREADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, 8 (1999)).

they will have the flexibility to grow the divested business and effectively compete.[5] In addition, a buyer might have already been planning to enter the market anyway, which means that they are bolstering their own competitiveness rather than replacing competition.

C. Divestiture remedies can fail even with well-capitalized buyers and experienced management, especially when the business is not a core focus of the owner.

Rather than block a merger outright or weed out questionable buyers, the FTC sometimes rolls the dice. When rental car giant Hertz sought to get even bigger with its illegal takeover of Dollar Thrifty, the FTC entered into a settlement to address the illegal merger by ordering a divestiture of its Advantage Rent a Car business to Franchise Services of North America (FSNA) and Macquarie Capital.[6] FSNA didn't operate a traditional airport rental car operation; it ran a U-Haul and Rent-a-Wreck business that served a different customer need.[7] The CEO of FSNA had previous experience in traditional rental cars,[8] and the FTC approved the buyer. But, soon after the FTC settlement, the new enterprise filed for bankruptcy.[9]

When the FTC reviewed the illegal merger of Dollar Tree and Family Dollar, it settled for divestitures to Sycamore Partners, the private equity outfit. Sycamore Partners proposed a management team with experience in the business.[10] Nevertheless, the arrangement quickly failed and stores were ultimately resold to Dollar General. Instead of creating a new competitor, the big national players simply grew more powerful.

In the illegal takeover of Safeway by private equity-owned Albertson's, the FTC didn't sue to block the merger outright. Instead, the agency approved Haggen as the buyer of 146 stores.[11] Haggen was an experienced grocer and was backed by a financial partner, but only

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5 Statement of Commissioner Rohit Chopra In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Comm'n File No. 1710068, 1 (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

6 *In the Matter of Hertz Global Holdings, Inc.,* FTC File No. 101-0137 (July 10, 2013).

7 Franchise Servs. of North Am. Press Release, Franchise Services of North America Inc. Announces Agreement to Acquire Advantage® Rent-A-Car Business (Aug. 28, 2012) (on file with PR Newswire), https://www.newswire.ca/news-releases/franchise-services-of-north-america-inc-announces-agreement-to-acquire-advantage-rent-a-car-business-5l0636941.html.

8 *Id.*

9 David McLaughlin et al., *Hertz' Spinoff of Advantage Rent A Car Was Doomed From the Start Says Insider,* SKIFT (Nov. 30, 2013, 9:00 AM), https://skift.com/2013/11/30/hertz-spinoff-of-advantage-rent-a-car-was-doomed-from-the-start-says-insider/.

10 Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Sycamore Partners II, L.P. et al., FTC File No. 181-0180, 4 (Jan. 28, 2019); see also Katherine Peralta and Rick Rothacker, Family Dollar's 'scheme to kill' Charlotte retailer cost thousands of jobs, suit says, THE CHARLOTTE OBSERVER (last updated June 5, 2017, 1:37 PM), https://www.charlotteobserver.com/news/business/article153904309.html.

11 *In the Matter of Cerberus Institutional Partners V, LP et al.,* FTC File No. 141-0108 (July 2, 2015).

operated 18 stores. Within nine months, Haggen filed for bankruptcy.[12] Haggen would later accuse Albertson's of sabotaging the divestitures in order to steal customers from its new rival.[13] Albertson's then bought back many of the divested stores in bankruptcy.

Despite these outcomes, the FTC published a study in 2017 and declared that its merger remedies were effective.[14] It is important that we learn from these and other divestitures that did not fully restore competition.

D. Divestitures are more likely to fail when the FTC relies on speculation, rather than real- world data and robust due diligence.

During my two years as a Commissioner, I have expressed concerns that the FTC makes many of its decisions based on superficial evidence, rather than a close examination of the underlying dynamics in an industry. As a result, the agency can inadvertently miss marketplace realities.

To combat these concerns, I have strongly advocated that we increase the level of analytical rigor in our decision-making across the agency's mission, particularly when it comes to remedies. In the context of a divestiture remedy, this includes a careful assessment of divestiture buyers. Our process should more closely resemble how a lender, insurer, or equity investor might assess a corporate entity's likelihood of success.

A divestiture buyer cannot simply have management or a sales force with expertise or access to capital. Instead, a well-developed long-term strategy that fits within the overall goals of the corporation is necessary. Therefore, we must conduct due diligence that specifically explores how divested assets will fit into a buyer's broader business and long-term financial strategy. For example, we should gather specific evidence that speaks to the likelihood of a divestiture buyer quickly reselling or repurposing an asset. We should examine whether an asset may simply be a part of a branding strategy to increase sales of its other products. Of course, we must always discount the assertions of their executives and lawyers, and we must always seek to substantiate their assertions. Without this level of due diligence, we roll the dice and risk failure.

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12 Hannah Madans, *Haggen bankruptcy: Failure* is *the 'fastest' in modern grocery store history,* THE ORANGE COUNTY REGISTER (Sept. 10, 2015, 9:08 AM), https://www.ocregister.com/2015/09/10/haggen-bankruptcy-failure-is-the-fastest-in-modem-grocery-store-history/.

13 Angel Gonzalez, *Haggen sues Albertsons for $1 billion over big grocery deal,* THE SEATTLE TIMES (last updated Sept. 2, 2015, 9:00 AM), https://www.seattletimes.com/business/retail/haggen-sues-albertsons-for-l-billion-over-big-grocery-deal/.

14 Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012, A Rep. of the Bureaus of Competition and Economics, 10 (2017); *see also* Chris Sagers, *The Limits of Divestiture as an Antitrust Remedy,* N.Y. Times: DealBook/Business & Policy (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/business/dealbook/the-limits-of-divestiture-as-an-antitrust-remedy.html.

Assessing the suitability of a divestiture buyer is difficult, and we must keep these challenges in mind as we evaluate the likelihood that Nestlé and AstraZeneca will fully replace Allergan's role in key product markets.

III. Nestlé Cannot Cure This Harmful Merger

Pancreatic cancer is expected to be the second leading cause of cancer-related death in America this year. It has the highest mortality rate of all major cancers.[15] Cystic fibrosis is a hereditary condition that clogs a person's lungs and obstructs the function of their pancreas. Patients are typically diagnosed as babies. Chronic pancreatitis is a condition where individuals experience persistent inflammation of the pancreas that leads to permanent damage. Patients with pancreatic cancer, cystic fibrosis, chronic pancreatitis, as well as those with other conditions that affect the pancreas, may require pancreatic enzyme replacement therapy.

According to the agency's investigation, the two major prescription drugs used for pancreatic enzyme replacement therapy were AbbVie's Creon and Allergan's Zenpep, with Creon as the clear leader. While there are three other drugs that are also approved for this therapy, two of the three products are made by small pharmaceutical companies that have struggled to make inroads in capturing market share. Allergan owns the third, Viokase. There are no generic competitors.

The merger of AbbVie and Allergan would allow the merged companies to dominate the market, reducing competition in violation of the law. To cure this harm, the majority proposes that the merged AbbVie-Allergan sell the rights to Zenpep and Viokase to Nestlé. This is a risky gamble.

A. Nestlé's core business is focused on food and beverages, not prescription drugs.

Nestlé may be one of the world's largest corporations, but it is not a pharmaceutical company. As the company's mission - "Good Food, Good Life" - indicates, Nestlé is a food and beverage company. The lion's share of its revenue and profits comes from its candy products like CRUNCH and KitKat chocolate bars; coffee products like Nespresso, Nescafe, Blue Bottle, and packaged Starbucks offerings; and other items typically purchased while grocery shopping. In the United States, Nestlé is particularly successful in pet care through its subsidiary Purina, which markets Friskies, Beggin', Tidy Cats, and other brands.

Nestlé seeks to outperform its industry peers in the STOXX Global 1800 Food and Beverage Index,[16] whose major components include Coca-Cola, PepsiCo, and Diageo. The company's public financial statements note that the company ties certain executive compensation

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15 *Pancreatic Cancer Facts,* Hirshberg Foundation for Pancreatic Cancer Research (last visited May 4, 2020), http://pancreatic.org/pancreatic-cancer/pancreatic-cancer-facts/.

16 *WHY INVEST IN NESTLE, A winning strategy delivering results,* NESTLÉ (last visited May 5, 2020), https://www.nestle.com/investors/creating-shareholder-value.

components to this metric. Neither the Board nor management have recently stated that they intend to transform Nestlé into a major player in the pharmaceutical business.

B. Nestlé's efforts on nutrition do not come close to Allergan's capabilities and capacity to compete in pharmaceuticals.

Like many other food and beverage companies, Nestlé has sought to increase its offerings that appeal to health and wellness across its businesses. For example, in its pet care business, Nestlé has launched brands like Purina ONE and Beneful, which cater to consumers looking for healthy food for their dogs. Nestlé recently launched a new Starbucks packaged coffee product with "essential vitamins."

Nestlé also has a subsidiary called Nestlé Health Science that develops and markets "nutritional therapies," such as vitamins, supplements, nutritional shakes, and soups. One of its top-selling products is the Boost nutritional drink.[17] Like Nestlé's other lines of businesses, Nestlé Health Science is heavily engaged in traditional food marketing. For example, the company markets the Boost business by developing new varieties of the product and catering to special diets, such as lactose-free and gluten-free. Boost now offers multiple flavors, a pudding format, and special varieties for men and women.[18]

The Nestlé Health Science subsidiary has also invested in other vitamin and supplement businesses. Recently, it made a major investment to acquire Persona, a personalized vitamin startup.[19] It also purchased Atrium Innovations for $2.3 billion, which makes probiotics, vitamins, and meal supplements.[20]

Nestlé and its nutrition subsidiary cannot match Allergan's experience and know-how. While this subsidiary is offering over-the-counter products to those suffering from pancreatic conditions,[21] is marketing some of its products through doctors,[22] and is run by executives with

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17 Susan Caminiti, *Food giant Nestlé pivots to gain a foothold in the personal nutrition market,* CNBC: Evolve (Oct. 17, 2019, 11:23 AM), https://www.cnbc.com/2019/10/17/nestle-pivots-to-gain-a-foothold-in-the-personal-nutrition-market.html.

18 *Meet the Boost family,* BOOST (last visited May 4, 2020), https://www.boost.com/products.

19 Nestlé Press Release, Nestlé Health Science expands into personalized nutrition with acquisition of Persona™ (Aug. 22, 2019), https://www.nestle.com/media/news/nestle-health-science-acquisition-persona.

20 Nestlé Press Release, Nestlé extends consumer healthcare portfolio by agreeing to acquire Atrium Innovations (Dec. 5, 2017), https://www.nestle.com/media/pressreleases/allpressreleases/nestle-acquires-atrium-innovations.

21 Angus Liu, *Pharma AbbVie, Allergan sell 3 drugs to win US. antitrust clearance – and send AZ, Nestlé into new realms,* FIERCEPHARMA (Jan. 27, 2020), https://www.fiercepharma.com/pharma/abbvie-allergan-sell-3-drugs-to-win-u-s-antitrust-clearance-and-take-astra-nestle-into-new.

22 *ABOUT NESTLE HEALTH SCIENCE,* Nestlé (last visited May 5, 2020), https://www.nestlehealthscience.com/about-us.

related pharmaceutical expertise,[23] the subsidiary's capabilities pale in comparison to what Allergan is today.

Over the years, Allergan and its predecessor companies have developed and acquired a large portfolio of top-selling drugs.[24] Today, Allergan has "built one of the broadest pharmaceutical and device research and development pipelines in the industry."[25] It takes many years for a pharmaceutical company to develop into what Allergan is today. Companies like Allergan don't build themselves into the behemoths they are by accident: they do so for the very specific purpose of achieving the scale and breadth of products across a portfolio that they can then use as leverage in negotiations with health insurers and pharmacy benefit managers. Pharmaceutical businesses have increasingly evolved this way over the last twenty years. This does not happen overnight.

There is simply no comparison between Allergan, with its strategic focus and experience in pharmaceuticals, and Nestlé's nutrition business.

C. Nestlé has a checkered record when it comes to its past experiments with pharmaceuticals.

In 2014, Nestlé became the sole owner of Galderma, a dermatology company. Galderma was originally a joint venture between Nestlé and L'Oreal until Nestlé bought back all the shares in 2014.[26] The venture was not particularly fruitful. Documents produced to the FTC confirm that Nestlé was unsuccessful in [redacted]. Under pressure from activist investor Third Point, Nestlé sold the business in 2019.[27]

In 2011, Nestlé Health Science purchased Prometheus Laboratories.[28] Prometheus held the U.S. rights to an oncology drug that Nestlé sold off in 2019.[29] Nestlé then exited its

23 *Corporate Governance Rep.,* NESTLÉ, 6 (2019), https://www.nestle.com/sites/default/files/2020-03/2019-annual-review-corp-governance-compensation-financial-statements-en.pdf.

24 Acquisitions had long been the strategy for Allergan, which now includes Watson, Actavis, Warner Chilcott and Forest Laboratories . *See* PUBLIC CITIZEN, *By Any Means Necessary: How Allergan Gamed the System to Raise Drug Prices and Flood the Country with Pill,* 7 (Jan. 27, 2019), https://www.citizen.org/news/how-allergan-gamed-the-system-to-spike-prices-and-sell-opioids/.

25 *We Are Allergan,* ALLERGAN (last visited May 1, 2020), https://www.allergan.com/about/about-allergan.

26 *See Consolidated Financial Statements of the Nestlé Group 2014,* NESTLÉ, 6 2 (Feb. 18, 2015), https://www.nestle.co.nz/sites/g/files/pydnoa371/files/aboutus/documents/2014-financial-statements.pdf.

27 Gautam Naik, *Attention shifts to Nestlé's $29B L'Oreal stake after sale of skin health unit,* S&P Global: Market Intelligence (July 18, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/52918238.

28 Nestlé Press Release, Nestlé Health Science acquires leading US gastrointestinal diagnostics company (May 24, 2011), https://www.nestle.com/media/pressreleases/allpressreleases/nestle-health-science-acquires-leading-us-gastrointestinal-diagnostics-company.

investment in Prometheus later that year.[30] In 2010, Nestlé also exited its eye care business.[31] Typically, Nestlé has justified these and other exits on the basis of a periodic strategic review of whether or not the acquired business fit into the company's core strategy. This raises the risk of whether Zenpep might find itself facing similar considerations of whether it fits into the company's core strategy in the future.

D. Other competitors with a small prescription drug footprint have failed to gain traction in this market, which suggests that Nestlé faces an uphill battle relative to Allergan.

Today, only four companies sell prescription pancreatic enzyme replacements: AbbVie's Creon, Allergan's Zenpep and Viokace, Vivus' Pancreaze, and Digestive Care's Pertzye. Because all of the products have similar clinical effectiveness, sales are heavily dependent on whether the drug is listed as "preferred" by a patient's insurance company, since patients typically pay lower co-pays for drugs with preferred status.

The market leader, Creon, is the only medication approved for treatment of five exocrine pancreatic insufficiency medical diagnoses (also known as "indications") in adults. Allergan's Zenpep and Digestive Care's Pertzye have approval for only three of Creon's five indications.[32] This may give Creon a competitive advantage, since the eligible patient population that can be treated with Creon is larger than the population that can be treated with Zenpep. This also may give AbbVie more leverage to bargain for preferred positions on an insurance company's list of covered drugs.

Currently, Allergan aggressively markets its portfolio of drugs to make sure its drugs are preferred by insurance companies. The evidence in the investigation shows [redacted].

Chairman Simons, Commissioner Phillips, and Commissioner Wilson argue that Nestlé can simply copy Allergan's strategy, even though it will only have one drug to market compared to the many that Allergan offers today.

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29 Sarah de Crescenzo, *Nestlé Sells Gut-Health Test Maker Prometheus Labs, Layoffs Expected,* XCONOMY (July 10, 2019), https://xconomy.com/san-diego/2019/07/10/nestle-sells-gut-health-test-maker-prometheus-labs-layoffs-expected/.

30 *Id; see also* Corrine Gretter, *Nestlé Sells Prometheus Laboratories in Trim of Health Portfolio,* BLOOMBERG L. (July 11, 2019, 10:50 AM), https://news.bloomberglaw.com/mergers-and-antitrust/nestle-sells-prometheus-laboratories-in-trim-of-health-portfolio.

31 Nestlé Press Release, Nestlé completes sale of Alcon to Novartis (Aug. 26, 2010), https://www.nestle.com/media/pressreleases/allpressreleases/nestle-completes-sale-of-alcon-to-novartis.

32 Eurand Pharm., Ltd, Zenpep (pancrelipase) Delayed-Release Capsules, BLA 022210 (Aug. 27, 2009); Digestive Care Inc., Pertzye (pancrelipase) Delayed-Release Capsules, BLA 022175 (May 17, 2012); AbbVie Inc., Creon (pancrelipase) Delayed-Releas e Capsules, BLA 020725 (Apr. 30, 2009).

Unsurprisingly, smaller pharmaceutical companies that don't offer an expansive list of drugs have less bargaining leverage. Pancreaze and Pertzye have less than 2% market share,[33] even though they work just as well for most patients that use Creon and Zenpep. This reality relegates companies like them to market their products on a more limited basis, with the hopes that another drug company may one day take them over. Nestlé, which will not have much bargaining leverage, may find itself losing more share to Creon and suffering the same fate as Pancreaze and Pertzye.

Chairman Simons, Commissioner Phillips, and Commissioner Wilson claim that Nestlé has "budgeted" funds for marketing and future development. This is not a promise but is instead a sales pitch. I prefer to approach these assertions with skepticism and evaluate them against how they fit into the buyer's overall financial incentives.

E. Nestlé manages its business to maximize its overall profits. Even if the Zenpep business shrinks, it will have little impact on Nestlé's overall financial results.

When taking a risk of divesting a drug to food and beverage company, it is particularly important to determine whether success or failure will make a meaningful difference in Nestlé's overall financial performance - especially for a company that is seeking to enter a market outside of its core capabilities and strategic focus. In my view, the Commission primarily focused on whether Nestlé would have the personnel and manufacturing capabilities to offer Zenpep. However, I am concerned that we did not conduct sufficient financial due diligence.

After conducting my own analysis of financial information from Nestlé, it is clear that the purchase of these divested businesses is fairly minor. In fact, the purchase was not even significant enough to disclose the financial details to Nestlé's investors. While other transactions and business developments have been carefully examined in management calls with analysts, the company has been mostly silent on this transaction, potentially due to the fact that the acquisition is much smaller than its other transactions. Based on my review, evidence suggests that even if Zenpep lost significant share to a combined AbbVie and Allergan, it would not materially impact Nestlé's overall earnings per share.

I can also conclude that Nestlé's top management and board directors will not have an incentive to devote significant energy to ensure that this divestiture is successful. Based on my assessment, it is more likely to prioritize revitalizing its Perrier and San Pellegrino sparkling water brands, investing further in pet care, and increasing sales of its Starbucks packaged coffee business. All of these would make more financial sense than allocating significant time and effort to make Zenpep a true success. In addition, based on Nestlé's approach to mergers and acquisitions, I also believe that there is a significant risk that the Zenpep business will be resold.

33 *Data for Digestive Enzymes (2018 - 2019),* IQVIA (on file with IQVIA); *see also* Analysis of Agreement Containing Consent Orders to Aid Public Comment, *in the Matter of AbbVie Inc. and Allergan plc,* FTC File No. 191-0169 , 2 (May 5, 2020).

F. Supplemental order provisions could have reduced the risk of Nestlé as the divestiture buyer.

While I believe there would be many buyers that may have been superior to Nestlé,[34] the Commission could have taken steps to increase the chance that Nestlé would succeed in taking Allergan's place over the long term. These provisions could be designed after thorough due diligence on Nestlé's corporate governance, executive compensation, mergers and acquisition strategy, and capital allocation strategy.

For example, the Commission could have sought amendments to the company's senior management compensation agreements that incentivize investment and attention to Zenpep. The Commission could have sought binding assurances that Nestlé senior management would not resell assets without prior Commission approval. The Commission could have sought terms that give the nutrition subsidiary more independence when seeking outside financing to grow the business. Other supplemental provisions could also bolster senior management's commitment to long-term success of the divestiture.

Given Nestlé's core focus, track record, and the financial aspects of this deal, I have serious doubts that Nestlé will be able to replace the competition killed off by AbbVie and Allergan's merging. The combined company has essentially selected a new competitor that it will clearly be able to crush in the market, and the FTC has given the go-ahead. This is too risky and is a mistake.

IV. AstraZeneca Has an Option to Compete, Not a Commitment to Compete

Injectable biologic drugs that affect the body's immune system can be used to treat a host of conditions and disorders. Unsurprisingly, such drugs can be very expensive for companies to develop and for affected patient populations to afford. Under the FTC's status quo approach of analyzing pharmaceutical mergers, the agency determined that Allergan had an immunologic pipeline drug in development that could one day rival those currently marketed by AbbVie.

Since AbbVie also has a pipeline drug very similar to Allergan's in development, the FTC is proposing that the merging companies renegotiate a development deal with AstraZeneca.

Both AbbVie and Allergan are developing "IL-23" inhibitors[35] to treat moderate-to-severe Crohn's disease and ulcerative colitis.[36] These two diseases are caused by chronic

34 Merging parties typically propose a buyer to the Commission rather than the Commission selecting a buyer from a list of bidders that parties are willing to sell to.

35 IL-23 is a pro-inflammatory cytokine that is secreted by white blood cells. Allergan's version of the IL-23 inhibitor is called brazikumab, and AbbVie's is called Risankizumab. *See Immunology Pipeline: Risankizumab,* ABBVIE (last visited May 4, 2020), https://www.abbvie.com/our-science/pipeline/risankizumab.html; *Gastroenterology Pipeline: Brazikumab,* ALLERGAN (last visited May 4. 2020), https://www.allergan.com/research-and-development/pipeline.

36 Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of AbbVie Inc. and Allergan plc,* FTC File No. 191-0169, 1 (May 5, 2020).

inflammation in the digestive track and have similar symptoms: severe diarrhea, abdominal pain, fatigue, and weight loss. Both can be debilitating and lead to life-threatening complications.

The parties are two of only four companies developing IL-23 inhibitors for Crohn's disease and ulcerative colitis.[37] AbbVie's IL-23 inhibitor Skyrizi is expected to be approved in [redacted] to treat Crohn's disease and in [redacted] to treat ulcerative colitis. Allergan is expected to launch its IL-23 inhibitor in 2025 for Crohn's disease and in 2026 for ulcerative colitis.[38]

These unusual deal terms make me question whether AstraZeneca will have the incentive to fully replace competition lost from the merger or to complete the development process. I share the view of some industry analysts who believe this deal is a massive windfall for AstraZeneca.[39] The company will pay nothing and gets to keep the $250 million upfront payment it received a few years ago from Allergan.[40] Now, it can re-license the project again, which could further delay needed competition in the immunology space.

A. AstraZeneca has only recently re-focused on the immunology space, which suggests it may not prioritize the development of brazikumab.

In 2015, AstraZeneca made a strategic decision to focus on a narrow set of core therapy areas that did not include immunology.[41] At that time it began selling off rights to various drugs in its immunology portfolio. Brazikumab was part of that effort. In 2016, it licensed its research and development ofbrazikumab to Allergan.[42] Prior to that, in 2015, AstraZeneca divested its non-U.S. global rights to Entocort (a medicine for ulcerative colitis and Crohn's Disease). AstraZeneca decided to discontinue its work on brazikumab because the project is "outside [of] AstraZeneca's three main therapy areas."[43] AstraZeneca licensed brazikumab to Allergan, and Allergan took over the work in exchange for a $250 million upfront payment and royalties paid

37 *Id.,* 2.

38 *AstraZeneca acquires global rights to brazikumab following AbbVie'spending acquisition of Allergan,* PHARMACEUTICAL TECHNOLOGY (Feb. 3, 2020), https://www.pharmaceutical-technology.com/comment/brazikumab-allergan/.

39 Jacob Plieth, *Astra's retrospective brazikumab cashback,* EVALUATE VANTAGE (Jan. 27, 2020), https://www.evaluate.com/vantage/articles/news/snippets/astras-retrospective-brazikumab-cashback.

40 AstraZeneca Press Release, Medimmune out licenses potential medicine for inflammatory diseases to Allergan (Oct. 3, 2016), https://www.astrazeneca.com/media-centre/press-releases /2016/medimmune-out-licenses-potential-medicine-for-inflammatory-diseases-to-allergan-03102016.html#.

41 AstraZeneca Press Release, AstraZeneca sharpens focus on main therapy areas through agreement with gastroenterology specialist Tillotts Pharma for Entocort (July 9, 2015) https://www.astrazeneca.com/media-centre/press-releases/2015/astrazeneca-tillotts-pharma-entocort-gastroenterology-09072015.html#.

42 AstraZeneca Press Release, *supra,* note 40.

43 AstraZeneca Press Release, *supra,* note 40.

to AstraZeneca.[44] While AstraZeneca is apparently now re-focusing on immunology, these facts raise questions about its long-term commitment to the field.

The Commission proposes to resolve competitive concerns from the overlap between Allergan's brazikumab and AbbVie's Skyrizi by requiring Allergan to terminate the 2016 licensing agreement with AstraZeneca. AstraZeneca will take back all intellectual property it previously licensed to Allergan, as well as all the intellectual property Allergan has developed in relation to brazikumab since acquiring the license to the product. In addition, Allergan will assign the contracts related to manufacturing and clinical development of brazikumab to AstraZeneca and transfer ownership of all clinical study materials and clinical data.

AstraZeneca will not make an upfront payment for brazikumab, as would normally be expected in a Commission-approved divestiture. Instead, the money is flowing in the opposite direction: Allergan will reimburse AstraZeneca up to [redacted] of AstraZeneca's development costs related to Brazikumab [redacted].

B. Given the deal structure of the "divestiture, "AstraZeneca has weaker incentives than Allergan to bring brazikumab to market and to compete successfully.

The Commission's proposed remedy is not a divestiture in a traditional sense, because there is no purchase of assets. Allergan is merely terminating a 2016 licensing agreement that Allergan entered into with AstraZeneca for the rights to take over development work of brazikumab. Thus, the Commission's remedy merely grants AstraZeneca the right to continue the development of a product that it previously decided to get rid of, with funding from Allergan.

One analyst correctly noted that this arrangement is "essentially a 'free' new pipeline option."[45] In other words, if AstraZeneca wants to prioritize brazikumab, it can, but it doesn't have to. It is not a true capital commitment like Allergan's. AstraZeneca clearly had good cause to believe that Allergan would be better positioned to commercialize brazikumab than it did when it entered into the 2016 licensing agreement. This is not unlike a situation where someone pays $300 for a ticket to a desirable concert performance, but then gives it away. When we make a substantial purchase like that, we are revealing our preferences that we value that good, service, or investment. This can demonstrate that the purchase is a priority ranking above other items we might purchase. Using this analogy, someone who gets a free ticket is much more likely to be a no-show than someone who paid for it. And if the ticket's market price is $300, there is also a risk that the person getting it for free will simply resell it for a $300 profit.

I am always concerned when a buyer is selected outside of a typical, competitive bidding process. Theoretically, AstraZeneca may find it worthwhile to prioritize this project over others.

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44 *Id.*

45 Nick Paul Taylor, *Allergan axes AstraZeneca deal, clearing path for AbbVie merger,* FIERCEBIOTECH (Jan. 27, 2020, 7:57 AM), https://www.fiercebiotech.com/biotech/allergan-axes-astrazeneca-deal-clearing-path-for-abbvie-merger.

In my view, the FTC's investigation did not include a rigorous analysis of all of AstraZeneca's development projects and the metrics AstraZeneca uses to prioritize such initiatives. Absent this evidence and analysis, we have little to rest on when claiming that AstraZeneca will fill the shoes of Allergan, except for self-interested assertions by the parties benefiting from this settlement.

Of course, there is a risk that the current owner of a drug development project will not succeed. However, we must take steps to ensure that any prospective buyer has the same or higher chance of success.

Unfortunately, the Commission did not require an alternative deal structure that would have increased the likelihood of AstraZeneca's entry. The deal structure could have easily been altered in ways that would better reveal AstraZeneca's preferences over other potential projects.

C. There are no supplemental conduct provisions to ensure that AstraZeneca will bring brazikumab to market.

The unusual deal structure is enough to disqualify AstraZeneca as a credible replacement for Allergan. Even though the Commission insisted on pushing forward with AstraZeneca, the agency did not take steps to increase AstraZeneca's chances of success by including supplemental conduct provisions tailored to the features of competition in the market.

As discussed earlier, the FTC often includes supplemental conduct provisions to increase the likelihood that a divestiture buyer can replace the competitive intensity lost by a merger. For example, AstraZeneca is not subject to the Commission's order, and the Commission is not requiring AstraZeneca to prioritize the brazikumab project over other opportunities.

The Commission could have also taken steps to reduce a key barrier to entry and expansion for AstraZeneca by restricting AbbVie and Allergan's contracting and rebating practices. This would make it more likely that AstraZeneca would exercise its option to develop and bring brazikumab to market.

Importantly, in the immunology space, a key feature of competition is the ability for a market player to engage in "portfolio contracting" and "bundled rebates" across its portfolio of drugs. The evidence in the investigation suggests that AbbVie currently uses its bargaining leverage from its blockbuster drug Humira to preference its other immunology drugs. For example, [redacted].

AbbVie's rebating practices are suspicious in their own right, and certain aspects of these practices might be unlawful. But, rebating is undoubtedly a fixture of the competitive environment in immunology that might act as a barrier to entry and expansion for other drugmakers with less bargaining leverage.

One potential way to increase the likelihood that AstraZeneca would fully replace lost competition and bring brazikumab to market would be to restrict certain contracting practices by the combined AbbVie and Allergan.

In certain instances, the FTC and Department of Justice (DOJ) have prohibited contracting practices that make entry and expansion difficult for a divestiture buyer.[46] For example, in 2016, the DOJ determined that AnheuserBusch InBev's (ABI) acquisition of SABMiller would increase ABI's incentive and ability to disadvantage its remaining brewery rivals by limiting or impeding the distribution of their beers.[47] ABI's practices typically included incentives for independent wholesale distributors to sell exclusively or near exclusively ABI beers. To remedy that concern, ABI was required to divest SABMiller's entire U.S. business, including SABMiller's ownership interest in MillerCoors, the right to brew and sell certain SABMiller beers in the United States, and the worldwide Miller beer brand rights. ABI was also prohibited from engaging in contracting practices designed to limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals.[48] It is unclear whether this supplemental conduct provision fully restored competition, though it is certainly better than allowing the divestiture to proceed without meaningful safeguards.

The FTC pursued a similar approach in its 2012 order resolving competitive concerns stemming from the merger of CoStar Group, Inc. and LoopNet, Inc.[49] The FTC imposed supplemental conduct provisions that prohibited the merged firm from restricting customers' ability to support the divested product or requiring customers to buy any of its products as a condition for receiving other products.[50] Again, we do not know whether this belt-and-suspenders approach fully restored the competition lost by the merger, but it is certainly less risky than allowing a divestiture buyer to be squashed by the combined company.

While provisions like these could have ameliorated some of the concerns with AstraZeneca, I ultimately conclude that simply allowing AstraZeneca to get a windfall without skin-in-the-game is problematic in its own right.

IV. Conclusion

AbbVie and Allergan are no strangers to the Federal Trade Commission. Both companies are pioneers in intellectual property abuse and anticompetitive practices. The FTC has battled

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46 *United States v. Anheuser-Busch InBEV SA/NV, et al.,* No. 1:16-cv-01483 (Oct. 22, 2018); *In the Matter of Simon Property Group, Inc.,* FTC File No. 101-0061 (Jan. 13, 2011); *In the Matter ofCoStar Group, Inc., Lonestar Acquisition Sub, Inc., and LoopNet, Inc.,* FTC File No. 111-0172 (Aug. 29, 2012); *In the Matter of Perrigo Company and Paddock Laboratories, Inc.,* FTC File No. 111-0083 (June 21, 2012).

47 *United States v. Anheuser-Busch InBEV SA/NV, et al.*

48 *Id.*

49 *In the Matter of CoStar Group, Inc., Lonestar Acquisition Sub, Inc., and LoopNet, Inc.*

50 *Id.*

both companies for years, including one case that went to the Supreme Court and another that achieved a record-breaking monetary judgment.[51]

But in this matter, we took a far different approach. Just days after the President declared a state of emergency due to the current global 2andemic, the FTC's Bureau of Competition entered into a settlement with AbbVie and Allergan. [redacted], eliminating any realistic possibilities of correcting the deficiencies in the settlement.

The FTC must learn from this experience and let go of the status quo. The Commissioners should take several steps to move forward.

(1) Dramatically increase rigor and Commission supervision of innovation-merger investigations, especially in industries where new market entrants drive innovation.

I share Commissioner Rebecca Kelly Slaughter's concerns about investigations into innovation effects of mergers. It is difficult to quantify the harms associated with suppressed entry of new life-saving innovations or breakthrough technologies. When pharmaceutical industries assemble multiple dominant products or when technology companies combine multiple sources of data, this affects how those firms can exert bargaining leverage across the supply chain. It also reduces the ability for new firms to raise capital for entry.

However, in my view we do not have a robust approach to assess how a merger can choke off the entry of startups and nascent businesses. I have observed that when we do uncover evidence that a transaction may lead to these effects, we do not give it the appropriate weight.

As Commissioners, we must substantially increase our supervision to ensure we are meeting our obligations to the public to protect competition. Specifically, the Commission should:

- Request that the Inspector General conduct a programmatic review of our merger investigations in biomedical, consumer technology, and other innovation markets.

- Hold formal Commission meetings on large merger investigations in these sectors prior to any proposed remedy negotiated between staff and merging parties.

- Analyze "stealth consolidation" in the pharmaceutical sector, in accordance with Commissioner Christine S. Wilson's statement in February of this year.[52]

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51 In 2018, after years of hard-fought litigation , a federal court awarded the FTC a $448 million monetary judgment – the highest ever in a litigated antitrust case – after finding that AbbVie broke the law by filing sham patent infringement lawsuits against potential generic competitors. *Fed. Trade Comm'n v. AbbVie et al.,* 329 F. Supp. 3d 98 (E.D. Pa. 2018). For years, the FTC and Allergan battled in court over so-called pay-for-delay settlements, where pharmaceutical companies gave payoffs to generic companies to stay off the market. The case was ultimately decided by the Supreme Court. *Fed. Trade Comm'n v. Actavis, Inc. et al.,* 570 U.S. 136 (2013). (In 2015, Actavis purchased Allergan, and the combined company took Allergan's name. The CEO of Actavis, Brent Saunders, continues to be the CEO of Allergan).

- Require the Bureau of Competition to obtain a vote of the Commission before closing investigations or granting early termination of the Hart-Scott-Rodino waiting period for large mergers, particularly in sectors where innovation is critical for the public interest.[53]

(2) Enhance our analytical capabilities when assessing prospective divestiture buyers and when crafting remedies for anticompetitive mergers and conduct.

During the Senate confirmation process, Chairman Simons outlined his desire to reduce the failure rate of remedies in merger settlements.[54] I completely agree with this objective.

The FTC Bureau of Competition's Compliance Division is one of the most important offices in the entire agency. The office assesses prospective divestiture buyers, creates remedies, and ensures compliance with Commission orders. The Compliance Division largely consists of attorneys. While the division has strong capabilities when it comes to assessing many of the legal dimensions of a transaction, including the transfer of contracts and intellectual property, the Commission has not augmented the division with other needed skill sets related to the financial and technical dimensions.

For example, in the United Kingdom, the Competition and Markets Authority established a highly respected group focused on remedies. The group is interdisciplinary and includes individuals with backgrounds in law, auditing and accounting, financial analysis, investment banking, management consulting, and other analytically minded skill sets.[55] It is clear that this group is a tremendous asset to the Competition and Markets Authority's competition policymaking.

The Commission would also benefit from those with diverse backgrounds and technical expertise. To increase analytical rigor and reduce risk of divestiture remedy failure, the Commission should:

- Support the Compliance Division with additional professionals with experience in transactional due diligence and other technical skill sets.

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52 Statement of Commissioner Christine S. Wilson joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-fiIe-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

53 For example, shortly after the new Commission took office in 2018, the Bureau of Competition was able to grant unconditional clearance to Takeda's $62 billion takeover of Shire without seeking a Commission vote.

54 Federal Trade Commissioner Confirmations Before The Senate Commerce, Science and Transportation Committee, 115th Cong. (Feb. 14, 2018).

55 Adam Land, *Introducing our Remedies, Business and Financial Analysis team,* COMPETITION AND MARKETS AUTHORITY (Aug. 17, 2018), https://competitionandmarkets.blog.gov.uk/2018/08/17/introducing-our-remedies-business-and-financial-analysis-team/.

- Increase the proportion of financial analysts in the Bureau of Economics and elevate their role in investigations.

(3) Increase coordination and cooperation with state attorneys general in merger review.

When law enforcement agencies do not effectively cooperate and coordinate, companies seeking to consummate unlawful mergers can take advantage of the gaps. Given their concurrent jurisdiction, the state attorneys general are key partners in competition enforcement.

Coordination and cooperation can include sharing documentary evidence, conducting joint interviews and investigational hearings, and pooling resources on expert analysis. The FTC should do more to strengthen these partnerships. To advance this goal, the Commission should:

- Ensure that Commission staff verify that merging parties have complied with subpoenas and other reasonable information requests from state regulators prior to finalizing any settlement negotiations.

- Update agreements and policies governing joint investigations with state attorneys general on merger review.[56]

- Assist state policymakers who are seeking to institute state laws on merger control and pre-merger notification.

(4) Provide greater transparency to the public about the scope of FTC merger reviews.

Under agency rules, the Commission must solicit public comments on its administrative settlements regarding unlawful mergers. The agency publishes an Analysis to Aid Public Comment that describes the investigation. However, the FTC provides sparse information in this document. I previously raised this concern in *Fresenius/NxStage*.[57]

Greater transparency can increase confidence that the Commission was thorough and independent in its investigation, while still respecting laws and regulations governing confidentiality. It can also offer other merging parties clearer expectations of how it can fully cooperate. The Commission should:

- Publish a more detailed discussion of the analyses conducted regarding potential anticompetitive effects when proposing a settlement.

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56 *Protocol for Coordination in Merger Investigations,* Fed. Trade Comm'n (last visited May 5, 2020), https://www.ftc.gov/tips-advice/competition-guidance/merger-investigations; *see also Press Release, Fed Trade Comm'n, Federal Antitrust Agencies and State Attorneys General Announce Protocol for Joint Federal/State Merger Investigations (Mar. 11, 1998), https://www.ftc.gov/news-events/press-releases/1998/03/federal-antitrust-agencies-and-state-attorneys-general-announce.*

57 Dissenting Statement of Commissioner Rohit Chopra In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227, 4 (Feb. 19, 2019) https://www.ftc.gov/public-statements/2019/02/statement-commissioner-chopra-matter-fresenius-medical-care-ag-co-kgaa.

- Disclose the data sets relied upon to justify a remedy (or lack thereof).
- Provide the public with more details about the assessment of any proposed divestiture buyers.
- Outline the Commission's assessment of entry conditions post-transaction.

Today's uncertain times reveal that the mission of the FTC has never been more relevant. The agency must evolve, and the Commission must take concrete actions to improve agency decision-making to ensure the agency is advancing this mission.

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Today, the Commission proposes a consent agreement with AbbVie and Allergan to settle claims that the parties' pending merger will substantially lessen competition in three relevant markets: (1) drugs for the treatment of exocrine pancreatic insufficiency, a condition that makes it impossible to digest food properly; (2) Interleukin-23 ("IL-23") inhibitors for the treatment of moderate-to-severe Crohn's disease; and (3) IL-23 inhibitors for the treatment of moderate-to- severe ulcerative colitis. AbbVie's $63 billion acquisition of Allergan-a merger of two of the largest pharmaceutical companies in the world, both of which have previously been the subject of allegations of anticompetitive conduct-has rightfully garnered substantial public attention. Commission staff painstakingly reviewed and analyzed large volumes of information, and I commend them for their work on this investigation, especially in light of the challenging and unprecedented circumstances of the past several months. As I have said in the past, however, I remain concerned about the Commission's approach to pharmaceutical mergers. In this case specifically, I do not believe the proposed settlement adequately remedies a range of competitive issues that this acquisition poses. I share the concerns Commissioner Chopra has articulated in detail about the proposed divestitures and the absence of meaningful benefits to consumers, and I write separately only to add a few additional thoughts on the question of innovation harms.

Analysis of the effects of a merger on innovation is a standard practice for the Commission in all merger matters, and I think that it deserves particularly substantial and vigorous investigation when it comes to transactions between pharmaceutical companies. At a time when we are all enduring increasingly difficult news about family members, friends, and neighbors near and far with serious health concerns because of the global coronavirus pandemic, we are keenly aware of the need for companies to innovate by creating and manufacturing products for testing, prevention, and treatment. As pharmaceutical companies frequently cite the

need to invest in research and development to justify exorbitant drug prices,[1] innovation consequences of pharmaceutical mergers merit particular scrutiny.

Vigorous enforcement of the antitrust laws helps protect and promote the competitive environment that supports strong incentives for research and development and leads to greater innovation.[2] Innovation also helps lead to better outcomes for consumers in the form of lower prices, higher quality, and more choices. Thus, it is essential to scrutinize closely whether a merger is likely to diminish innovation competition by incentivizing the merged firm to curtail its innovative efforts, including investment in research and development, below the level that would prevail in the absence of the merger.

The explicit inclusion of a section on innovation effects in the 2010 Horizontal Merger Guidelines was a significant step in formalizing the recognition that a merger could harm innovation.[3] Since the 2010 Guidelines, the Commission has brought several cases that include allegations of harm to innovation.[4] To conduct a thorough analysis of innovation competition, it is essential to seek both past evidence of innovation in an industry, but also information about what parties and other stakeholders in the industry predict about future competition. When considering the competitive effects on innovation, we must be particularly mindful of Section 7's instructing us to prevent monopolies and oligopolies in their "incipiency" and the Supreme Court's emphasis that the Clayton Act deals with "probabilities, not certainties."[5]

More importantly, the Commission must seek to gather this kind of evidence at the earliest stage possible in an investigation and from the most relevant sources possible to ensure the most thorough record. In addition, we need to cast a broad net for third parties and other industry participants to consult. In this case, staff deserves credit for its consideration of, and investigation into, the transaction's effect on the parties' research and development programs and investments, as well as on innovation competition that was more in-depth than what I have seen in previous pharmaceutical mergers.[6]

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1 Yoni Blumberg, *Here's why many prescription drugs in the US cost so much – and it's not innovation or improvement,* CNBC (Jan. 14, 2019), https://www.cnbc.com/2019/01/10/why-prescription-drugs-in-the-us-cost-so-much.html.

2 *See* Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption,* Innovation Pol'y & Econ. 125, 26 (2019), http://faculty.haas.berkeley.edu/shapiro/disruption.pdf.

3 *See* U.S Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.4 (2010).

4 *See, e.g., In the Matter of Altria Group/JUUL Labs,* Docket No. 9393 (Apr. 1, 2020); *In the Matter of Illumina Inc./Pacific Biosciences of California, Inc.,* Docket No. 9387 (Dec. 12, 2019); *In the Matter of CDK Global and Auto /Mate,* Docket No. 9382 (Mar. 20, 2018); *In the Matter of Verisk/Eagle View,* Docket No. 9363 (Dec. I 6, 2014); *FTC v. Steris Corporation,* No. 15-cv-1080, (N.D. Ohio Sept. 24, 2015).

5 *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 (1962).

6 *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb and Celgene,* Fed. Trade Comm'n (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf; *Closing Remarks of Commissioner Rebecca Kelly Slaughter,*

Nevertheless, I am concerned that the initial scope of the investigation curtailed the Commission's ability to obtain and consider all relevant evidence. For example, crucial pieces of evidence should be made available early in the investigation and pursuant to a Second Request. Because Second Requests are enforceable in court for a party's lack of substantial compliance, information produced under that process provides the Commission with a materially different level of confidence that it has received the relevant information needed to determine whether a transaction is likely to harm competition. Furthermore, in these types of cases, it is incumbent on the Commission to seek and on parties to produce evidence from the individuals best positioned to understand the scientific significance of particular research and development projects, as well as contemporaneous evidence that was generated at the time and not documents created in anticipation of an agency challenge.

Based on my review of the record before the Commission, and in light of AbbVie's public representations about its plans to curtail Allergan's ongoing research programs,[7] I cannot share the majority's confidence that the innovation effects of this merger are competitively benign.

I appreciate that the investigative analysis in this case on the question of innovation harms is movement in the right direction. Going forward, however, I hope our investigations will address these issues more comprehensively at the very start of an investigation.

FTC Hearing #4: Innovation and Intellectual Property (Oct. 24, 2018), https://www.ftc.gov/system/files/documents/public_statements/1418279/slaughter_-_closing_remarks_at_ip_innovation_hearing_10-24-18.pdf.

7 Eric Sagonowsky, *AbbVie, nearing the end of Humira's historic run, scoops up a struggling Allergan for $63B,* FiercePharma (June 25, 2019), https://www.fiercepharma.com/pharma/no-allergan-split-abbvie-buys-struggling-drugmaker-for-63b.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from AbbVie Inc. ("AbbVie") and Allergan plc ("Allergan") designed to remedy the anticompetitive effects resulting from AbbVie's proposed acquisition of Allergan. The proposed Decision and Order ("Order") contained in the Consent Agreement requires Allergan to divest all rights and assets related to its Zenpep and Viokase products to Nestlé S.A. ("Nestlé"). The proposed Order also requires that Allergan return its rights and assets related to brazikumab to AstraZeneca plc ("AstraZeneca").

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

Pursuant to a Scheme of Arrangement under Irish law, AbbVie will acquire all of the voting securities of Allergan from its shareholders for approximately $63 billion (the "Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for (1) prescription drugs for the treatment of exocrine pancreatic insufficiency ("EPI"); (2) Interleukin-23 ("IL-23") inhibitors for the treatment of moderate-to-severe Crohn's disease; and (3) IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

THE PARTIES

Headquartered in North Chicago, Illinois, AbbVie researches, develops, manufactures, and sells prescription pharmaceutical products and biologic products in several therapeutic areas, including immunology, oncology, virology, neuroscience, and women's health. Among other products, AbbVie sells a product to treat EPI and is developing an IL-23 inhibitor to treat moderate-to-severe Crohn's disease and ulcerative colitis. Like AbbVie, Allergan researches, develops, manufactures, and sells prescription pharmaceutical products in the United States. Among its products, Allergan also sells a product to treat EPI and is developing an IL-23 inhibitor to treat moderate-to-severe Crohn's disease and ulcerative colitis.

THE RELEVANT PRODUCTS AND STRUCTURE OF THE MARKETS

Drugs for the Treatment of Exocrine Pancreatic Insufficiency

EPI is a condition that results from a deficiency of pancreatic enzymes. Patients who have EPI cannot properly digest fats, proteins, and carbohydrates in the foods they eat and, as a

result, may suffer from malnutrition and have uncomfortable gastrointestinal symptoms when they eat. EPI is treated using pancreatic enzyme products. Pancreatic enzyme products contain the active ingredient pancrelipase, a mixture of the digestive enzymes amylase, lipase, and protease that is extracted from the pancreas of a pig.

Only four companies sell prescription pancreatic enzyme product in the United States: AbbVie, Allergan, Vivus Inc. ("Vivus"), and Chiesi USA, Inc. ("Chiesi"). AbbVie is the clear market leader with its product, Creon, and Allergan is the second-largest supplier, with its product, Zenpep. Vivus sells Pancreaze and Chiesi sells Pertzye. Allergan also sells a second pancreatic enzyme product, Viokase, although its sales in the United States are much more limited. Together, AbbVie and Allergan have a share of more than 95 percent of the market for drugs to treat EPI.

Interleukin-23 Inhibitors for the Treatment of Moderate-to-Severe Crohn's Disease and for the Treatment of Moderate-to-Severe Ulcerative Colitis

Ulcerative colitis and Crohn's disease are the most common causes of chronic inflammation of the digestive track. Both diseases have similar symptoms—severe diarrhea, abdominal pain, fatigue, and weight loss—and both can be debilitating and lead to life-threatening complications. The location of the inflammation is the primary difference between the two diseases: ulcerative colitis is a continuous inflammation of the colon, affecting only the innermost lining, while Crohn's disease can occur anywhere between the mouth and the anus, has healthy parts of the digestive tract between inflamed parts, and can occur in all layers of the bowel walls. Because the diseases are similar, drugs that are effective in treating ulcerative colitis are also typically effective in treatment Crohn's disease (and vice versa), but the United States Food and Drug Administration ("FDA") requires that companies seeking ulcerative colitis and Crohn's disease indications for drugs conduct separate clinical studies and submit separate applications to market drugs for each indication.

A variety of drugs are approved to treat ulcerative colitis and Crohn's disease, but the effectiveness for most drugs is limited. IL-23 inhibitors are a new class of drugs to treat both diseases. Johnson & Johnson's Stelara is the only IL-23 inhibitor currently approved to treat moderate-to-severe Crohn's disease and ulcerative colitis in the United States. Stelara is both an IL-23 inhibitor and an Interleukin-12 inhibitor. Only three other companies—AbbVie, Allergan, and Eli Lilly and Company—have IL-23 inhibitors in late-stage development for ulcerative colitis and Crohn's disease. Allergan is developing brazikumab and AbbVie is developing Skyrizi.

THE RELEVANT GEOGRAPHIC MARKET

The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition. Drugs to treat EPI and drugs to treat moderate-to-severe ulcerative colitis and Crohn's disease are prescription pharmaceutical products and regulated by FDA. As such, products sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in substantial competitive harm to consumers in the markets for prescription drugs for the treatment of EPI, IL-23 inhibitors for the treatment of moderate-to-severe Crohn's disease, and IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis. Together, AbbVie and Allergan account for more than 95 percent of the market for drugs to treat EPI, and they are two of a limited number of companies in late-stage development with IL-23 inhibitors to treat moderate-to-severe ulcerative colitis and Crohn's disease.

ENTRY CONDITIONS

Entry in the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. New entry would require significant investment of time and money for product research and development, regulatory approval by the FDA, developing clinical history supporting the long-term efficacy of the product, and establishing a U.S. sales and service infrastructure. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring the combined company to divest Allergan's Zenpep and Viokase business, including its regulatory approvals, intellectual property, contracts, and inventory to Nestlé, and Allergan's brazikumab business to AstraZeneca. AbbVie and Allergan also must transfer all business information, research and development information, regulatory, formulation, and manufacturing reports related to the divested products, as well as provide access to knowledgeable employees to assist in the transfer. The provisions of the Consent Agreement ensure that Nestlé and AstraZeneca become independent, viable, and effective competitors in the U.S. markets.

Nestlé is the world's largest food and beverage company, operating in more than 190 countries around the world. While the company is most well-known for its chocolate products, it also operates Nestlé Health Science, an integrated health company that focuses on nutrition products, including enteral feeding products that are used in hospitals and at home by patients who are unable to chew or swallow food. Nestlé's existing business includes products that are highly complementary to the divestiture assets. Nestlé has the expertise, U.S. sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition.

AstraZeneca is a global research-based pharmaceutical company specializing in researching, developing, manufacturing, and marketing prescription products. AstraZeneca was responsible for conducting some of the early phase clinical studies for brazikumab, but out-licensed the product to Allergan in 2016. AstraZeneca is a well-qualified buyer for brazikumab because, as the original innovator of the product, it already has experience developing

brazikumab prior to out-licensing it to Allergan, and, further, the key team members who were previously responsible for brazikumab's development are still employed by the company and will take responsibility for the developing the product. With its resources, capabilities, and previous experience with brazikumab, AstraZeneca is well positioned to successfully develop and commercialize the product and thereby replace the competition that otherwise would have been lost through the proposed Acquisition.

AbbVie and Allergan must accomplish the divestitures no later than ten days after consummating the proposed Acquisition. If the Commission determines that Nestlé or AstraZeneca are not acceptable acquirers, or that the manner of the divestitures is not acceptable, the proposed Order requires AbbVie and Allergan to unwind the sale of rights and assets and then divest the affected product to a Commission-approved acquirer within six months of the date the Order becomes final. The Commission has agreed to appoint a Monitor to ensure that AbbVie and Allergan comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the rights and assets to the buyers. The proposed Order further allows the Commission to appoint a trustee in the event that AbbVie and Allergan fail to divest the products as required.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

ARKO HOLDINGS LTD., GPM SOUTHEAST, LLC, GPM PETROLEUM, LLC, AND EMPIRE PETROLEUM PARTNERS, LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4726; File No. 201 0041
Complaint, August 25, 2020 – Decision, October 5, 2020

This consent order addresses the $415 million acquisition of certain assets of Empire Petroleum Partners, LLC by Arko Holdings Ltd., GPM Southeast, LLC, and GPM Petroleum, LLC. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the retail sale of gasoline in seven local markets in Indiana, Michigan, Maryland, and Texas, and by substantially lessening competition for the retail sale of diesel fuel in three local markets in Indiana, Michigan, and Texas. Under the order respondents must divest certain retail fuel assets in seven local markets in Indiana, Michigan, Maryland, and Texas.

Participants

For the *Commission*: *Steven R. Couper* and *Nicolas Stebinger.*

For the *Respondents*: *Stephen M. Pepper, Greenberg Traurig LLP; Edward G. Biester III, Duane Morris LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Arko Holdings Ltd., through its indirectly controlled subsidiaries GPM Southeast, LLC, and GPM Petroleum, LLC, entered into an agreement to acquire retail fuel outlets and other interests from Empire Petroleum Partners, LLC, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows.

I. RESPONDENTS

GPM

1. Respondent Arko Holdings Ltd. ("Arko") is a corporation organized, existing, and doing business under, and by virtue of, the laws of Israel, with its executive offices and principal

place of business located at 3 Hanechushet Street, Building B, 3rd Floor, Tel-Aviv 6971068, Israel, with its United States office for purposes of service of process by the Commission located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

2. Respondent GPM Southeast, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

3. Respondent GPM Petroleum, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

4. Arko, through its subsidiaries GPM Southeast, LLC, and GPM Petroleum, LLC, is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

5. Arko, GPM Southeast, LLC, and GPM Petroleum, LLC (collectively, "GPM"), are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Empire

6. Respondent Empire Petroleum Partners, LLC ("Empire"), is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 8350 North Central Expressway, M2185, Dallas, Texas 75206.

7. Empire is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

8. Empire is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

9. Pursuant to an Asset Purchase Agreement dated December 17, 2019, GPM proposes to acquire retail outlets and other interests from Empire (the "Acquisition").

10. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

11. The relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. No economic or practical alternative to the retail sale of gasoline or diesel fuel exists.

12. The relevant geographic markets in which to analyze the effects of the Acquisition are seven local markets within the following cities: Arlington, Texas; Edmore, Michigan; Hastings, Michigan; Knox, Indiana; Kokomo, Indiana; South Bend, Indiana; and Stevensville, Maryland.

13. The relevant geographic markets for retail gasoline and retail diesel fuel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting such features as commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

IV. MARKET STRUCTURE

14. With regard to the retail sale of gasoline, the Acquisition, if consummated, would reduce the number of competitively constraining independent market participants from four to three in two local markets, from three to two in four local markets, and from two to one in one local market. The Acquisition would result in a highly concentrated market in each of these markets.

15. With regard to the retail sale of diesel fuel, the Acquisition, if consummated, would reduce the number of competitively constraining independent market participants from three to two in two local markets and from two to one in one local market. The Acquisition would result in a highly concentrated market in each of these markets.

V. BARRIERS TO ENTRY

16. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

VI. EFFECTS OF THE ACQUISITION

17. The effects of the Acquisition, as described in Paragraph 9, if consummated, may be to substantially lessen competition or to tend to create a monopoly in each of the relevant markets, with each constituting an independent violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by:

a. increasing the likelihood that GPM would unilaterally exercise market power in each relevant market; and

b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in each relevant market.

VII. VIOLATIONS CHARGED

18. The Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Asset Purchase Agreement entered into by GPM and Empire constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-fifth day of August, 2020, issues its Complaint against Respondents.

By the Commission, Commissioners Slaughter and Wilson not participating.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by GPM Southeast, LLC, and GPM Petroleum, LLC, indirectly controlled by Arko Holdings Ltd., of certain assets of Empire Petroleum Partners, LLC (each a "Respondent" and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings and issues the following Order to Maintain Assets:

1. Respondent Arko Holdings Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Israel with its executive offices and principal place of business located at 3 Hanechushet Street, Building B, 3rd Floor, Tel-Aviv 6971068, Israel, with its United States office for purposes of service of process by the Commission located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

2. Respondent GPM Southeast, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

3. Respondent GPM Petroleum, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

4. Respondent Empire Petroleum Partners, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at 8350 North Central Expressway, M2185, Dallas, Texas 75206.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Arko" means Arko Holdings Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Arko Holdings Ltd., including GPM Southeast and GPM Petroleum, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "GPM Southeast" means GPM Southeast, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by GPM Southeast, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "GPM Petroleum" means GPM Petroleum, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by GPM Petroleum, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Empire" means Empire Petroleum Partners, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Empire Petroleum Partners, LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.

F. "Orders" means this Order to Maintain Assets and the Decision and Order.

II. Asset Maintenance

IT IS FURTHER ORDERED that until Respondents fully transfer each Retail Fuel Business and related Retail Fuel Assets to each Acquirer, Respondents shall ensure that each Retail Fuel Business and related Retail Fuel Assets are operated and maintained in the ordinary course of business consistent with past practices. Included in these obligations, Respondents shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Retail Fuel Business and related Retail Fuel Assets, minimize the risk of any loss of their competitive potential, operate them in a manner consistent with applicable laws and regulations, and prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear).

B. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Business and related Retail Fuel Assets, or terminate any of their operations, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with each Retail Fuel Business and related Retail Fuel Assets.

D. Provide each Retail Fuel Business and related Retail Fuel Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with each Retail Fuel Business and related Retail Fuel Assets.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each Retail Fuel Business and related Retail Fuel Assets, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from any Retail Fuel Business to another of Respondents' businesses.

G. Maintain and preserve the Business Information of each Retail Fuel Business and related Retail Fuel Assets.

H. Provide the resources necessary for each Retail Fuel Business and related Retail Fuel Assets to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to each Retail Fuel Business and related Retail Fuel Assets.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of each Retail Fuel Business and related Retail Fuel Assets, and operate each Retail Fuel Business and related Retail Fuel Assets in accordance and in compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with each Retail Fuel Business and related Retail Fuel Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed-to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Retail Fuel Assets and related Retail Fuel Assets and consistent with the purposes of the Orders.

III. Transitional Services

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Retail Fuel Assets to the relevant Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the relevant Acquirer with access to that Business Information (wherever located and however stored) and to employees who possess the Business Information.

B. At the option of an Acquirer, Respondents shall provide the Acquirer Transitional Services sufficient to (i) efficiently transfer the Retail Fuel Business to the Acquirer and (ii) allow the Acquirer to operate the acquired Retail Fuel Business and related Retail Fuel Assets in a manner that is equivalent in all material respects to the manner in which Respondents operated the Retail Fuel Assets and Retail Fuel Business prior to the Acquisition.

C. Respondents shall provide Transitional Services:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of this Paragraph, which shall be, at the option of each Acquirer, for up to 15 months after the Divestiture Date; *provided, however*, that within 15 days after a request by an Acquirer, Respondents shall file with the Commission a request for prior approval to extend the term for providing Transitional Services as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow each Acquirer to terminate, in whole or part, any Transitional Services at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Services due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Services.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until one year after each respective Divestiture Date, Respondents shall cooperate with and assist each Acquirer of Retail Fuel Assets to evaluate independently and offer employment to any Retail Fuel Employee.

B. Until one year after each respective Divestiture Date, Respondents shall:

1. No later than 10 days after a request from an Acquirer, provide a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from an Acquirer, provide an opportunity to privately interview any of the Retail Fuel Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by an Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with an Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by an Acquirer.

C. Respondents shall not, for a period of one year following each Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by an Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

V. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall not (i) disclose (including as to Respondents' employees) or (ii) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial, regulatory, or other reporting or legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Retail Fuel Business or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph V.A of this Order to Maintain Assets, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A, and (iii) only after

such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph V as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph V, including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Additional Obligations

IT IS FURTHER ORDERED Respondents shall:

A. Obtain, no later than the Divestiture Date and at their sole expense, all Consents from Third Parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to each Acquirer and for each Acquirer to operate any aspect of the relevant Retail Fuel Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from Third Parties by (i) certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; or (ii) substituting equivalent assets or arrangements as specified in the respective Divestiture Agreement; and

2. With respect to any Governmental Authorizations relating to the Retail Fuel Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow each Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Authorizations pending the Acquirer's receipt of its own Governmental Authorizations, and Respondents shall provide such assistance as each Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorizations;

B. Assist each Acquirer to conduct a due diligence investigation of the Retail Fuel Assets and Retail Fuel Business the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, and other documents and data relating to the relevant Retail Fuel Business, with such rights of access to be

exercised in a manner that does not unreasonably interfere with the operations of Respondents.

VII. Monitor

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by staff of the Commission to Respondents of the identity of any proposed Monitor, the Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. No later than 5 days after the Commission appoints the Monitor, Respondents shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders as set forth in Paragraph VII.D;

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in Paragraph VII.D; and

3. Enter into an agreement with the Monitor that is approved by the Commission. If Respondents and the Monitor fail to sign an agreement within the allotted time, the Commission will approve, and Respondents shall agree to consent to, an agreement with terms and provisions typical of Commission monitor agreements and require that the Monitor's fees will be his or her standard and customary fees plus expenses reasonably incurred performing duties as the Monitor.

D. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Shall report in writing to the Commission concerning Respondents' compliance with this Order: (i) 30 days after appointment and every 30 days thereafter until Respondents have completed all obligations required by Paragraphs II and IV of this Order; (ii) when Respondents have completed the obligations required by Paragraphs II and IV of this Order; and (iii) at any other time requested by the staff of the Commission; and

9. Shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of the Decision and Order, or until such other time as may be determined by the Commission or its staff.

E. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the Monitor to monitor Respondents' compliance with its obligations under the Orders; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.

F. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or are connected with any claim concerning the Monitor's performance of the Monitor's duties under the Orders, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct.

For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VII.D of this Order to Maintain Assets.

G. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

H. Respondent shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including written reports submitted pursuant to Paragraph VII.D.8, or any Person with whom the Monitor communicates in the performance of his/her duties.

I. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and subject to all obligations of this Paragraph VII:

1. The Commission shall select the substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor, Respondents have not opposed, in writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement with the Monitor first appointed and referenced in Paragraph VII.A, above; or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under the Orders.

J. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

VIII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after each Divestiture Date.

B. Each Respondent shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit compliance reports 30 days after this Order to Maintain Assets is issued and every 30 days thereafter until this Order to Maintain Assets terminates, and additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory statements that the Respondents have complied with its obligations under the Orders are insufficient. Respondents shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that Respondents have complied or will comply with each paragraph of the Orders.

3. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as the reports required to be submitted by each Respondent pursuant the Decision and Order.

Provided further, however, that Respondent Empire's reporting obligations under this Paragraph VIII shall cease once it has completed its obligations under Paragraphs II and IV of the Decision and Order.

IX. Change in Respondents

IT IS FURTHER ORDERED that Respondents Arko, GPM Southeast, and GPM Petroleum shall each notify the Commission at least 30 days prior to:

A. Its proposed dissolution (i.e. the dissolution of Arko Holdings Ltd., GPM Southeast, LLC, or GPM Petroleum, LLC);

B. Its proposed acquisition, merger or consolidation (i.e. the acquisition, merger or consolidation of Arko Holdings Ltd., GPM Southeast, LLC, or GPM Petroleum, LLC); or

C. Any other change in Respondents Arko, GPM Southeast, or GPM Petroleum, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

X. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control of, the Respondents related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XI. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Business locations as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) ensure that Respondents obtain no Confidential Information relating to the Retail Fuel Business, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestitures and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

XII. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the later of:

A. Three business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each Retail Fuel Business required to be divested pursuant to Paragraph II of the Decision and Order, the day after the Divestiture Date of the respective Retail Fuel Assets;

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate 3 business days after the Decision and Order becomes final;

Provided further, however, that if the Commission, pursuant to Paragraph II of the Decision and Order, requires Respondents to rescind any of the divestitures in that Paragraph, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission, Commissioners Slaughter and Wilson not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by GPM Southeast, LLC, and GPM Petroleum, LLC, indirectly controlled by Arko Holdings Ltd., of certain assets of Empire Petroleum Partners, LLC (each a "Respondent" and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as

alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Arko Holdings Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Israel with its executive offices and principal place of business located at 3 Hanechushet Street, Building B, 3rd Floor, Tel-Aviv 6971068, Israel, with its United States office for purposes of service of process by the Commission located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

2. Respondent GPM Southeast, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

3. Respondent GPM Petroleum, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 8565 Magellan Parkway, Suite 400, Richmond, Virginia 23227.

4. Respondent Empire Petroleum Partners, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at 8350 North Central Expressway, M2185, Dallas, Texas 75206.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

A. "Arko" means Arko Holdings Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries,

divisions, groups, and affiliates controlled by Arko Holdings Ltd., including GPM Southeast and GPM Petroleum, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "GPM Southeast" means GPM Southeast, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by GPM Southeast, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "GPM Petroleum" means GPM Petroleum, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by GPM Petroleum, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Empire" means Empire Petroleum Partners, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Empire Petroleum Partners, LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means

1. Good Oil;

2. Groves Fuel;

3. Javed;

4. Marathon Flint;

5. Skyway;

6. SM Gas; or

7. Any other Person that acquires Retail Fuel Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the agreement entitled "Asset Purchase Agreement by and between GPM Southeast, LLC and GPM Petroleum, LLC, as Purchaser, and Empire Petroleum Partners, LLC and the Entities Listed on Schedule I hereto, as Seller, dated as of December 17, 2019."

H. "Acquisition Date" means the date the Acquisition is consummated.

I. "Arlington Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 4600 S. Collins Street, Arlington, Texas 76018, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

J. "Business Information" means books, records, data, and information, wherever located and however stored, used in or related to the Retail Fuel Assets or Retail Fuel Business, including documents, written information, graphic materials, and data and information in electronic format, along with the knowledge of employees, contractors, and representatives. Business Information includes books, records, information, know how, and data relating to sales, marketing, logistics, products and SKUs, pricing, promotions, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, vendors, and all other information relating to the Retail Fuel Business or Retail Fuel Assets. For clarity, Business Information includes Respondent's right and control over information and material provided to any other Person.

K. "Confidential Information" means all Business Information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

L. "Consents" means all approvals, consents, ratifications, waivers, or other authorizations from any Person, including a landlord, that are necessary to effect the complete transfer of the Retail Fuel Assets or the Retail Fuel Business to each Acquirer.

M. "Contracts" means all agreements, contracts, leases, license agreements, consensual obligations, promises or undertakings (whether written or oral and whether express or implied), whether or not legally binding with third parties.

N. "Direct Cost" means the cost of labor, materials, travel, and other expenditures directly incurred to provide Transitional Services. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor.

O. "Divestiture Agreement" means:

1. Good Oil Divestiture Agreement;

2. Groves Fuel Divestiture Agreement;

3. Javed Divestiture Agreement;

4. Marathon Flint Divestiture Agreement;

5. Skyway Divestiture Agreement;

6. SM Gas Divestiture Agreement; or

7. Any other agreement between Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer for the purchase of any of the Retail Fuel Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

P. "Divestiture Date" means, as to the divestiture of a Retail Fuel Business, the date on which Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) consummate the divestiture of that Retail Fuel Business as required by Paragraph II of this Order.

Q. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph IX of this Order.

R. "Edmore Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 218 E. Main Street, Edmore, Michigan 48829, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

S. "Employee Information" means for each Retail Fuel Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The employee's base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

T. "Equipment" means all tangible personal property (other than Inventories) of every kind owned or leased by Respondents in connection with the operation of the Retail Fuel Outlet Business, including, but not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of the Retail Fuel Outlet Business, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

U. "Fuel Products" means refined petroleum gasoline and diesel products.

V. "Good Oil" means Good Oil Company, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 1201 N. US 35, Winamac, Indiana 46996.

W. "Good Oil Divestiture Agreement" means the Agreement by and among Empire Petroleum Partners, LLC, Woody's Food Stores, Inc., and Good Oil Company, Inc., dated as of May 19, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix II.

X. "Governmental Authorization" means any consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

Y. "Groves Fuel" means Groves Fuel Management LLC, a limited liability company organized, existing, and doing business under, and by virtue of the laws of the State of Texas, with its office and principal place of business located at 6207 Glendora Avenue, Dallas, Texas, 75230.

Z. "Groves Fuel Divestiture Agreement" means the Purchase and Sale Agreement by and between Groves Fuel Management LLC and EPP-Texas Acquisition, LLC, dated as of May 28, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix III.

AA. "Hastings Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 1335 N. Broadway, Hastings, Michigan 49058, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

BB. "Intellectual Property" means intellectual property of any kind, including, but not limited to, (i) commercial names, assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (ii) patents, patent applications and inventions and discoveries that may be patentable; (iii) registered and unregistered copyrights in both published works and unpublished works; (iv) rights in mask works; (v) know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (vi) and rights in internet web sites and internet domain names.

CC. "Inventories" means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out-of-date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

DD. "Javed" means Nadeem Javed, an individual.

EE. "Javed Divestiture Agreement" means the Purchase and Sale Agreement by and between Nadeem Javed, an individual and EPP-Besche Acquisition, LLC, dated as of May 15, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix IV.

FF. "Knox Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 1 North Heaton Street, Knox, Indiana 46534, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

GG. "Kokomo Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 2413 W. Sycamore Street, Kokomo, Indiana 46901, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

HH. "Marathon Flint" means Marathon Flint Oil Company, a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1919 South Dort Highway, Flint, Michigan 48503.

II. "Marathon Flint Divestiture Agreement" means the Assignment and Assumption of Gasoline Marketing/Consignment Agreement and Consignment Agreement by and between Marathon Flint Oil Company and Empire Petroleum Partners, LLC and Quik-Way Retail Associates II, Ltd. dated as of May 18, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix V.

JJ. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

KK. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

LL. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

MM. "Prior Notice Location" means any physical location that is a Prior Notice Location as defined in Appendix I of this Order.

NN. "Retail Fuel Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to any Retail Fuel Business, including:

1. All real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. All Equipment, including any Equipment removed from the location of the Retail Fuel Businesses since the date of the announcement of the Acquisition and not replaced;

3. All Inventories;

4. All accounts receivable;

5. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

6. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

7. All Business Information; and

8. All intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Retail Fuel Assets need not include the Retained Assets.

OO. "Retail Fuel Business" means the Arlington Business, Edmore Business, Hastings Business, Knox Business, Kokomo Business, South Bend Business, or Stevensville Business.

PP. "Retail Fuel Employee" means any full-time, part-time, or contract individual employed by Respondents, as applicable, at each Retail Fuel Business, as of December 17, 2019.

QQ. "Retained Assets" means:

1. Corporate or regional offices;

2. Trade names and trademarks that Respondents use primarily for businesses other than the Retail Fuel Businesses to be divested;

3. Third Party brand or trademark licenses relating to Fuel Products, unless requested by the Acquirer;

4. Software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);

5. Enterprise software that Respondents use primarily to manage and account for businesses other than the relevant businesses to be divested;

6. The portion of any Business Information that contains information about any business other than the businesses to be divested, and from which Confidential Business Information has been redacted;

7. Inventory that an Acquirer agrees not to purchase or that cannot be transferred by law in the applicable jurisdiction;

8. The Subway franchise operated as part of the South Bend Business; and

9. The following equipment, unless requested by an Acquirer (and to the extent transferrable): equipment belonging to vendors or leased from third parties; automated teller machines; Western Union equipment; credit card processing equipment; back office computers (including monitors, printers and scanners); proprietary equipment; APC backups; UPS or PDI

handhelds; routers, power strips, Cisco switches; and TNS, Cybera, Echo Sat and Net Express devices.

RR. "Skyway" means Skyway Fuels Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 1131 Redbud Drive, La Porte, Indiana 46350.

SS. "Skyway Divestiture Agreement" means the Purchase Agreement by and between Next Door Operations, LLC and Skyway Fuels Inc., dated as of May 19, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix VI.

TT. "SM Gas" means SM Gas Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 15482 Bryanton Court, Granger, Indiana 46530.

UU. "SM Gas Divestiture Agreement" means the Purchase Agreement by and between Village Pantry, LLC and SM Gas Inc., dated as of May 7, 2020, and all amendments, exhibits, attachments, agreements (including agreements to provide Transitional Assistance), and schedules thereto, attached to this Order as Non-Public Appendix VII.

VV. "South Bend Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 26499 US Highway 20, South Bend, Indiana 46628, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

WW. "Stevensville Business" means all business activities conducted by Respondents prior to the Acquisition Date at the location at 101 Duke Street, Stevensville, Maryland 21666, including the (i) sale of Fuel Products and (ii) the operation of any associated convenience store and related business and service.

XX. "Third Party" means any Person other than the Respondents or an Acquirer.

YY. "Transitional Services" means technical services, personnel, assistance, training, the supply of products, and other logistical, administrative, and other transitional support as required by an Acquirer to facilitate the transfer of the Retail Fuel Assets from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents' brands for

transitional purposes, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 20 days after the Acquisition Date, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, as set forth below:

1. Respondents shall divest the Retail Fuel Assets relating to the Arlington Business to Groves Fuel in accordance with the Groves Fuel Divestiture Agreement;

2. Respondents shall divest the Retail Fuel Assets relating to the Edmore Business and Hastings Business to Marathon Flint in accordance with the Marathon Flint Divestiture Agreement;

3. Respondents shall divest the Retail Fuel Assets relating to the Knox Business to Skyway in accordance with the Skyway Divestiture Agreement;

4. Respondents shall divest the Retail Fuel Assets relating to the Kokomo Business to Good Oil in accordance with the Good Oil Divestiture Agreement;

5. Respondents shall divest the Retail Fuel Assets relating to the South Bend Business to SM Gas in accordance with the SM Gas Divestiture Agreement; and

6. Respondents shall divest the Retail Fuel Assets relating to the Stevensville Business to Javed in accordance with the Javed Divestiture Agreement.

Provided, however, if that in cases in which Business Information included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets and to other, retained businesses of a Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Retail Fuel Assets, or (b) where Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies of the materials containing such information with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

B. If, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. An Acquirer is not an acceptable purchaser of the relevant Retail Fuel Assets, then Respondents shall immediately rescind the divestiture to that Acquirer, and shall divest the relevant Retail Fuel Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to one or more Persons that receive the prior approval of the Commission; or

2. The manner in which the Respondents divested the relevant Retail Fuel Assets to an Acquirer is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner in which Respondents divested the relevant Retail Fuel Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall:

1. Obtain, no later than the Divestiture Date and at their sole expense, all Consents from Third Parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to each Acquirer and for each Acquirer to operate any aspect of the relevant Retail Fuel Business;

Provided, however, that:

a. Respondents may satisfy the requirement to obtain all Consents from Third Parties by (i) certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; or (ii) substituting equivalent assets or arrangements as specified in the respective Divestiture Agreement; and

b. With respect to any Governmental Authorizations relating to the Retail Fuel Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow each Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Authorizations pending the Acquirer's receipt of its own Governmental Authorizations, and Respondents shall provide such assistance as each Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorizations;

2. Assist each Acquirer to conduct a due diligence investigation of the Retail Fuel Assets and Retail Fuel Business the Acquirer seeks to purchase,

including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, and other documents and data relating to the relevant Retail Fuel Business, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

III. Divestiture Agreements

IT IS FURTHER ORDERED that**:**

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of Divestiture Agreements shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transitional Services

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Retail Fuel Assets to the relevant Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the relevant Acquirer with access to that Business Information (wherever located and however stored) and to employees who possess the Business Information.

B. At the option of an Acquirer, Respondents shall provide the Acquirer Transitional Services sufficient to (i) efficiently transfer the Retail Fuel Business to the Acquirer and (ii) allow the Acquirer to operate the acquired Retail Fuel Business and related Retail Fuel Assets in a manner that is equivalent in all material respects to the manner in which Respondents operated the Retail Fuel Assets and Retail Fuel Business prior to the Acquisition.

C. Respondents shall provide Transitional Services:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of this Paragraph, which shall be, at the option of each Acquirer, for up to 15 months after the Divestiture Date; *provided, however*, that within 15 days after a request by an Acquirer, Respondents shall file with the Commission a request for prior approval to extend the term for providing Transitional Services as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow each Acquirer to terminate, in whole or part, any Transitional Services at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Services due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Services.

V. Asset Maintenance

IT IS FURTHER ORDERED that until Respondents fully transfer each Retail Fuel Business and related Retail Fuel Assets to an Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that each Retail Fuel Business and related Retail Fuel Assets are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Retail Fuel Business and related Retail Fuel Assets, minimize the risk of any loss of their competitive potential, and prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear).

B. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Business and related Retail Fuel Assets (other than in the manner prescribed in this Order and the Order to Maintain Assets) or take any action that lessens their full economic viability, marketability, or competitiveness; and

C. Not terminate the operations of the Retail Fuel Business and related Retail Fuel Assets, and shall conduct or cause to be conducted the operations of the Retail

Fuel Business and related Retail Fuel Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Retail Fuel Business and related Retail Fuel Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Retail Fuel Business and related Retail Fuel Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Retail Fuel Business and related Retail Fuel Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until one year after each respective Divestiture Date, Respondents shall cooperate with and assist each Acquirer of Retail Fuel Assets to evaluate independently and offer employment to any Retail Fuel Employee.

B. Until one year after each respective Divestiture Date, Respondents shall:

1. No later than 10 days after a request from an Acquirer, provide a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from an Acquirer, provide an opportunity to privately interview any of the Retail Fuel Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by an Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with an Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by an Acquirer.

C. Respondents shall not, for a period of one year following each Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by an Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

VII. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall not (i) disclose (including to Respondents' employees) or (ii) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or any Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Retail Fuel

Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph VII.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph VII and take necessary actions to ensure that their employees and other Persons comply with the terms of this Paragraph VII, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreements.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. No later than 5 days after the Commission appoints the Monitor, Respondents shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets as set forth in Paragraph VIII.D;

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in Paragraph VIII.D; and

3. Enter into an agreement with the Monitor that is approved by the Commission. If Respondents and the Monitor fail to sign an agreement within the allotted time, the Commission will approve, and Respondents agree to consent to, an agreement with terms and provisions typical of Commission monitor agreements and require that the Monitor's fees will be his or her standard and customary fees plus expenses reasonably incurred performing duties as the Monitor.

D. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in this Order and the Order to Maintain Assets;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Shall report in writing to the Commission concerning Respondents' compliance with this Order: (i) 30 days after appointment and every 30 days thereafter until Respondents have completed all obligations required by Paragraphs II and IV of this Order; (ii) when Respondents have completed the obligations required by Paragraphs II and IV of this Order; and (iii) at any other time requested by the staff of the Commission; and

9. Shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of this Order, or until such other time as may be determined by the Commission or its staff.

E. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the Monitor to monitor Respondents' compliance with its obligations under this Order; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to this Order.

F. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or are connected with any claim concerning the Monitor's performance of the Monitor's duties under this Order, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct.

For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.D of this Order.

G. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

H. Respondent shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including written reports submitted pursuant to Paragraph VIII.D.8, or any Person with whom the Monitor communicates in the performance of his/her duties.

I. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and subject to all obligations of this Paragraph VIII:

1. The Commission shall select the substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor, Respondents have not opposed, in writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement with the Monitor first appointed and referenced in Paragraph VIII.A, above; or (ii)

is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under this Order.

J. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the relevant Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trustee agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from

among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph IX.E.6, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph IX.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Retail Fuel Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality

agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Notice

IT IS FURTHERED ORDERED that:

A. For a period of ten years from the date this Order is issued, Respondents Arko, GPM Southeast, and GPM Petroleum shall not, without providing advance written notification to the Commission ("Notification"):

1. Acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in the sale of gasoline or diesel Fuel Products at a Prior Notice Location, or

2. Enter into any contract with any concern, corporate or non-corporate, engaged in the sale of gasoline or diesel Fuel Products at a Prior Notice Location in which Respondents will control the retail price of such products.

B. With respect to the Notification:

1. The Notification required by this Paragraph X shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission,

Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents Arko, GPM Southeast, and GPM Petroleum and not of any other party to the transaction.

2. Include a description of the proposed acquisition and provide:

   a. A map showing all retail fuel outlets by ownership (*e.g.*, OPIS Corporate Brand) within five driving miles of the relevant Prior Notice Location;

   b. For each retail fuel outlet owned by Respondent Arko, GPM Southeast, or GPM Petroleum that is located within five driving miles of the relevant Prior Notice Location, a list of the retail fuel outlets that Respondent Arko, GPM Southeast, or GPM Petroleum monitored at any time within the preceding 12 month period (to the extent such information is available); and

   c. Respondents Arko, GPM Southeast, and GPM Petroleum's pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph X.B.2(b) of this Order.

3. Provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). Further, if, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents Arko, GPM Southeast, and GPM Petroleum shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material.

4. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after each Divestiture Date.

B. Each Respondent shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit interim compliance reports 30 days after this Order is issued and every 30 days thereafter until Respondents have fully complied with the provisions of Paragraphs II and IV of this Order; annual compliance reports one year after the date this Order is issued and annually thereafter for the next nine years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that the Respondents have complied with its obligations under this Order are insufficient. Respondents shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that Respondents have complied or will comply with each paragraph of the Order.

3. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that Respondent Empire's reporting obligations under this Paragraph XI shall cease once it has completed its obligations under Paragraphs II and IV of this Order.

XII. Change in Respondents

IT IS FURTHER ORDERED that Respondents Arko, GPM Southeast, and GPM Petroleum shall each notify the Commission at least 30 days prior to:

A. Its proposed dissolution (i.e. the dissolution of Arko Holdings Ltd., GPM Southeast, LLC, or GPM Petroleum, LLC);

B. Its proposed acquisition, merger or consolidation (i.e. the acquisition, merger or consolidation of Arko Holdings Ltd., GPM Southeast, LLC, or GPM Petroleum, LLC); or

C. Any other change in Respondents Arko, GPM Southeast, and GPM Petroleum, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to ensure the continued use of the related Retail Fuel Assets in the same Retail Fuel Business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate October 5, 2030.

By the Commission, Commissioners Slaughter and Wilson not participating.

Appendix I

Prior Notice Locations

State	Area	Prior Notice Location
Indiana	Knox	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 910 S. Heaton Street, Knox, Indiana.
Indiana	Kokomo	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 3636 W. Sycamore Street, Kokomo, Indiana.
Indiana	South Bend	Any location within 5 miles driving distance (using the shortest route calculated by Google maps) of 26395 State Road 2, South Bend, Indiana.
Maryland	Stevensville	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 100 Main Street, Stevensville, Maryland, or 201 Romancoke Street, Stevensville, Maryland.
Michigan	Edmore	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 1102 E. Main Street, Edmore, Michigan.
Michigan	Hastings	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 313 N. Broadway, Hastings, Michigan.
Texas	Arlington	Any location within 3 miles driving distance (using the shortest route calculated by Google maps) of 4601 S. Collins Street, Arlington, Texas.

Appendix II

Good Oil Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix III

Groves Fuel Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix IV

Javed Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix V

Marathon Flint Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix VI

Skyway Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix VII

SM Gas Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Arko Holdings Ltd. ("Arko"), GPM Southeast, LLC, and GPM Petroleum, LLC (collectively with Arko, "GPM") and Empire Petroleum Partners, LLC ("Empire," and collectively "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from GPM's proposed acquisition of retail fuel assets from Empire.

Under the terms of the proposed Consent Agreement, Respondents must divest certain retail fuel assets in seven local markets in Indiana, Michigan, Maryland, and Texas. Respondents must complete the divestiture within 20 days after the closing of the acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the up-front buyers acquire the divested assets.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

The Respondents

Respondent Arko is a publicly traded company headquartered in Tel Aviv, Israel. Arko, through its subsidiaries GPM Southeast, LLC, and GPM Petroleum, LLC, supplies wholesale fuel to or operates approximately 1,400 retail fuel and convenience stores in twenty-two states across the South, Mid-Atlantic, and Midwest. In 2019, GPM ranked as the sixth largest operator of retail fuel and convenience stores in the United States.

Respondent Empire is a privately held Delaware limited liability company headquartered in Dallas, Texas. Empire also distributes fuel on a wholesale basis and operates retail fuel and convenience stores in 30 states and Washington, D.C. With respect to wholesale fuel distribution, Empire is a "super jobber," a company that supplies over one billion gallons of fuel each year. Empire has supply relationships with all major oil companies, and distributes both branded and unbranded fuel. Empire supplies fuel to 1,555 retail sites, and operates 76 retail fuel and convenience stores itself.

The Proposed Acquisition

On December 17, 2019, GPM entered into an agreement to acquire certain retail and wholesale fuel assets from Empire and related entities (the "Acquisition"). With the Complaint, the Commission alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline in seven local markets in Indiana, Michigan, Maryland, and Texas, and by substantially lessening competition for the retail sale of diesel fuel in three local markets in Indiana, Michigan, and Texas.

The Retail Sale of Gasoline and Diesel Fuel

The Commission alleges that the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are seven local markets in and around the following cities: Knox, Indiana; Kokomo, Indiana; South Bend, Indiana; Stevensville, Maryland; Edmore, Michigan; Hastings, Michigan; and Arlington, Texas. The relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of diesel fuel are three local markets in and around the following cities: South Bend, Indiana; Edmore, Michigan; and Arlington, Texas.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition would substantially lessen competition in each of these local markets, resulting in seven highly concentrated markets for the retail sale of gasoline and three highly concentrated markets for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. In each of the local gasoline and diesel fuel retail markets, the Acquisition would reduce the number of competitively constraining independent market participants to three or fewer. The combined entity would be able to raise prices unilaterally in markets where GPM and Empire are close competitors. Absent the Acquisition, GPM and Empire would continue to compete head to head in these local markets.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two or three competitively constraining independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to observe each other's fuel prices without difficulty. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Respondents to divest certain retail fuel assets to an independent competitor in each local market. Each buyer of divestiture assets is an experienced operator or supplier of retail fuel sites, and will be a new entrant into the local market.

The proposed Consent Agreement requires that the divestiture be completed no later than 20 days after Respondents consummate the Acquisition. The proposed Consent Agreement further requires Respondents to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture is complete. For up to 15 months following the divestiture, Respondents must provide transitional services, as needed, to assist the buyers with the divestiture assets.

Analysis to Aid Public Comment

In addition to requiring outlet divestitures, the proposed Consent Agreement requires Respondents to provide the Commission notice before acquiring retail fuel assets within a fixed distance of any GPM outlet in a market involving a divestiture for ten years. The prior notice provision is necessary because an acquisition in close proximity to divested assets likely would raise the same competitive concerns as the Acquisition, and may fall below the Hart-Scott-Rodino Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date Respondents complete the divestiture. The Commission may appoint an independent third party as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

PEABODY ENERGY CORPORATION,
AND
ARCH COAL, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9391; File No. 191 0154
Complaint, February 25, 2020 – Decision, October 16, 2020

This case addresses a proposed joint venture between Peabody Energy Corporation and Arch Coal, Inc. that will own and operate the two most productive coal mines in the Southern Powder River Basin ("SPRB") in Wyoming. The complaint alleges that the joint venture would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for coal from the SPRB in the United States. Respondents informed Complaint Counsel that they terminated their proposed acquisition and that Peabody had withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for this proposed acquisition and has no intent to refile. Complaint Counsel and Respondents Peabody Energy Corporation and Arch Coal, Inc. jointly moved to dismiss the complaint. The order dismisses the Complaint as moot.

Participants

For the *Commission*: *Taylor Alexander, Jeanine Balbach, Alicia Bums-Wright, Steven Dahm, Amy Dobrzynski, Eric Elmore, Michael Franchak, Josh Goodman, Sean Hughto, Stephen Santulli, Robert Tovsky,* and *Cecelia Waldeck.*

For the *Respondents*: *Gorav Jindal, Corey Roush,* and *Haidee Schwartz, Akin Gump; Steve Weissman* and *Michael Perry, Baker Botts.*

COMPLAINT

1. 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 Peabody Energy Corporation ("Peabody") and Arch Coal, Inc. ("Arch") have executed an joint venture agreement (the "Joint Venture") in violation of Section 5 of the FTC Act, as amended, 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. If consummated, the Joint Venture would combine the coal mining operations and the sales operations of Respondents' coal mines located in the Southern Powder River Basin

("SPRB"). Respondents are currently—by a wide margin—the two largest producers of SPRB coal. They compete with one another to supply SPRB coal, providing substantial benefits to purchasers in the form of lower prices and other benefits. The Joint Venture would eliminate that competition and those benefits.

2. The SPRB is a large coal-bearing geological formation located in northeastern Wyoming. Respondents extract the coal and sell it primarily to power plants, which burn the coal to generate electricity. SPRB coal is attractive to electric power producers because the SPRB's coal deposits are relatively close to the earth's surface and therefore relatively inexpensive to extract, and SPRB coal's characteristics (in particular, its sulfur content) allow electric power plants to burn significant quantities of it without violating environmental regulations. Moreover, many power plants that burn SPRB coal can face substantial switching costs if they attempt to switch to other coals, which could include installation of additional pollution-control equipment.

3. In 2018, Respondents produced more than 60% of all SPRB coal mined. Respondents collectively control more than 60% of SPRB coal reserves. The Joint Venture would significantly increase concentration in an already concentrated market, well beyond the thresholds set forth in the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"). Under the Merger Guidelines, a merger or other business combination, such as a joint venture, is presumptively unlawful when it would result in a post-transaction market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points. The Joint Venture exceeds those thresholds and is thus presumptively unlawful.

4. The Joint Venture would substantially lessen competition for the production and sale of SPRB coal by eliminating current head-to-head competition between Peabody and Arch, replacing that competition with a single producer with a greater incentive and ability to reduce output or increase prices, which would likely result in significant harm to SPRB coal customers. Other SPRB coal producers are significantly smaller than Respondents and will not make up for this lost competition. The SPRB coal market contains few competitors; aside from Respondents, only three other producers of SPRB coal are realistic options for power plants that demand SPRB coal, and none is likely to increase output or otherwise compete more aggressively to sufficiently eliminate the harm from a post-Joint Venture price increase or output reduction.

5. Due to high entry barriers, new entry into SPRB coal production is unlikely to occur in a timely manner, or on a scale sufficient to counteract the anticompetitive effects of the Joint Venture. The significant barriers to entry for SPRB coal producers include the need for substantial capital investment and the likelihood that it would take several years to begin coal production due to regulatory requirements. Expansion or repositioning by current producers is also unlikely to be sufficient to offset the Joint Venture's anticompetitive effects. Among other reasons, a significant portion of Respondents' rivals' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch.

6. Respondents cannot show cognizable, transaction-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Joint Venture.

II. JURISDICTION

7. Respondents 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.

8. The Joint Venture constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

9. Respondent Peabody Energy Corporation is headquartered in St. Louis, Missouri. Peabody is the largest coal producer in the United States and the largest producer in the SPRB by production and reserves. Peabody operates three mines in the SPRB: North Antelope Rochelle, Caballo, and Rawhide. The North Antelope Rochelle mine is the largest coal mine in the world, according to Peabody. In 2018, Peabody sold 119.2 million tons of coal extracted from its three SPRB mines. Worldwide, in 2018 Peabody sold 186.7 million tons of coal, and recognized revenues exceeding $5.5 billion.

10. Respondent Arch Coal, Inc., also headquartered in St. Louis, Missouri, is the second largest coal producer in the United States, and the second largest in the SPRB by production and reserves. Arch operates two mines in the SPRB: Black Thunder and Coal Creek. In 2018, Arch sold 79 million tons of coal extracted from these two mines. In total, Arch sold 96 million tons of coal in 2018, and recognized revenues of approximately $2.5 billion.

IV. THE JOINT VENTURE

11. Under the terms of the June 18, 2019 Joint Venture Agreement, each firm will contribute assets comprising their respective SPRB and Colorado coal mining operations. Specifically, Peabody will contribute four mines—three from the SPRB (North Antelope Rochelle, Caballo, and Rawhide) and one in Colorado (Twentymile)—and Arch will contribute three mines—two in the SPRB (Black Thunder and Coal Creek) and one in Colorado (West Elk). In exchange for their respective contributions, Peabody and Arch will receive 66.5% and 33.5% of the noncorporate interests of the Joint Venture, respectively.

V. RELEVANT MARKETS

A. Relevant Product Market

12. A relevant product market in which to assess the effects of the Joint Venture is the sale of SPRB coal.

13. SPRB coal is distinguishable from coal mined elsewhere in the United States (*e.g.*, the Illinois Basin, the Uinta Basin located in Utah and Colorado, and coal mined in the Appalachian region) by a number of key factors that are important to electric power producers, including, but not limited to:

- Low cost of production: SPRB coal is relatively close to the earth's surface, and thus is extracted from surface mines, which generally face lower costs than underground mines. SPRB coal beds are relatively thick, which also reduces the cost of extraction, compared to thinner beds. The difference in cost is reflected in the sales price of the coal. Measured in dollars per million British Thermal Units ($/mmBTU), SPRB coal is the lowest priced coal in the United States, measured at the mine mouth. For example, the United States Energy Information Administration ("EIA") releases weekly information regarding the spot price of different coals, broken down by coal region. According to the EIA, for the week ending January 10, 2020, on a $/mmBTU basis, the spot price of Appalachian coals was more than three times the price of Powder River Basin coal, and such price differences have been persistent over time.

- Heat content: SPRB mines yield subbituminous coal with a heat content that typically ranges from 8400 to 8800 BTU per pound, while other varieties of coal have different heat contents (for example, lignite coal typically produces less than 8300 BTU per pound, while bituminous and anthracite coal produce substantially more heat per pound, at least 11,500 BTUs). Electric power generators typically seek to purchase coal with an appropriate BTU specification in order to run their units cost-effectively.

- Low sulfur content: The sulfur content of the coal burned in coal-fired power plants is important to power generators because local, state and federal regulations limit emissions of certain pollutants, including sulfur dioxide. SPRB coal typically has relatively low sulfur content, and thus when burned produces less sulfur dioxide than higher-sulfur coals.

- Low sodium content: SPRB coal is also relatively low in sodium compared to other coals mined in the United States. Ash is another waste product of coal combustion, and a relatively low sodium content in ash is considered desirable by power producers.

14. Coal mined in other basins does not meaningfully constrain the price of SPRB coal in the large portions of the United States where SPRB coal can be shipped economically. Power plant generation units that burn SPRB coal rarely switch to coal from a different basin. Not only is SPRB coal the lowest-cost coal produced in the United States, environmental restrictions may prevent SPRB-burning power plants from burning coal with higher proportions of certain pollutants (such as sulfur). In some cases, plant owners may be entirely foreclosed from burning another type of coal because the plant only has regulatory approval to burn SPRB coal. Moreover, many power plants that burn SPRB coal can face substantial switching costs if

they attempt to switch to other coals, which could include installation of additional pollution-control equipment.

15. Industry and public recognition confirms that SPRB coal differs from non-SPRB coals. Public sources of information, including analysis of commodity prices, routinely differentiate between SPRB coal and other types of coal. Likewise, market participants and industry analysts regularly discuss supply and demand conditions for SPRB coal separately from supply and demand for other types of coal.

16. SPRB coal prices are typically determined through direct interactions between SPRB coal producers and customers, involving a request-for-proposal ("RFP") process in which customers solicit bids from multiple suppliers of SPRB coal. Customers typically issue an RFP specifying the quantity of coal that they desire to contract for and the time period in which the coal will be delivered (often one year or two years). Based on responses to the RFP, a customer will negotiate a supply contract with one or more suppliers. While customers can also purchase SPRB coal by placing a bid on the Over-The-Counter ("OTC") spot market, due to their reliance on regular supplies of large amounts of coal for their coal-fired power plants, most customers prefer to contract with suppliers for most of their SPRB coal purchases rather than rely exclusively or primarily on OTC purchases. SPRB coal customers value the security of supply provided by a contract, and OTC prices are typically higher than individually negotiated contract prices.

17. Due to the widespread use of RFPs, SPRB coal producers typically know the identity of customers seeking to purchase SPRB coal, and are able to customize their bids based on a customer's circumstances, including the location of the customer's power plants, which impact both the plants' regulatory requirements and the shipping costs the customer will incur. SPRB coal purchasers generally negotiate shipping costs directly with railroads, without the involvement of SPRB coal producers, and greater distances typically result in greater shipping costs. Shipping costs are significant compared to the free-on-board price of SPRB coal; in many cases, shipping costs account for 50% or more of a customer's delivered cost.

18. Power generation units designed to burn SPRB coal cannot readily replace SPRB coal with natural gas, wind, sun, or nuclear fuels. Owners of such units cannot practicably construct new facilities that use alternative fuels in response to small-but-significant increase in the price of SPRB coal, because it is expensive and time-consuming to construct new facilities powered by natural gas, renewables, or nuclear fuels.

19. While the total demand for SPRB coal in the economy has been falling over time, industry regulators such as EIA, and SPRB coal producers (including Peabody and Arch), expect that SPRB coal plants will continue to purchase and burn many millions of tons of SPRB coal for many years to come.

20. Some power plants that rely on SPRB coal are owned by utilities that can also supply electricity to end-customers by (i) generating it from power plants designed to use fuels other than SPRB coal, and/or (ii) purchasing power "wholesale" from other power generators. If SPRB coal prices were to increase by a small-but-significant amount, such utilities are unlikely

to reduce their purchases of SPRB coal by enough to render the price increase unprofitable, for several reasons. Among other reasons:

- coal-fired power plants are expensive to construct (modern plants can cost more than one billion dollars), and once a power plant operator has made such a significant investment, it has strong incentives to operate its plant, even if the price of coal increases by a small-but-significant amount;

- electricity producers often rely on coal-fired power units to run continuously to reliably supply power despite variable conditions (such as weather, natural gas pipeline constraints, and electricity grid congestion) that can render alternative power sources unreliable or unavailable; and

- a small-but-significant increase in SPRB coal producers' prices would have only a minor impact on a power generator's cost of producing electricity, due to the high transportation costs of SPRB coal and other factors.

B. Relevant Geographic Market

21. A relevant geographic market in which to analyze the competitive effects of this transaction is the Southern Powder River Basin. The suppliers of SPRB coal are located within the Southern Powder River Basin, and this is the region in which purchasers of SPRB coal can seek alternative suppliers of SPRB coal.

22. Further, the United States is a relevant geographic market in which to analyze the competitive effects of this transaction. SPRB coal is not sold in any significant quantities outside the United States, and even if it were, due to high transportation costs, SPRB coal customers could not defeat a price increase by purchasing SPRB coal outside of the United States and re-importing it.

23. Alternatively, relevant geographic markets could be defined based on the locations at which SPRB coal is consumed. All or nearly all SPRB coal consumed in 2018 was burned at fewer than 150 power plants; the majority was consumed by power plants located in the central United States and upper Midwest, within the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming. The Joint Venture would substantially lessen competition for the sale of SPRB coal within a relevant geographic market consisting of one or more of the locations at which SPRB coal is consumed.

VI. MARKET CONCENTRATION AND THE JOINT VENTURE'S PRESUMPTIVE ILLEGALITY

24. The Joint Venture would create a single entity with a dominant share of SPRB coal reserves, and a dominant share of sales to SPRB customers. Post-Joint Venture, the combined entity would control more than 60% of SPRB coal reserves and approximately 60% or more of SPRB coal production.

25. The minority of SPRB reserves and production not controlled by Peabody and Arch are split among five producers. Two producers are vertically integrated companies that utilize their SPRB production to supply their own captive power plants: the Dry Fork mine is operated by the Western Fuels Association, a cooperative organization of power plant owners, and the Wyodak mine is owned by the Black Hills Corporation, which operates an SPRB coal-fired power plant located at the mine mouth. These mines do not meaningfully compete to supply power plants other than the captive power plants the mines currently serve. The other three producers are Navajo Transitional Energy Company, LLC, Eagle Specialty Materials, LLC, and Peter Kiewit Sons' Inc. If the Joint Venture were consummated, none of these would approach the scale of the Joint Venture: in 2018, Arch and Peabody collectively produced approximately five times the SPRB coal production of the next largest producer, and collectively controlled more than five times the SPRB coal reserves of the next largest rival.

26. The Merger Guidelines and federal courts measure concentration using HHIs. The HHI for a relevant market is calculated by totaling the squares of the market shares of each producer that sells the relevant product within the relevant geographic market. The post-Joint Venture HHI and the change in HHI (post-Joint Venture compared to pre-Joint Venture) are used to determine whether a transaction raises significant competitive concerns. A transaction is presumed likely to create or enhance market power – and is presumptively illegal – when the post-transaction HHI exceeds 2,500 and the transaction increases the HHI by more than 200 points. Both of these conditions would be satisfied by the Joint Venture in any of the three geographic markets identified above: the Southern Powder River Basin, the United States, or a relevant geographic market consisting of one or more of the locations at which SPRB coal is consumed. In each of these relevant geographic markets, whether market shares are measured by SPRB coal reserves or SPRB coal production, the Joint Venture would result in HHIs over 4,500 and produce an HHI increase of at least 2,000 – far exceeding the thresholds that create a presumption of illegality. Therefore, the Joint Venture is presumptively unlawful.

VII. ANTICOMPETITIVE EFFECTS

27. The Joint Venture would eliminate current competition between Peabody and Arch that benefits SPRB coal customers.

28. As the two biggest SPRB coal competitors, with large deposits of high-quality coal that can be mined at relatively low costs, Respondents often bid directly against each other in response to RFPs and other competitive opportunities to supply SPRB coal, resulting in lower prices and other benefits for customers. The Joint Venture would eliminate this competition immediately.

29. The Joint Venture would face few rivals with significant low-cost and high-quality reserves, and would have the increased incentive and ability to reduce its output and/or increase its prices compared to the prices and output that Peabody and Arch would provide to customers but-for the Joint Venture.

30. The other, much smaller SPRB coal producers will not make up for the competition lost as a result of the Joint Venture. Among other reasons, a significant portion of

the Respondents' competitors' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch. As a result, even if Respondents' rivals had an incentive to increase output or otherwise compete more aggressively in response to the Joint Venture's post-transaction conduct, they would not be able to do so on a scale sufficient to alleviate the anticompetitive effects on SPRB coal customers. In addition, one or more of Respondents' rivals may be dissuaded from acting on an incentive to increase output or compete more aggressively due to an anticipated reaction by the Joint Venture.

31. Moreover, Respondents' rivals may each find it individually rational to refrain from increasing output or otherwise competing more aggressively in response to a post-Joint Venture price increase or output reduction. By reducing the number of producers in the market and significantly increasing concentration, the transaction will increase rivals' ability to predict the overall response to a price increase or other competitive initiative, thereby affecting rivals' competitive incentives and potentially emboldening price increases. Each SPRB coal producer's ability to predict rivals' responses is heightened by significant transparency regarding output, pricing, and the competitive initiatives of rival firms. In addition to mine production, mine cost, and mine capacity information, SPRB coal producers have awareness of pricing. SPRB coal producers learn about competitors' pricing during the RFP process, and each producer can (and generally does) track the OTC spot market price of SPRB coal.[1]

32. Competition from fuels other than SPRB coal will also not replace the competition lost between Peabody and Arch. Suppliers of natural gas, uranium, and renewable energy do not bid against SPRB coal suppliers in RFPs or other competitive opportunities to supply SPRB coal-fired power generation units at all. SPRB producers face relatively inelastic demand for SPRB coal because, among other reasons, SPRB coal-fired power plants have high fixed costs, their generating units are unable to use alternative fuels, and many customers are utilities subject to retail rate regulation that are able to pass through their fuel costs to their end-customers (residential, commercial, and industrial consumers of electricity).

VIII. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

33. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Joint Venture.

34. Expansion by the existing firms sufficient to defeat anticompetitive effects in the SPRB coal market is unlikely because, among other reasons, a significant portion of Respondents' rivals' coal reserves are more costly to extract than the coal currently mined by Peabody and Arch.

1 While some SPRB mines yield coal with different heat rates, the price of SPRB coals of differing heat rates can be compared by calculating the price per-million-BTUs (rather than the price-per-ton).

35. New entry into the SPRB coal market is unlikely due to substantial barriers to entry. Firms historically enter the SPRB coal market by leasing rights to extract SPRB coal from federally owned land. Obtaining these rights typically entails a lengthy regulatory process including environmental assessments, the submission of detailed plans, and other regulatory hurdles. Moreover, new SPRB coal producers must make significant up-front financial investments in equipment and infrastructure before they are able to mine coal cost-effectively, and must be able to fund significant reclamation liabilities once the lease expires. Thus, new entry is unlikely to occur in a timely fashion on a scale sufficient to prevent a price increase by current SPRB coal producers.

B. Efficiencies

36. Respondents cannot demonstrate cognizable, transaction-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Joint Venture's likely significant anticompetitive effects.

IX. VIOLATION

Count I – Illegal Agreement

37. The allegations of Paragraphs 1 through 36 above are incorporated by reference as though fully set forth herein.

38. The Joint Venture Agreement 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 Joint Venture

39. The allegations of Paragraphs 1 through 36 above are incorporated by reference as though fully set forth herein.

40. The Joint Venture, 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 eleventh day of August, 2020, at 10:00 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 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 Joint Venture 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 Joint Venture 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 markets, with the ability to offer such products and services as Peabody and Arch were offering and planning to offer prior to the Joint Venture.

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

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

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 Arch as a 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 twenty-fifth day of February 2020.

By the Commission, Commissioner Wilson dissenting.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. The Joint Motion states that Respondents Peabody Energy Corporation and Arch Coal, Inc. have informed Complaint Counsel that they have terminated their proposed acquisition and that Peabody has withdrawn its Hart-Scott-Rodino Notification and Report Forms for that transaction and has no intent to refile. Having considered the Joint Motion, we have determined that it should be granted. Accordingly,

IT IS HEREBY ORDERED that the Joint Motion to Dismiss Complaint dated October 15, 2020, is **GRANTED** and the Complaint in this proceeding is dismissed without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

NTT GLOBAL DATA CENTERS AMERICAS, INC.
F/K/A
RAGINGWIRE DATA CENTERS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9386; File No. 182 3189
Complaint, November 5, 2019 – Decision, October 28, 2020

This consent order addresses NTT Global Data Centers Americas, Inc., formerly known as RagingWire Data Centers, Inc.'s representations concerning its participation in, and compliance with, the EU-U.S. Privacy Shield Framework agreed upon by the U.S. and the European Union. The complaint alleges that NTT Global continued to represent that it was a Privacy Shield participant after allowing its certification to lapse. The complaint also alleges that NTT Global failed to comply with three substantive Privacy Shield requirements by not: a) providing an independent recourse mechanism for the entire time it was a Privacy Shield participant; b) annually verifying that its assertions regarding its Privacy Shield practices were implemented and in accord with the Privacy Shield principles; and c) affirming or verifying, after it was withdrawn from the Framework, that it would delete or return information collected or that it would continue its ongoing commitment to protect any retained data it had received pursuant to Privacy Shield. The consent order prohibits NTT Global from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield Framework, the Swiss-U.S. Privacy Shield Framework, and the Asia-Pacific Economic Cooperation Privacy Framework.

Participants

For the *Commission*: *Brian Berggren, Linda Holleran Kopp, Cathlin Tully,* and *Robin Wetherill.*

For the *Respondents*: *Corey W. Roush, Diana Schaffner,* and *C. Fairley Spillman, Akin Gump Strauss Hauer & Feld.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that RagingWire Data Centers, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent RagingWire Data Centers, Inc. ("RagingWire") is a Nevada corporation with its principal office or place of business at 200 S. Virginia Street, 8th Floor, Reno, NV 89501.

2. RagingWire provides data colocation services. Specifically, RagingWire offers specialized storage facilities—often referred to as "data centers"—that are designed to house and protect servers owned and operated by other businesses, along with various complementary services including on-site technical support, network connectivity, and physical security.

3. The acts and practices of RagingWire as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. As described in more detail below, RagingWire has made deceptive statements on its website, https://www.ragingwire.com/content/online-privacy-policy, and in its marketing materials, about its participation in and compliance with the EU-U.S. Privacy Shield Framework and/or EU-U.S. Safe Harbor Framework.

Personal Data Transfers Under EU Law

5. The EU-U.S. Privacy Shield Framework ("Privacy Shield") was negotiated by the Department of Commerce ("Commerce") and the European Commission ("EC") to provide a mechanism for companies to transfer personal data from the European Union ("EU") to the U.S. in a manner consistent with the requirements of European Union law on data protection. Enacted in 1995, the EU Data Protection Directive set forth EU requirements for the protection of personal data. Among other things, it required EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. The EU has since enacted a new data protection regime, the General Data Protection Regulation ("GDPR"), which took effect as of May 25, 2018, and contains similar provisions on data transfers. The GDPR explicitly recognizes EC adequacy determinations in effect as of that date. Unlike the Directive, the GDPR is directly applicable and generally does not require member states to enact implementing legislation.

7. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield Framework, which the European Commission determined was adequate by written decision in July 2016, and took effect August 1, 2016. Thus, the EU-U.S. Privacy Shield Framework allows for the transfer of personal data lawfully from the EU to those companies in the United States that participate in Privacy Shield.

8. The EU-U.S. Privacy Shield Framework replaced the U.S.-EU Safe Harbor Framework ("Safe Harbor Framework"), in effect from 2000-2016, as a lawful mechanism under EU law for transferring data from the EU to the United States.

9. To join the EU-U.S. Privacy Shield Framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles, and to related requirements that have been deemed to meet the EU's adequacy standard. Participating companies must annually recertify their compliance.

10. The EU-U.S. Privacy Shield Framework expressly provides that while decisions by organizations to "enter the Privacy Shield are entirely voluntary, effective compliance is compulsory: organizations that self-certify to the Department and publicly declare their

commitment to adhere to the Principles *must comply fully* with the Principles." (Emphasis added.)

11. To comply with the Privacy Shield Principles, companies must, among other things, ascertain that any third-party agents to which they transfer data received pursuant to Privacy Shield are obligated to provide at least the same level of privacy protection as is required by the Principles, as required by Privacy Shield Principle 3, "Accountability for Onward Transfer." One way to meet this requirement is to use an agent that is also a Privacy Shield participant.

12. Companies under the jurisdiction of the FTC are eligible to join the EU-U.S. Privacy Shield Framework. The framework expressly warns companies that claim to have self-certified to the Privacy Shield Principles that failure to comply or otherwise to "fully implement" the Privacy Shield Principles "is enforceable under Section 5 of the Federal Trade Commission Act."

13. The European Commission's adequacy decision expressly notes that, "to ensure the proper application of the EU-U.S. Privacy Shield Framework, interested parties, such as data subjects, data exporters and the national Data Protection Authorities (DPAs), must be able to identify those organisations adhering to the Principles." To that end, Commerce maintains a public website, https://www.privacyshield.gov, where it posts the names of companies that have self-certified to the EU-U.S. Privacy Shield Framework. The listing of companies, available at https://www.privacyshield.gov/list, indicates whether the company's self-certification is current. A U.S. company may only benefit from the EC adequacy decision while it is on the Department of Commerce's Privacy Shield list.

14. Under Article 83 of GDPR, transfers of personal information from the European Economic Area ("EEA") to the United States without the benefit of an authorized mechanism such as Privacy Shield are subject to severe penalties, including administrative fines of up to 20,000,000€ or 4% of the transferor's worldwide annual turnover from the preceding financial year, whichever is greater.

15. RagingWire is under the jurisdiction of the FTC.

RagingWire's Business Practices

16. RagingWire offers colocation services that store customer data at one of three data centers located in the United States. RagingWire customers that collect or process personal information from the EEA and want to transfer that data to RagingWire in the U.S. can comply with GDPR and/or their own Privacy Shield obligations if RagingWire participates in Privacy Shield.

17. RagingWire originally participated in the Safe Harbor Framework, and submitted its final annual recertification for the Safe Harbor Framework on June 16, 2016.

18. RagingWire submitted a Privacy Shield self-certification application in approximately October 2016. It obtained Privacy Shield certification in January 2017.

19. One year later, RagingWire did not complete the steps necessary to renew its Privacy Shield certification, and its Privacy Shield certification lapsed in January 2018.

20. From approximately January 2017 until October 2018, RagingWire disseminated or caused to be disseminated the following representations in its online privacy policy, available at https://www.ragingwire.com/content/online-privacy-policy, including, but not limited to, statements that it participated in and complied with the EU-U.S. Privacy Shield (the "Privacy Shield Statements"):

> **EU-U.S. Privacy Shield**
>
> RagingWire complies with the EU-US Privacy Shield Framework as set forth by the US Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries. RagingWire has certified that it adheres to the Privacy Shield Principles of Notice, Choice, Accountability for Onward Transfer, Security, Data Integrity and Purpose Limitation, Access, and Recourse, Enforcement and Liability. If there is any conflict between the policies in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov/
>
> **The Federal Trade Commission (FTC) has jurisdiction over RagingWire's compliance with the Privacy Shield.**
>
> **DISPUTE RESOLUTION**
>
> In compliance with the EU-US Privacy Shield Principles, RagingWire commits to resolve complaints about your privacy and our collection or use of your personal information. . .. If you have an unresolved privacy or data use concern that we have not addressed satisfactorily, please contact our U.S.-based third party dispute resolution provider (free of charge) at https://feedback-form.truste.com/watchdog/request. Please note that if your complaint is not resolved through these channels, under limited circumstances, a binding arbitration option may be available before a Privacy Shield Panel.

21. RagingWire also has disseminated or caused to be disseminated sales materials containing representations that RagingWire was a participant in Privacy Shield and/or the Safe Harbor Framework after it was no longer participating in the frameworks. For example, RagingWire's marketing slides, the "Sales Tour Deck," represented in 2018 that RagingWire participated in the Safe Harbor Framework when, in fact, RagingWire no longer participated in the Safe Harbor Framework or Privacy Shield as of January 2018. A copy of this representation is attached hereto as Exhibit A.

22. Following the lapse of RagingWire's Privacy Shield certification in January 2018, Commerce warned the company in February 2018, and again in May 2018, to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation in the EU-U.S. Privacy Shield Framework.

23. RagingWire did not remove its Privacy Shield Statements until October 2018, after RagingWire was contacted by the FTC.

24. In June 2019, RagingWire again obtained Privacy Shield certification.

RagingWire's Privacy Shield Non-Compliance

25. At least during the January 2017-18 period that RagingWire was a Privacy Shield participant, RagingWire failed to comply with the Privacy Shield Principles.

RagingWire's Failure to Verify Compliance

26. Supplemental Principle 7 of the Privacy Shield Principles requires any company that participates in Privacy Shield to annually verify, through self-assessment or outside compliance review, that the assertions it makes about its Privacy Shield privacy practices are true and that those privacy practices have been implemented.

27. Participants must also prepare a statement, signed by a corporate officer or outside reviewer, that such assessment or outside compliance review has been completed. Participants must make their annual verification statements available on request to the FTC or Department of Transportation, whoever has unfair and deceptive practices jurisdiction over the company.

28. During the 2017-18 period that RagingWire participated in Privacy Shield, RagingWire did not verify, through self-assessment or outside compliance review, that its assertions about its Privacy Shield privacy practices were true and that those privacy practices had been implemented.

29. During the 2017-18 period that RagingWire participated in Privacy Shield, RagingWire also did not complete a verification statement signed by an officer or outside compliance reviewer that the assertions it had made about its Privacy Shield privacy practices during the time it participated in the program were true and that those privacy practices had been implemented.

RagingWire's Failure to Maintain an Independent Recourse Mechanism

30. Principle 7(a)(i) of the Privacy Shield Principles requires, among other things, that organizations participating in Privacy Shield provide "readily available independent recourse mechanisms by which each individual's complaints and disputes are investigated and expeditiously resolved at no cost to the individual and by reference to the Principles."

Supplemental Principle 11(a) specifies that participating organizations may comply with Principle 7(a)(i) by using a qualifying private-sector program.

31. TRUSTe LLC ("TRUSTe"), a subsidiary of TrustArc Inc., offers a qualifying Privacy Shield dispute resolution mechanism. Privacy Shield participants may satisfy the requirements of Principle 7(a)(i) and Supplemental Principle 11(a) by participating in TRUSTe's dispute resolution program.

32. RagingWire contracted with TRUSTe to provide dispute resolution services.

33. Under the heading "Dispute Resolution," RagingWire's Privacy Shield Statements included a hyperlink to the private sector program developed by TRUSTe LLC. RagingWire's Privacy Shield Statements directed consumers to use that link to submit "unresolved privacy or data use concern[s]" to RagingWire's "U.S.-based third party dispute resolution provider."

34. However, RagingWire's subscription with TRUSTe was terminated as of October 1, 2017, and TRUSTe ceased providing dispute resolution services to RagingWire as of that date. RagingWire did not renew its dispute resolution subscription with TRUSTe until June 2018.

RagingWire's Failure to Properly Withdraw and Affirm Its Ongoing Compliance

35. Supplemental Principle 6(f) of the Privacy Shield Principles requires that any participant that withdraws from Privacy Shield affirm to Commerce that it will either continue to apply the Privacy Shield Principles to any data received pursuant to Privacy Shield or will delete or return all such data. Supplemental Principle 7 requires organizations to respond promptly to inquiries and other requests for information from Commerce relating to the organization's adherence to the Privacy Shield Principles.

36. In February 2018, Commerce informed RagingWire that, because its certification had lapsed, it was required to complete a questionnaire verifying whether the company would re-certify or withdraw from the program and, if the latter, whether RagingWire would return and delete the data it had received under Privacy Shield or would continue to apply the Privacy Shield Principles to that data.

37. RagingWire did not complete the questionnaire.

Count 1-Privacy Shield Participation Misrepresentation

38. As described in Paragraphs 20-21, RagingWire has represented, directly or indirectly, expressly or by implication, that it was a current participant in the EU-U.S Privacy Shield Framework and/or the Safe Harbor Framework from at least January 2017 until at least October 2018.

39. In fact, as described in Paragraphs 17 and 19, RagingWire's Privacy Shield and Safe Harbor Framework certifications had lapsed and it was not a current participant in the EU-

U.S. Privacy Shield Framework or the Safe Harbor Framework from at least January 2018 until approximately June 2019. Therefore, the representations set forth in Paragraphs 38 were false or misleading.

Count 2-Misrepresentation Regarding Verification

40. As described in Paragraphs 20-21, RagingWire has represented, directly or indirectly, expressly or by implication, that it complies with the Privacy Shield Principles.

41. In fact, as described in Paragraphs 26-29, RagingWire failed to comply with the verification requirements during the time it participated in Privacy Shield. Therefore, the representations set forth in Paragraph 40 were false or misleading.

Count 3-Misrepresentation Regarding Dispute Resolution

42. As described in Paragraphs 20-21, RagingWire has represented, directly or indirectly, expressly or by implication, that it complies with the Privacy Shield Principles.

43. In fact, as described in Paragraphs 30-34, RagingWire failed to comply with the Privacy Shield Principles' requirement that it maintain a readily available independent recourse mechanism for the period from approximately October 1, 2017 through June 19, 2018. Therefore, the representations set forth in Paragraph 42 were false or misleading.

Count 4-Misrepresentation Regarding Continuing Obligations

44. As described in Paragraphs 20-21, RagingWire has represented, directly or indirectly, expressly or by implication, that it complies with the Privacy Shield Principles.

45. In fact, as described in Paragraphs 35-37, RagingWire let its certification lapse and did not affirm or verify to Commerce that it would either delete or return personal information that it received during the time it participated in the program or would continue to apply the principles to such information. Therefore, the representations set forth in Paragraph 44 were false or misleading.

Violations of Section 5 of the FTC Act

46. The acts and practices of RagingWire as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

You are notified that on the seventh day of July, 2020, at 10:00 a.m., at the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Room 532-H, Washington, DC 20580, an Administrative Law Judge of the Federal Trade Commission, will hold a hearing on the charges set forth in this Complaint. At that time and place, you will have the right under the Federal

Trade Commission 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 this Complaint.

You are notified that you are afforded the opportunity to file with the Federal Trade Commission ("Commission") an answer to this Complaint on or before the 14th day after service of the Complaint upon you. An answer in which the allegations of the Complaint are contested must 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 will be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer should consist of a statement that you admit all of the material facts to be true. Such an answer will 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 may 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 of fact and conclusions of law under FTC Rule § 3.46.

Failure to answer timely will be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint. It will also 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 will hold an initial prehearing scheduling conference to be held not later than 10 days after the answer is filed by the Respondent. 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, NW, Room 532-H, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than 5 days after the answer is filed by the Respondent. Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

The following is the form of the order which the Commission has reason to believe should issue if the facts are found to be as alleged in the Complaint. If, however, the Commission concludes from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Respondent might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary and appropriate.

Complaint

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means RagingWire Data Centers, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield Framework and the Swiss-U.S. Privacy Shield Framework and the APEC Cross-Border Privacy Rules.

II. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, must affirm to the Department of Commerce, within thirty (30) days after any withdrawal or lapse in its certification to the EU-U.S. Privacy Shield Framework or the Swiss-U.S. Privacy Shield Framework, and on an annual basis thereafter for as long as it retains such information, that it will:

1. Continue to apply the EU-U.S. Privacy Shield Framework Principles to the personal information it received while it participated in the Privacy Shield; or

2. Protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield Framework) or Swiss (for the Swiss-U.S. Privacy Shield Framework) law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

3. Return or delete the information.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the effective date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *RagingWire Data Centers, Inc*., FTC File No. 1823189.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that the final and effective date of this Order is the 60th day after this Order is served. This Order will terminate twenty (20) years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

B. this Order's application to any respondent that is not named as a defendant in such complaint; and

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

THEREFORE, the Federal Trade Commission, this fifth day of November, 2019, has issued this Complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") issued a complaint challenging certain acts and practices of the Respondent named above in the caption. The Commission's Bureau of Consumer Protection ("BCP") filed the Complaint, which charged the Respondent with violating the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Acting Secretary of the Commission thereafter withdrew this matter from adjudication in accordance with Section 3.25(c) of the Commission's Rules, 16 C.F.R. 3.25(c) ("Rule 3.25").

The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Rule 2.34. Now, in further conformity with the procedure prescribed in Rule § 3.25 (f), the Commission makes the following Findings and issues the following Order:

Findings

1. Respondent is NTT Global Data Centers Americas, Inc., a Nevada corporation, with its principal office or place of business at 1625 W. National Drive, Sacramento, CA 95834. NTT Global Data Centers Americas, Inc. is the successor in interest to RagingWire Data Centers, Inc.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "**Respondent**" means NTT Global Data Centers Americas, Inc., and any successors and assigns.

B. "**EU**" means European Union.

C. "**Privacy Shield**" means the EU-U.S. Privacy Shield Framework and/or the Swiss-U.S. Privacy Shield Framework, administered by the U.S. Department of Commerce.

D. "**Privacy Shield Principles**" means the requirements for self-certified participants of the EU-U.S. Privacy Shield Framework and/or the Swiss-U.S. Privacy Shield Framework, as reflected in Exhibit A.

Provisions

I. Prohibition Against Misrepresentations About Participation in or Compliance with Privacy Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield Framework, the Swiss-U.S. Privacy Shield Framework, and the APEC Cross-Border Privacy Rules.

II. Requirement for Annual Outside Compliance Review

IT IS ORDERED that, commencing no later than 120 days after the effective date of this Order and for so long as Respondent is a self-certified participant in Privacy Shield, Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertisement, marketing, promotion, offering for sale, or sale of any product or service, shall obtain an annual outside compliance review from an independent third-party assessor approved by the Associate Director for the Division of Enforcement of the Bureau of Consumer Protection at the Federal Trade Commission, that demonstrates that the assertions Respondent makes about its Privacy Shield practices are true, and that those Privacy Shield practices have been implemented as represented and in accord with the Privacy Shield Principles. A statement verifying that an outside compliance review has been successfully completed must be signed by the third-party assessor and made available to the Commission upon request.

III. Requirement to Meet Continuing Obligations Under Privacy Shield

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, must affirm to the Department of Commerce, within thirty (30) days after any withdrawal or lapse in its

certification to the EU-U.S. Privacy Shield Framework or the Swiss-U.S. Privacy Shield Framework, and on an annual basis thereafter for as long as it retains such information, that it will:

A. Continue to apply the EU-U.S. Privacy Shield Framework Principles to the personal information it received while it participated in the Privacy Shield; or

B. Protect the information by another means authorized under EU (for the EU-U.S. Privacy Shield Framework) or Swiss (for the Swiss-U.S. Privacy Shield Framework) law, including by using a binding corporate rule or a contract that fully reflects the requirements of the relevant standard contractual clauses adopted by the European Commission; or

C. Return or delete the information.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the effective date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use

to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: In re *NTT Global Data Centers Americas, Inc*., Docket No. 9386.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold;

B. personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

D. a copy of each widely disseminated representation by Respondent making any representation subject to this Order, and all materials that were relied upon in making the representation.

VII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VIII. Order Effective Dates

IT IS FURTHER ORDERED that the final and effective date of this Order is the 60th day after this Order is served. This Order will terminate on October 28, 2040, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

B. this Order's application to any respondent that is not named as a defendant in such complaint; and

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Chopra dissenting, Commissioner Slaughter not participating.

MAJORITY STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

The Federal Trade Commission remains committed to enforcing the EU-U.S. Privacy Shield and Swiss-U.S. Privacy Shield programs, and the order we approve today is consistent with that commitment. This order is, in fact, more protective of the Privacy Shield Principles than the 14 orders this Commission (including Commissioner Chopra) has approved in prior Privacy Shield cases. Specifically, it requires Respondent to obtain third-party assessments for as long as it participates in Privacy Shield.

Notably, this heightened obligation exceeds the scope of the notice order that the Commission (including Commissioner Chopra) unanimously approved in November 2019 in this case. Commissioner Chopra asserts that new facts have emerged in litigation that would support even more relief. But what staff did here is obtain additional evidence, through discovery, that supports the complaint's allegations. The Commission had reason to believe that Respondent's Privacy Shield representations were included in a variety of publications and were material when we voted to litigate. During litigation, staff uncovered further evidence confirming materiality. This should not have come as a surprise to Commissioner Chopra. For example, the complaint specifically alleges that Respondent claimed, both in its privacy policy and in marketing materials, that it participated in Privacy Shield, and staff found evidence that Respondent was, in fact, touting its participation in Privacy Shield as a selling point.

Commissioner Chopra would ask us to reject a settlement that protects consumers and furthers our Privacy Shield goals, to instead continue litigation during an ongoing pandemic. There is no need and doing so would unnecessarily divert resources from other important matters, including investigations of other substantive violations of Privacy Shield. We do not support moving the goalposts in this manner[1] and for this reason vote to accept the settlement,

1 Commissioner Chopra attempts to distinguish his earlier approval of settlements by arguing that additional relief is warranted in cases involving large businesses that violate substantive provisions of Privacy Shield. Notably, however, several recent settlements approved unanimously by this Commission that similarly alleged substantive

which not just accords with but exceeds the relief the Commission unanimously sought to obtain at the outset of the case.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

June 30, 2020

Summary

- American businesses that participate in the EU-U.S. Privacy Shield Framework should not have to compete with those that break their privacy promises.
- The FTC charged a data center company with violating their Privacy Shield commitments, but our proposed settlement does not even attempt to adequately remedy the harm to the market.
- The evidence in the record raises serious concerns that customers looking to follow the law relied on the company's representations and may be locked into long-term contracts.
- A quick settlement with a small firm for an inadvertent mistake may be appropriate, but it is inadequate for a dishonest, large firm violating a core pillar of Privacy Shield.
- We must consider seeking additional remedies, including rights to renegotiate contracts, disgorgement of ill-gotten revenue and data, and notice and redress for customers.

EU-U.S. Privacy Shield Framework

European companies seeking to comply with data protection rules need to ensure that their service providers are on the right side of the law. To adhere to legal requirements when transferring personal data from Europe to the United States, these companies prefer to work with partners that participate in the EU-U.S. Privacy Shield Framework, the cross-border data-sharing protocol between the European Union and the United States.

One of the ways that American companies can distinguish themselves to prospective clients in the European Union is to participate (or work with a participant) in the Privacy Shield program, administered by the U.S. Department of Commerce. By participating, American companies must comply with a list of requirements on data protection, and they agree to be held accountable for these commitments. For example, companies must articulate how individuals can

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violations of Privacy Shield involved companies that also generated substantial revenue, nor have the allegations or the defendant changed since the Commission initially approved the notice order.

access the personal data held by the participating company, explain the ways in which individuals can limit the use and disclosure of their personal data, and provide individuals access, at no charge, to an independent recourse mechanism to resolve disputes. Importantly, the Federal Trade Commission can take enforcement actions against companies that violate their Privacy Shield promises.

Strengthening the FTC Cross-Border Data Transfer Enforcement Program

Typically, the FTC uses this enforcement authority by entering into no-money, no-fault settlements where a company simply agrees it will stop breaking the law. I believe it is critical that we approach our enforcement program with a mindset of seeking continuous improvement, given the integral role we play to root out deception in this arena.

Deception does not simply harm consumers; it also harms honest businesses and it distorts fair competition. This is not a new concept - it is longstanding policy. I continue to believe that our Privacy Shield enforcement program can do more to protect and redress individuals in the European Union, while also ensuring honest American firms participating in the Privacy Shield program do not have to compete with companies that break their privacy promises.[1]

The FTC Act permits the Commission to issue orders to companies after serving notice of its charges and offering the individual or company an opportunity to respond. Under our procedures, after the Commission charges a respondent with wrongdoing, the parties can exchange evidence in the discovery process and an Administrative Law Judge ultimately presides over a trial. At the conclusion of these procedures, whether through appeal or directly, the Commission can issue an order to the Respondent if the Commission concludes that there was a law violation.

But, the process does not end there. After entering an order, the Commission can obtain additional remedies from a federal court if we have reason to believe that the misconduct was "dishonest" or "fraudulent."[2] These remedies include monetary restitution and rescission of contracts. In an administrative settlement, the Commission can obtain the full range of these remedies, since it is forgoing further litigation in federal court.

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1 In 1983, even as the Federal Trade Commission formally adopted a more lenient posture toward deception, the FTC Policy Statement on Deception noted that the prohibition on deceptive practices is "intended to prevent injury to competitors as well as to consumers . . .. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted." *FTC Statement on Deception,* 103 F.T.C. 174 (1983) *(appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984)), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

2 Under 15 U.S.C. § 57b, "[i]f the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent," it can seek "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification[.]"

Dissenting Statement

FTC's Administrative Complaint and Proposed Settlement with NTT

I have long been concerned with the FTC's Privacy Shield enforcement strategy, which overwhelmingly targets small businesses, some of whom may have made inadvertent mistakes. But these mistakes were still violations of law, and most of these orders did not involve violations of substantive protections of the Privacy Shield framework, so I have supported quick settlements with these small businesses given our limited resources. However, the FTC encountered a very different situation with a major data center company.

In November 2019, the Commission charged NTT Global Data Centers Americas (NTT), a major data center company controlled by Nippon Telephone & Telegraph formerly known as RagingWire, with failing to live up to its promises under the EU-U.S. Privacy Shield Framework. The Commission alleged that the company misrepresented its Privacy Shield participation and failed to meet certain obligations when it was a participant, including one of the core pillars: providing users with the ability to file complaints and disputes about their personal data. An administrative proceeding commenced, and NTT denied most of the Commission's allegations.[3]

The Commission now proposes to end the administrative litigation through a no-money, no-fault settlement that does not include any of the additional remedies available under the FTC Act for "dishonest" conduct. I believe the proposed settlement should be renegotiated, given that the additional evidence gathered suggests that the company's conduct was dishonest.

It is clear that the company's misrepresentations about Privacy Shield were not limited to a reference in its privacy policy. Most importantly, there was clear evidence of reliance on NTT's representations regarding its privacy protocols as a prerequisite for purchasing. Take the example of a customer of NTT, DreamHost, which offers web hosting services. DreamHost clearly values privacy. It carefully vets its partners to ensure compliance with the EU's General Data Protection Regulation. DreamHost specifically checks to see whether a prospective partner is a Privacy Shield participant. If not, DreamHost must take other steps to ensure that it meets its data protection obligations. The evidence in the record suggests that DreamHost is locked into a five-year contract that will not expire until 2022.[4] Making matters worse, [redacted]. In other words, NTT's deception and dishonesty appears to have generated sales from customers who were seeking to protect customer privacy. This distorted the market, as NTT's competitors likely lost sales due to the alleged deception.

3 Answer and Affirmative Defenses of Respondent Raging Wire Data Centers, LLC, NTT Global Data Centers Americas, Inc., Docket No. 9386 (Nov. 25, 2019), https://www.ftc.gov/system/files/documents/cases/d09386_nov_25-r_answer_and_affirmative_defensepublic596761.pdf. In its answer, the company denied that it disseminated sales materials touting its participation in Privacy Shield. Answer ¶¶ 20-21.

4 See attached Declaration of Christopher Ghazarian, NTT Global Data Centers Americas, Inc., Docket No. 9386 (Dec. 20, 2019).

The proposed settlement does nothing for companies that put a premium on privacy, like DreamHost. A more appropriate settlement would include redress for customers, forfeiture of the company's gains from any deceptive sales practices, or a specific admission of liability that would allow its customers to pursue claims in private litigation. Perhaps most importantly, NTT customers that entered into long-term contracts should be free to renegotiate or terminate these agreements if they were finalized during the period when NTT was engaged in the alleged deceptive conduct. Companies like DreamHost should not be locked into long-term contracts with NTT, given the evidence of dishonest conduct. Contract remedies would allow customers to switch to NTT's law-abiding Privacy Shield- compliant competitors, who may have lost business due to the deception. Even if the Commission sought one or more of these remedies and NTT subsequently declined to agree, it would have been more prudent to resume the administrative litigation,[5] at an appropriate time.[6]

For these reasons, I respectfully dissent.

Attachment

DECLARATION OF CHRISTOPHER GHAZARIAN
PURSUANT TO 28 U.S.C. *§* 1746

I, Christopher Ghazarian have personal knowledge of the following facts and matters discussed in this declaration. If called as a witness 1 I would testify as follows:

1. I am over age 18 years old and reside in California.

2. I am the General Counsel of DreamHost, LLC ("DreamHost"). Dream Host provides a variety of webhosting services that allow customers to create websites and host them on DreamHost's servers.

5 As noted earlier, if the Commission entered a final cease-and-desist order at the conclusion of litigation, I believe this could trigger civil penalties, pursuant to Section 5(m)(l)(B) of the FTC Act, for other companies with knowledge of the order that do not fulfill their obligations under the EU-U.S. Privacy Shield Framework or other privacy or security programs sponsored by the government or a standard-setting organization. In addition, there is a paucity of litigated FTC cases in the data protection arena, which hampers development of the law.

6 While I have great faith that our staff would be able to successfully renegotiate the existing no-money, no-fault settlement, I would be willing to continue the administrative proceeding at some time in the future. The Commission has voted to issue a number of orders to pause administrative proceedings, given the safety and logistical concerns associated with the current pandemic.

3. DreamHost has housed some of those servers in facilities owned and operated by RagingWire Data Centers, Inc. ("RagingWire"). DreamHost most recently renewed its contract with RagingWire in 2017. The term of the contract is five years.

4. Starting in 2017, DreamHost started working towards meeting the requirements for GDPR compliance. DreamHost complies with GDPR, and ensures that all of its partners that deal with personally identifiable information from residents in the European Economic Area are also compliant. DreamHost vets all of its partners from security, legal and privacy standpoints, which includes checking the partner's privacy policy.

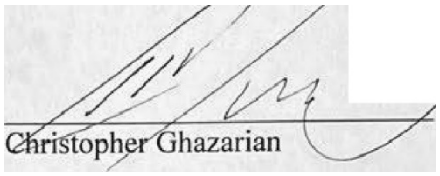
5. For partners implicated by GDPR, one of the many things we check for is to see if the partner is Privacy Shield certified. If a company is not Privacy Shield certified, we pursue other methods to ensure GDPR compliance, such as model contract clauses. The accuracy of a company's representations about being a Privacy Shield participant is a big deal to DreamHost.

6. Working with Privacy Shield-certified partners is attractive because the partner's certification gives us more peace of mind when considering whether or not to partner with that company. Raging Wire's Privacy Shield certification was therefore a plus for deciding to work with RagingWire.

7. There was a discussion about DreamHost's GDPR or Privacy Shield compliance in one of DreamHost's community forum discussion groups on or around May 2018. A true and correct copy of a screenshot of this discussion is attached to this declaration *as* Exhibit A.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: December 20, 2019



STATEMENT OF COMMISSIONER ROHIT CHOPRA

October 28, 2020

I respectfully dissent from today's action to give final approval to this settlement. Evidence uncovered in the litigation makes clear that businesses relied on NTT's EU-U.S. Privacy Shield promises, yet the settlement proposed does nothing to help these businesses or to meaningfully hold NTT accountable.[1] The Commission's vote to finalize another data protection settlement – with no money, no help for victims, and no admission or findings of liability – is a setback for the FTC's privacy enforcement program. I am hopeful we will change course.

I have recently outlined another way to reduce the FTC's reliance on no-consequences settlements, provide help for victims, and trigger penalties for those who engage in similar conduct.[2] I extend my sincere thanks to the public commenters who weighed in, in the pursuit of accountability for those that violate their Privacy Shield promises.[3]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from NTT Global Data Centers Americas, Inc., formerly known as RagingWire Data Centers, Inc. ("NTT Global"). The proposed consent order seeks to resolve allegations against NTT Global in the administrative complaint issued by the Commission on November 7, 2019.

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this

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1 Dissenting Statement of Commissioner Rohit Chopra Regarding the EU-U.S. Privacy Shield Framework in the Matter of NTT Global Data Centers Americas, Comm'n File No. 1823189 (Jun. 30, 2020), https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rohit-chopra-regarding-eu-us-privacy; Declaration of Christopher Ghazarian, NTT Global Data Centers Americas, Inc., Docket No. 9386 (Dec. 20, 2019).

2 Restating longstanding Commission policy regarding misrepresentations of affiliations with the government into a Commission rule would not create any substantive requirements for market participants, but would allow the Commission to more easily obtain appropriate remedies. Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers, Commission File No. P144400 (Oct. 19, 2020), https://www.ftc.gov/public-statements/2020/10/statement-commissioner-rohit-chopra-regarding-report-congress-protecting.

3 BEUC – The European Consumer Organisation, (Aug. 6, 2020), https://beta.regulations.gov/comment/FTC-2020-0053-0002; Burcu Kilic, on Behalf of Transatlantic Consumer Dialogue (TACD), (Aug. 10, 2020), https://beta.regulations.gov/comment/FTC-2020-0053-0003.

period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations by NTT Global concerning its participation in, and compliance with, the EU-U.S. Privacy Shield Framework agreed upon by the U.S. and the European Union ("EU"). The Privacy Shield Framework allows U.S. companies to receive personal data transferred from the EU without violating EU law. The Framework consists of a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company manages information about EU citizens.

To participate in the Privacy Shield Framework, a company must comply with the Privacy Shield principles and self-certify its compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies that have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

NTT Global provides secure data centers for housing its clients' servers (called colocation services) and related services. In a four-count complaint, the Commission alleged that NTT Global violated Section 5(a) of the Federal Trade Commission Act by falsely representing in its privacy policy, published on its website at http:/www.ragingwire.com, and in various marketing materials that it was a self-certified participant in, and that it complied with, the Privacy Shield Framework when it did not.

Specifically, the complaint alleged that NTT Global continued to represent that it was a Privacy Shield participant after allowing its certification to lapse. The complaint also alleged that NTT Global failed to comply with three substantive Privacy Shield requirements by not: a) providing an independent recourse mechanism for the entire time it was a Privacy Shield participant; b) annually verifying that its assertions regarding its Privacy Shield practices were implemented and in accord with the Privacy Shield principles; and c) affirming or verifying, after it was withdrawn from the Framework, that it would delete or return information collected or that it would continue its ongoing commitment to protect any retained data it had received pursuant to Privacy Shield.

Part I of the proposed order prohibits NTT Global from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield Framework, the Swiss-U.S. Privacy Shield Framework, and the Asia-Pacific Economic Cooperation ("APEC") Privacy Framework.

Part II of the proposed order requires that, for so long as NTT Global participates in Privacy Shield, it must obtain an annual compliance review from a third party assessor that demonstrates that NTT Global's assertions related to its Privacy Shield practices were implemented and are in accord with the Privacy Shield principles. The third-party assessor must be approved by the Associate Director of the Division of Enforcement of the FTC's Bureau of Consumer Protection, and must sign a statement verifying the successful completion of each annual compliance review.

Part III of the proposed order requires that, in the case of any future lapse in NTT Global's Privacy Shield certification, the company affirm to Commerce that it will continue to apply the Privacy Shield Framework principles to any data it received pursuant to the Framework, protect the data by another means authorized under EU or Swiss law, or delete or return such data.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part VI requires the company to create and retain certain documents relating to its compliance with the order. Part VII mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

The order will generally last for twenty (20) years.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

SUNDAY RILEY MODERN SKINCARE, LLC,
AND
SUNDAY RILEY

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4729; File No. 192 3008
Complaint, November 6, 2020 – Decision, November 6, 2020

This consent order addresses Sunday Riley Modern Skincare, LLC's marketing of their Sunday Riley brand cosmetic products. The complaint alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products, when they were written by Ms. Riley and her employees. The complaint further alleges that the respondents deceptively failed to disclose that certain online consumer reviews were written by Ms. Riley or her employees. The consent order prohibits the respondents, in connection with the sale of any product, from misrepresenting the status of any endorser or person providing a review of the product, including misrepresenting that the endorser or reviewer is an independent or ordinary user of the product.

Participants

For the *Commission*: *Michael Ostheimer.*

For the *Respondents*: *Behnam Dayanim, Charles A. Patrizia,* and *Noah N. Simmons, Paul Hastings.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunday Riley Modern Skincare, LLC, a limited liability company, and Sunday Riley, individually and as an officer of Sunday Riley Modern Skincare, LLC (collectively, "Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sunday Riley Modern Skincare, LLC ("Sunday Riley Skincare") is a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305, Houston, Texas 77027-4455.

2. Respondent Sunday Riley is the Chief Executive Officer of Sunday Riley Skincare. Individually or in concert with others, she controlled or had the authority to control or participated in the acts and practices of Sunday Riley Skincare, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Sunday Riley Skincare.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed Sunday Riley brand cosmetic products to consumers, including Luna Sleeping Night Oil, Good Genes All-In-One Lactic Acid Treatment, Blue Moon Tranquility Cleansing Balm, Start Over Active Eye Gel Cream, Bionic Anti-Aging Cream, C.E.O. Rapid Flash Brightening Serum, Effortless Breathable Tinted Primer, Tidal Brightening Facial Cream, Power Couple Duo: Total Transformation Kit, Martian Mattifying Melting Water-Gel Toner, U.F.O. Ultra-Clarifying Face Oil, Saturn Sulfur Acne Treatment Mask, and the Space Race Kit.

4. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Course of Conduct

5. Respondents have sold their Sunday Riley brand cosmetic products through Sephora, a multinational chain of personal care and beauty stores.

6. Sunday Riley brand cosmetic products sold through Sephora range in price from $22 for a 0.5-ounce jar of Tidal Brightening Facial Cream to $158 for a 1.7-ounce bottle of Good Genes All-In-One Lactic Acid Treatment.

7. Sephora provides consumers the opportunity to leave customer reviews of products sold on its website, www.sephora.com. Reviews provide a forum for sharing authentic feedback about products.

8. On multiple occasions between November 2015 and August 2017, Sunday Riley Skincare managers, including Respondent Sunday Riley, posted reviews of Sunday Riley brand cosmetic products on the Sephora website using fake accounts created just for that purpose or requested that other employees do so.

9. When Sephora removed fake reviews written by Sunday Riley Skincare employees, Sunday Riley Skincare employees suspected this was because Sephora recognized the reviews as coming from Sunday Riley Skincare's IP address. In response, Sunday Riley Skincare obtained, in the words of one manager, "an Express VPN account [to] … allow us to hide our IP address and location when we write reviews." A VPN (Virtual Private Network) is a service that lets users access the Internet privately by routing their connections through a server and hiding their online actions.

10. Calls for employees to write reviews were associated with, but not limited to, the launches of new products. In July 2016, Respondent Sunday Riley wrote to her staff:

> I would like everyone to create 3 accounts on Sephora.com, registered as a different identities.
>
> This is how you do it:

1. Create a new persona. Choose their name, city, skin type.
2. Setup a new email on gmail
3. Before going onto Sephora.com, clear your cookie history EACH TIME …
4. Connect to the internet ONLY using the VPN. Make sure to choose a city of origin that goes along with where your character lives. …
5. Leave a review – make sure to NOT compare the product to other products, to not use foul language, and to be very enthusiastic without looking like a plant. Always leave 5 stars.
6. Review a few other products as well – no skincare. Only review makeup, color, hair.
7. Leave a review for a different product every other day so you build up history. You can also use this identity on Beauty Board.
8. You will need to clear cookies and use the VPN every time, or your account will be flagged.
9. Focus on Martian, UFO, Tidal, Power Couple, Good Genes, Luna.

The other thing, if you see a negative review – DISLIKE it. After enough dislikes, it is removed. This directly translates to sales!!

Tidal and Good Genes are 4.2 and I would like to see them at 4.8+. UFO and Martian are at 4.9 – let's keep it that way!

11. In December 2016, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

> Now that CEO is up, we need to make sure the reviews for clients stay positive.
>
> I think someone created a profile yesterday and already wrote a review, only thing is it was a little pre-mature as the product only launched yesterday and wouldn't have arrived same day. **Credibility is key to the reviews!**
>
> If everyone could write *at least* 3 reviews for CEO between Friday and next Tuesday.

12. In August 2017, the Sunday Riley Skincare Account Manager responsible for Sephora wrote to other managers and employees:

> Now that Saturn is up and Space Race coming up next week, we need to make sure the reviews for clients stay positive and help generate and [sic] confidence in the products.
>
> **Credibility is key to the reviews!**

> If everyone could write *at least* 3 reviews for Saturn over the next week, and some for Space Race the week after. I would encourage you to create profiles ASAP and write a couple reviews on a makeup, hair or nail product to build a profile history. Please make sure to follow the guidelines for VPN (see below) as this is essential so the reviews don't get traced back to our IP address.
>
> When reviewing Saturn please address things like how cooling it felt, the green color, the non-drying mask effect, radiance boosting, got rid of your acne after a couple uses. The biggest points of difference for this mask and other acne masks are how this mask increases radiance and doesn't dry out the skin like all other acne masks do. It helps to make yourself seem relatable – like you know how hard acne is and you've tried everything, and this one actually works or mention things like yes, it's a little more expensive, but works incredible [sic] well compared to the cheaper masks out there. If you need any help with things to come up with to say, feel to ask myself, Sunday, or Addison. As reviews come in, read them too. If you notice someone saying things like I didn't like "x" about it, write a review that says the opposite. The power of reviews is mighty, people look to what others are saying to persuade them and answer potential questions they have.

13. In April 2018, Sunday Riley Skincare managers asked interns to create fake Sephora accounts in order to write reviews of Sunday Riley Skincare products, which they did.

Count I

False or Misleading Endorsement Claims

14. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products.

15. In fact, numerous reviews of Sunday Riley brand products on the Sephora website did not reflect the independent experiences or opinions of impartial ordinary users of the products because they were written by Sunday Riley and her employees. Therefore, the representations set forth in Paragraph 14 are false or misleading.

Count II

Deceptive Failure to Disclose Material Connections with Endorsers

16. Through the means described in Paragraphs 8 through 13, Respondents have represented, directly or indirectly, expressly or by implication, that certain reviews of Sunday

Riley brand products on the Sephora website reflected the experiences or opinions of users of the products.

17. In numerous instances in which Respondents made the representation set forth in Paragraph 16, they failed to disclose that the online consumer reviews were written by Sunday Riley or her employees. This fact would be material to consumers in evaluating the reviews of Sunday Riley brand products in connection with a purchase or use decision.

19. Respondents' failure to disclose the material information described in Paragraph 17, in light of the representations made in Paragraph 16, is a deceptive act or practice.

Violations of Section 5

21. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this sixth day of November 2020, has issued this Complaint against Respondents.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent

Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

   a. Respondent Sunday Riley Modern Skincare, LLC, a Texas limited liability company with its principal office or place of business at 4444 Westheimer Road, Suite G305, Houston, Texas 77027-4455.

   b. Respondent Sunday Riley, an officer of Corporate Respondent, Sunday Riley Modern Skincare, LLC. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of Sunday Riley Modern Skincare, LLC. Her principal office or place of business is the same as that of Sunday Riley Modern Skincare, LLC.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clearly and Conspicuously" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

   1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

   2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Close Proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Respondents" means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means Sunday Riley Modern Skincare, LLC, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means Sunday Riley.

D. "Unexpected Material Connection" means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions

I. Prohibited Representations Regarding Endorsements

IT IS ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the

advertising, promotion, offering for sale, or sale of any product must not make any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product, including a misrepresentation that the endorser or reviewer is an independent or ordinary user of the product.

II. Required Disclosure of Material Connections

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product must not make any representation, expressly or by implication, about any consumer or other endorser of such product without disclosing, Clearly and Conspicuously, and in Close Proximity to that representation, any Unexpected Material Connection between such endorser and (1) any Respondent; or (2) any other individual or entity affiliated with the product.

III. Notification of Disclosure Responsibilities

IT IS FURTHER ORDERED that Respondents provide each employee, agent, and representative with a clear statement of his or her responsibilities to disclose clearly and conspicuously and in close proximity to any endorsement in any online review, social media posting, or other communication endorsing any Respondent's product, the employee's, agent's, or representative's connection to the product, and obtaining from each such recipient a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it. Delivery and acknowledgement must occur within 10 days after the effective date of this Order for current employees, agents, and representatives. For all others, delivery and acknowledgement must occur before they assume their responsibilities.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and Corporate Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date

of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Respondent must: (a) identify all her telephone numbers and all her physical, postal, email and Internet addresses, including all residences; (b) identify all her business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or

indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which such Respondent has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580. The subject line must begin: In re *Sunday Riley Modern Skincare, LLC*.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name;

addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all consumer or other complaints relating to the independence or veracity of any product reviewer or endorser or the disclosure of Unexpected Material Connections by any endorser, whether received directly or indirectly, such as through a third party, and any response;

E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

F. a copy of each unique advertisement or other marketing material, including product reviews and social media endorsements, making a representation subject to this Order; and

G. for 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that tend to show any lack of compliance by Respondents with this Order.

VII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning the Individual Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

VIII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on November 6, 2040, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioners Chopra and Slaughter dissenting.

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

Today we announce finalization of a consent agreement against Sunday Riley Modern Skincare and its owner, Ms. Sunday Riley. This case is one of several recent FTC enforcement actions challenging fake or deceptive online reviews or endorsements for products and services.[1] These and similar cases seek to ensure that false and deceptive information is removed from the marketplace, enabling consumers to make informed purchasing decisions based on truthful and accurate information. In this case, the Commission's complaint alleges that Ms. Riley and her company polluted the online marketplace by writing and publishing fake positive reviews for

1 *FTC v. Devumi, LLC,* No. 9: 1 9-cv-81419-RKA (S.D. Fla. 2019), https://www.ftc.gov/enforcement/cases-proceedings/182-3066/devumi-llc; *FTC v. Teami, LLC,* No. 8:20-cv-518-VMC-TGW(M.D. Fla. 2020), https://www.ftc.gov/enforcement/cases-proceedings/182-3174/teami-llc.

Sunday Riley Modem Skincare products - conduct that would amount to clear violations of the FTC Act. The Commission's order holds Ms. Riley personally liable, prohibits both Ms. Riley and Sunday Riley Modem Skincare from making future misrepresentations (including through fake reviews), and requires them to instruct employees and agents about their legal responsibilities. Each violation of the order could result in a civil penalty of up to $42,530. There is no reason to believe that the Commission's order will not protect consumers from further misconduct or that the potential for civil penalties will not deter future violations.

Every case presents unique circumstances, and there are many factors that must be considered in determining what constitutes an appropriate settlement. The primary factor is the law. For example, to obtain monetary relief, the Commission must have a viable legal basis to demonstrate consumer injury or ill-gotten gains from the alleged violations. In some cases, such as frauds where the consumer receives no value, this calculation may be obvious. In others, including *Sunday Riley,* a legally defensible calculation of ill-gotten gains may be difficult. In such cases, the expenditure of resources needed to develop an adequate evidentiary basis reasonably to approximate ill-gotten gains may substantially outweigh any benefits to consumers and the market. We believe the Commission's order strikes the right balance.

The relief obtained in this case is consequential and will provide both specific and general deterrence. The administrative order binds Sunday Riley and its CEO. It constrains their future behavior by imposing limitations on their conduct, with the threat of civil penalties for violations. When evaluating relief we also must consider the cost and effect of the other sanctions imposed in the context of an enforcement action, such as the costs and constraints of complying with the injunction; the fencing in of otherwise legal conduct; the reputational effect of the order; the threat of follow-on actions by shareholders, private plaintiffs and other regulators; and other collateral consequences, such as the effect on relationships with business partners, vendors, investors, and regulators. All of these non-monetary sanctions can have substantial deterrent effect on violative behavior. Our dissenting colleagues focus on the lack of monetary relief, dismissing the efficacy both of injunctive relief and the naming of the CEO in this matter. This latter position is particularly curious given that, in other matters, they touted naming CEOs as the *sine qua non* for accountability.[2] This action sends a clear message to other companies that the FTC will not tolerate fake reviews, and underscores the applicable legal standards to follow to avoid running afoul of the law.[3]

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2 See, e.g., Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Facebook (July 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Facebook (July 2019), https: //www.ftc.gov/system/files/documents/public_statements/l536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf; Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, In the Matter of Musical.ly (now known as Tik Tok), https: //_www.ftc.gov/system/files/documents/public_statements/1463167/chopra_and_slaughter_musically_tiktok_joint statement_2-27-19 0.pdf.

3 Press coverage following the announcement of the Sunday Riley matter referred to an "FTC crackdown" and noted, for example, that "it would be naïve for companies to not start adjusting. *See* James Brumley "What Might The FTC's Crackdown On Deceptive Online Marketing Mean for Social Media Companies?" THE MOTLEY FOOL (Oct. 29, 2019), https://www.fool.com/investing/2019/10/29/what-might-the-ftcs-crackdown-on-deceptive-online

Fake and manipulated user reviews contaminate the online marketplace and inhibit informed decision-making by consumers. The FTC is intent on addressing this distortion of the marketplace, and is currently examining, among other things, how fake reviews affect consumer purchasing behavior; what platforms and other relevant market players are doing - and what they could be doing better - to combat fake reviews; and additional actions the FTC can take to address this problem beyond important law enforcement actions like this one. Advertisers and retailers should not doubt our resolve. Fake reviews, ratings, and rankings that pollute the digital marketplace are a high priority for the FTC, and we will continue to be active in this area. We also are mindful that true deterrence is not achieved via any single order but through concerted law enforcement campaigns. While this case standing alone will not cure advertisers of the urge to post fake reviews, it is part of a broader campaign to ensure that consumers are able to make purchasing decisions based on truthful and accurate information.

.aspx; *see also* Klein, David, "Social Media Influencer Marketing And FTC Enforcement" MONDAQ (March 26, 2020) (noting that "[g]iven the potential for large fines *and negative press,* companies must be aware of their obligations to ensure that their influencer marketing campaigns comply with applicable law.") (italics added), https://www.mondaq.com/unitedstates/Media-Telecoms-IT-Entertainment/907658/Social-Media-Influencer-Marketing-And-FTC-Enforcement.

Dissenting Statement

STATEMENT OF COMMISSIONER ROHIT CHOPRA JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER

Summary

- The FTC is doubling down on its no-money, no-fault settlement with Sunday Riley, who was charged with egregious fake review fraud. This weak settlement is a serious setback for the Commission's credibility as a watchdog over digital markets.
- To defend this settlement, the Commissioners supporting this outcome claim they had no basis to seek more than $0. Their analytical approach favors the fraudster, and it will undermine our mission in future cases.
- The Commission can end its no-consequences settlement policy by publishing a Policy Statement on Equitable Monetary Remedies, restating legal precedent into formal rules, and designating specific misconduct as penalty offenses through an unused FTC Act authority.

Introduction

With millions of retailers closed during the pandemic, Americans are relying more than ever on online reviews to compare products. Fake reviews are polluting digital marketplaces, harming consumers and honest sellers.

Fake review fraud is illegal, and the FTC has a responsibility to combat it. In the fake review fraud case before us today, Chairman Simons, Commissioner Phillips, and Commissioner Wilson have voted to finalize a settlement with a popular cosmetics company, Sunday Riley. The settlement includes no redress, no disgorgement of ill-gotten gains, no notice to consumers, and no admission of wrongdoing. Instead, Sunday Riley is merely being ordered to not break the law again.

Unsurprisingly, little has changed for Sunday Riley. Sephora, where Sunday Riley is alleged to have committed its fraud, continues to be a major sales channel. United Airlines retains its high-profile exclusive deal with Sunday Riley.[1] Influencers continue to promote the brand, which recently launched a new product line.[2]

Despite almost unanimous opposition to the proposed settlement, Chairman Simons, Commissioner Phillips, and Commissioner Wilson are voting to finalize it without changes. Rather than taking action today, they kick the can down the road and suggest the Commission

1 *See Amenity Kits,* UNITED AIRLINES, https://www.united.com/ual/en/us/fly/travel/inflight/amenity-kits.html (last visited on Oct. 6, 2020).

2 *See* Madge Maril, *The New Sunday Riley Clean Rinse Serum Is A Chemical Exfoliator – For Your Scalp ,* THE ZOE REPORT (Apr. 23, 2020), https://www.thezoereport.com/p/the-new-sunday-riley-clean-rinse-serum-is-a-chemical-exfoliator-for-your-scalp-22841796.

will one day take this problem more seriously. But it is not every day that whistleblowers come forward to reveal massive fake review fraud. This case was an opportunity for the Commission to signal that disinformation campaigns have costs. Instead, they're sending a clear signal that the cost is $0.

The Commission's insistence on seeking only a number that was 100 percent accurate led us to seek a number that was 100 percent inaccurate. This was not our only option. As I described in my original statement on this matter, empirical literature shows that positive reviews can materially and measurably increase sales. When a newly launched product attracts a slew of positive reviews, this can lead to a herd effect that generates massive revenue, because these reviews may affect how e-commerce platform algorithms prioritize listings. Given these effects, the Commission was in a strong position to estimate ill-gotten gains. But rather than relying on evidence and analysis, Chairman Simons, Commissioner Phillips, and Commissioner Wilson relied on a less rigorous approach that favors the fraudster.

The Commission's decision sends the unfortunate message to other fake review fraudsters that they, too, might be able to extract a no-consequences settlement from the FTC. In matters involving dishonest or fraudulent conduct, I do not support seeking nothing in settlement negotiations. To be credible as a digital regulator, we must change this approach.

Background on Sunday Riley's Scam and the No-Consequences Settlement

Sunday Riley is a successful cosmetics brand founded and operated by Ms. Sunday Riley. As detailed in the Commission's allegations, in 2018, Ms. Riley orchestrated an elaborate scheme to generate fake reviews of her firm's high-end skincare products, a practice that harms both consumers and honest competitors. To address these allegations of egregious lawbreaking, Chairman Simons, Commissioner Phillips, and Commissioner Wilson subsequently voted to propose a settlement under which Sunday Riley agreed to not break the law again, and to simply submit periodic paperwork.

During the public comment period that followed the settlement proposal, consumers pleaded with the Commission to do more to hold the company and its CEO accountable.[3] Numerous commenters detailed their personal experiences relying on reviews to purchase Sunday Riley products. One commenter warned that this order further diminishes their confidence in ordering skincare products online, and another commenter, a retail employee, observed that, when consumers lose trust, all sellers suffer.[4] Many called the settlement a "slap

3 Comments are available at *Fed. Trade Comm'n., Sunday Riley Modern Skincare, LLC; Analysis To Aid Public Comment,* Docket ID FTC-2019-0086 (Oct. 25, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0001 [Hereinafter Sunday Riley AAPC].

4 *See* Audrey Cooper, Comment No. 06 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0006; Ivy M., Comment No. 08 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 29, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0008; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0010; Nupur Patel, Comment No. 21 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1 , 2019), https://www.regulations.gov/document?D=FTC-20l9-0086-002l;

on the wrist" and argued it would be a "green light" for further fake review fraud.[5] An objection filed by Consumer Reports noted that Sunday Riley "will face no real consequences for its actions" and detailed the Commission's clear legal authority to go beyond the proposed no-money, no-fault order.[6]

Rejecting these nearly unanimous comments, the agency is doubling down on its deficient approach, with Chairman Simons, Commissioner Phillips, and Commissioner Wilson voting to finalize the proposed no-money, no-fault settlement without changes. They tout the paperwork the order requires, while warning that, if Ms. Riley and her company are charged with breaking the law *again,* they may face an actual penalty. This approach does little to deter digital deception, and the Commission can and must do better.

Commission's Authority to Seek Equitable Monetary Relief

The objection filed by Consumer Reports was correct in arguing that the Commission can seek monetary relief in cases such as this one. For companies engaged in deceptive advertising, full redress is an appropriate starting point for estimating restitution, with wrongdoers bearing the burden of showing which sales were untainted by deception.[7] Any uncertainty in this

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Anonymous Consumer, Comment No. 22 on Sunday Riley AAPC, FTC File No. 1923008 (Nov 4, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0022.

5 *See* Jeffrey Heft, Comment No. 03 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0003; Anonymous Consumer, Comment No. 04 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0004;Terri Morgenson, Comment No. 5 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 28, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0005; Anonymous Consumer, Comment No. 10 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0010; Anonymous Consumer, Comment No. 11 on Sunday Riley AAPC, FTC File No. 1923008 (Oct. 30, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-00ll; Kristina, Comment No. 16 on Sunday Riley AAPC, FTC Fil e No. 1923008 (Oct. 30, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0016; Linda Pan, Comment No. 20 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 1, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0020; Victoria Bums, Comment No. 28 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0028; Anonymous Consumer, Comment No. 32 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 18, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0032;Anonymous Consumer, Comment No. 42 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 25, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0042; Sophia Brunetti, Comment No. 45 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 27, 2019), https://www.regulations.gov/document?D=FTC-20l9-0086-0045.

6 Consumer Reports added that "[a]llowing companies to engage in and profit from egregious behaviors with merely a prospect of penalties if caught a second time and some limited recordkeeping responsibilities will hardly strike fear in the heart of potential fraudsters. Given the Commission's limited staff and capacity to police an $18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC. Those that do shouldn't get what amounts to a "Get Out of Jail Free" card for their first offense." *See* Maureen Mahoney on Behalf of Consumer Reports, Comment No. 46 on Sunday Riley AAPC, FTC File No. 1923008 (Nov. 27, 2019), https://www.regulations.gov/document?D=FTC-2019-0086-0046.

7 Generally, if the Commission can establish that materially false claims were widely disseminated, the starting point for calculating restitution is the total revenue of the enterprise. *See, e.g., FTC v. Kuykendall,* 371 F.3d 745, 764 (10th Cir. 2004) (holding, in a contempt action, that, after the Commission establishes a presumption of reliance,

estimation is to be resolved not against consumers but against "the wrongdoer whose illegal conduct created the uncertainty."[8]

Because the agency can seek monetary relief in federal court, through either Section 13(b) or Section 19, past Commissions have been able to recover funds in cases involving fake reviews without time-consuming litigation.[9] In 2011, the FTC charged Legacy Learning Systems with using fake reviews, in the form of undisclosed paid endorsements, to sell DVDs.[10] The Commission settled the matter for $250,000, or approximately five percent of sales attributable to affiliates who posted reviews, in spite of the fact that the DVDs worked as advertised, that the reviews were posted by third parties, and that our complaint did not detail which consumers, if any, relied on the reviews.[11]

We obtained this judgment with the same authority we have today, employing the same legal theory we are employing today, in the same forum we are using today. The only thing that has changed is the five Commissioners responsible for the decision.

A More Permissive Approach to Fake Reviews

While our authority remains the same as it was in 2011, Chairman Simons, Commissioner Phillips, and Commissioner Wilson are signaling a shift in the FTC's approach to policing fake reviews. Ordinarily, as discussed above, the Commission approximates disgorgement based on a firm's total revenue connected to the illegal practice, which incentivizes the firm to rebut that approximation with more granular data. But here, Chairman Simons,

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"the district court may use the Defendants' gross receipts as a starting point" for awarding monetary relief). In my view, there is no doubt that Sunday Riley's fake reviews met this standard – a view confirmed by the comments received by the Commission in response to this proposed settlement.

8 *FTC v. Commerce Planet, Inc.,* 815 F.3d 593, 603 (9th Cir. 2016) (internal quotation marks omitted). This also makes sense as a matter of policy, since resolving uncertainty in favor of wrongdoers only incentivizes them to keep poor records.

9 It has taken the Commission nearly a year to finalize this settlement, and, in the intervening months, the Supreme Court has granted certiorari to challenges to the FTC's authority under Section 13(b), while issuing a ruling in *Liu v. SEC* that raised questions about whether "legitimate expenses" should offset disgorgement orders. *See Liu v. SEC,* 140 S. Ct. 1936, 1946 (2020). The majority does not argue that the Commission lacked authority to seek monetary relief in this matter, nor does it argue that the expenses incurred in furthering this scheme would be seen as legitimate.

10 Press Release, Fed. Trade Comm'n, Firm to Pay FTC $250,000 to Settle Charges That It Used Misleading Online "Consumer" and "Independent" Reviews (Mar. 15, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online.

11 *See* Compl. ¶ 8, *In re Legacy Learning Sys. Inc.,* Docket No. C-4323 (2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110610legacyleamingcmpt.pdf. Importantly, Legacy Learning Systems required its affiliates to comply with FTC guidelines, and some of the fake reviews at issue actually included disclosures of their authors' material connections. These disclosures, as well as Legacy's monitoring , were charged to be insufficient, but still represent a greater effort at ensuring compliance than what was undertaken by Sunday Riley. *See id.* .9.

Commissioner Phillips, and Commissioner Wilson abandon this time-tested and judicially recognized approach, announcing it would be inappropriate to even *approximate* Sunday Riley's illegal profits. The predictable result of this new approach is a windfall for fake review fraudsters, who can count on their misconduct carrying no real costs.[12]

Chairman Simons, Commissioner Phillips, and Commissioner Wilson claim this settlement imposes certain hidden costs, but they seem to rely on speculation. They suggest the settlement may have a "reputational effect,"[13] but they cite no data or analysis, and it is unclear why they assume that news reports would affect Sunday Riley's sales, while the consumer reviews at issue in this case would not.[14] They claim that Sunday Riley may face collateral consequences from business partners, but the company continues to be promoted on Sephora,[15] and it remains the "signature skincare partner" of United Airlines.[16] Finally, they suggest Sunday Riley could face consequences from other regulators, but that should not justify a no-consequences settlement by *this* regulator.[17]

Ultimately, even if there were concern that seeking full redress is excessive, is the logical conclusion to then ask for zero? As I noted when this matter was proposed for public comment, there is extensive literature on the impact of fake reviews,[18] and the Commission has authority to

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12 Chairman Simons, Commissioner Phillips, and Commissioner Wilson may not believe Sunday Riley's alleged scheme was profitable, but Sunday Riley and her employees certainly did. *See* Compl. ¶ 10, *In the Matter of Sunday Riley Modern Skincare, LLC,* File No. 1923008 (2019) (quoting Sunday Riley as claiming review manipulation "directly translates to sales"); *Id* . ¶ 12 (quoting a Sunday Riley Account Manager instructing employees that "[t]he power of reviews is mighty").

13 Statement of Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson In re Sunday Riley Modern Skincare, LLC, Fed. Trade Comm'n File No. 1923008 (Nov. 6, 2020).

14 If imposing reputational costs is important to the majority, it is unclear why they did not require Sunday Riley to notify its customers of the fraud or forbid the company from manipulating search results to suppress information about this action. Relying solely on news reports to justify no-money settlements ignores the elaborate steps companies can take to "manage" their reputations, just as they "manage" consumer reviews. *See* Craig Silverman, *How To Game Google To Make Negative Results Disappear,* BUZZFEED NEWS (June 27, 2019), https://www.buzzfeednews.com/article/craigsilverman/google-search-manipulation-online-reputation-expert (reporting on a "global reputation management industry offering to cover up past arrests, poor customer reviews, allegations of fraud, and other character-killing online content.").

15 *Sunday Riley,* SEPHORA, https://www.sephora.com/brand/sunday-riley (last visited on Oct. 6, 2020).

16 *Supra* note 1.

17 The majority also misunderstands the role of individual liability, suggesting that this matter should be compared to the Commission's 2019 settlement with Facebook, where no individuals were charged. But one mistake does not justify another. In this matter, the Commission's complaint cited specific emails that Sunday Riley sent her staff, which provided an ample basis for charging her personally. In Facebook, the Commission opted to not interview Facebook's CEO, so it is unknown whether similar evidence existed. In every case, the decision of whether to name an individual should be based on the facts and circumstances, not on the size or clout of a firm.

18 *See, e.g.,* Georgios Askalidis & Edward C. Malthouse, *The Value of Online Customer Reviews,* RECSYS'16: PROCEEDINGS OF THE 10TH ACM CONFERENCE ON RECOMMENDER SYSTEMS 155-58 (2016), https://dl.acm.org/citation.cfm?id=2959181 (finding that "the conversion rate of a product can increase by as much

compel production of granular sales data from both Sunday Riley and Sephora if necessary. I am confident we could have developed a reasonable estimate of harm and ill-gotten gains, as we did in 2011, rather than presuming fake reviews are harmless or applying a different legal standard because Sunday Riley's conduct doesn't resemble that of other FTC defendants.

If Commissioners believe that moving the agency toward a more lenient approach against fake reviews is in the public interest, they should state as much. Alternatively, they could acknowledge that this settlement was mistaken and commit that they will change course. But claiming it was unrealistic to go beyond a no-money, no-fault order is not credible, and it will undermine us in future cases.[19]

Ending No-Consequences Settlements

As detailed in the comments in the official public docket and in my initial statement, the majority's approach does not bode well for honest businesses looking to compete online. Sunday Riley's alleged conduct was illegal, indefensible, and wrong – but it was also understandable. As explained by one leading e-commerce consultant, "Incentives are incredibly high for brands to create fake reviews or incentivize reviews," and many brands feel, "If I don't do this, then I'm not staying level with my competition, I'm literally just falling behind."[20]

While the incentives to post fake reviews and engage in disinformation tactics are very high, the likelihood of getting caught and facing consequences appears to be very low. It may be common for platforms to remove fake reviews, but it is unclear – and entirely discretionary – how and whether platforms hold perpetrators accountable. In this case, for example, there are allegations that at some point, Sephora detected Sunday Riley's scheme, leading the retailer to delete certain reviews.[21] But, as alleged in the complaint, Sunday Riley simply adjusted its tactics, directing employees to conceal their IP addresses to evade further detection.[22] It is

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as 270 percent as it accumulates reviews with the first 5 reviews driving the bulk of the aforementioned increase" and that "the existence of reviews provides valuable signals to the customers, increasing their propensity to purchase"); Lev Muchnik et al., *Social Influence Bias: A Randomized Experiment,* 341 SCI. 647, 649 (2013), https://science.sciencemag.org/content/341/6146/647 (finding that, for a given product, a single initial positive "up-vote" creates an accumulating herd effect that results in a 25 percent higher average rating for that item at the end of a 5-month observation window compared to an initial negative "down-vote").

19 Importantly, Chairman Simons, Commissioner Phillips, and Commissioner Wilson do not dispute the complaint's allegation that the company and its CEO broke the law. Indeed, Sunday Riley's alleged conduct likely violated the penalty statutes of many individual states. If the majority was genuinely concerned about the litigation risk under the FTC Act of seeking monetary relief, we could have simply enlisted states with their own penalty claims.

20 Sapna Maheshwari, *When Is a Star Not Always a Star? When It's an Online Review,* N.Y. TIMES (Nov. 28, 2019), https://www.nytimes.corn/2019/11/28/business/online-reviews-fake.html.

21 Sunday Riley Compl., *supra* note 12, ¶ 9.

22 *Id.*

unclear whether Sephora took any further action, and Sunday Riley's scheme became public only when a whistleblower came forward.[23]

Given this spotty private policing, it is critical that, in the rare circumstances when law enforcement steps in, we send an unambiguous message that posting fake reviews is not worth the risk. Today's no-money order, I fear, will have the opposite effect, sending the message that if you get caught *and* attract law enforcement scrutiny, the price you'll pay is zero.[24]

The problems with no-money orders were once widely understood. More than four decades ago, Robert Pitofsky, who would go on to serve on the Commission twice, including as its Chair, called no-money cease-and-desist orders "scandalously weak."[25] He, too, argued that they did little to deter wrongdoing and nothing to redress victims.[26] Yet the Commission continues to rely on them, even in cases, like this one, involving allegations of clear dishonesty and fraud.

When companies engage in egregious misconduct, a no-money, no-fault settlement is ineffective, especially when there appear to be no material disputes of fact or law. The Commission should formally signal that it is terminating its no-money, no-fault settlement approach for dishonest or fraudulent conduct by:

- **Publishing a Policy Statement on Equitable Monetary Remedies:** The Commission should issue a Policy Statement on Equitable Monetary Remedies. At a minimum, it should establish a rebuttable presumption that the Commission will not pursue no-money settlements in cases involving dishonesty or fraud.[27] This will help establish consistency

23 *See* u/throwawayacctSRiley, *Sunday Riley Employee: We Write Fake Sephora Reviews,* REDDIT (Oct. 15, 2018, 4:21 PM), https://www.reddit.com/r/SkincareAddiction/comments/9ogete/psa_sunday_riley_employee_we_write_fake_sephora/.

24 This view echoes that of Fakespot chief executive Saoud Khalifah, who warned, following the announcement of this settlement, that "[n]ow, everybody is like, O.K., if that's the penalty, then why not write more fake reviews and pump ourselves through the roof?" *Supra* note 20.

25 Irving Scher et al., *Part II-FTC Improvement Act,* 45 ANTITRUST L.J. 96, 117 (1976).

26 Here's how Pitofsky described the effects of no-money orders on the broader marketplace:

> Businessmen engaged in fraudulent practices knew in advance that the worst that could happen to them in most cases would be that if a fraud were detected, and if the Commission decided to proceed against that company as opposed to hundreds of other companies engaged in similar practices, and if the complaint ever proceeded to a conclusion, they would then be asked to discontinue the practice. In effect, the most significant deterrent to engaging in fraudulent practices in those days was the considerable lawyers' fees that would be generated by a Commission investigation.

Id.

27 *See* Statement of Commissioner Rohit Chopra In re Truly Organic, Fed. Trade Comm'n File No. 1923077 (Sept. 19, 2019), https://www.ftc.gov/public-statements/2019/09/statement-commissioner-rohit-chopra-matter-truly-organic (calling on the Commission to issue a policy statement on equitable monetary remedies). Importantly, there

in our enforcement program, ensuring that fraud carries consequences regardless of whether it is committed by a fly-by-night operation or by an established firm like Sunday Riley.

- **Restate Existing Legal Precedent into Rules:** The FTC is authorized to prohibit prevalent unfair or deceptive practices through rules, and to seek civil penalties against violators.[28] These rules need not impose any substantive obligation on market participants, and can instead simply restate existing law. For example, the FTC is currently undertaking a rulemaking to consider codifying its existing Made in USA guidance, which would help increase accountability for those who abuse the label.[29] In this area, the Commission can codify basic tenets of the FTC Endorsement Guides – in particular, the requirement that endorsers disclose material connections to sellers – into a rule. This would impose zero regulatory burden on market participants, while ensuring real accountability for those who cheat.[30]

- **Designate Specific Misconduct as Penalty Offenses:** The Commission need not wait to issue a rule to seek civil penalties against fake review fraudsters and other wrongdoers. The Commission has authority under Section 5(m)(l)(B) of the FTC Act to seek penalties against parties who engage in conduct known to have been previously condemned by the Commission.[31] The practice of endorsing products without disclosing material connections was condemned decades ago,[32] and the Commission can act almost immediately to trigger substantial penalties against the worst violators.

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are many cases that do not involve dishonesty or fraud – such as cases involving unfair practices – where monetary relief is also appropriate.

28 *See* 15 U.S.C. § 57a.

29 Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop.

30 *See* Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review, Fed. Trade Comm'n File No. P204500 (Feb. 12, 2020), https://www.ftc.gov/public-statements/2020/02/statement-commissioner-rohit-chopra-regarding-endorsement-guides-review. This would also reduce gamesmanship by fraudsters around our Section 13(b) authority.

31 The Commission can resurrect Section 5(m)(l)(B), the Penalty Offense Authority, to increase deterrence, reduce gamesmanship around Section 13(b), and promote market-wide compliance. *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority* (Oct. 29, 2020), https://papers.ssm.com/so13/papers.cfm?abstract_id=3721256.

32 Forty years ago, the Commission issued an order in *Cliffdale Associates* finding that it was deceptive under Section 5 to portray endorsements as objective when in fact they were written by the seller's paid agents. *See In the Matter of Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984). The Commission could provide notice of this and other relevant orders to market participants, which would expose them to stiff civil penalties if they engage in fake review fraud or similar disinformation tactics.

Conclusion

With disinformation pervading the digital world and fake reviews polluting online marketplaces, the Commission's decision to finalize this flawed settlement is more than a missed opportunity. It is a serious setback for online shoppers, honest sellers, and the Commission's credibility.

Rare is there a case as egregious as this one, with a whistleblower accusing a company of fraud in a public Reddit post. Despite clear authority to send a strong message through this case, the Commission is instead sending the message that there are no real consequences for online disinformation and fake review scams. This does not protect consumers. For these reasons, I respectfully dissent.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Sunday Riley Modern Skincare, LLC ("Sunday Riley Skincare") and its Chief Executive Officer, Ms. Sunday Riley (collectively "respondents").

The proposed consent order ("order") has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the order and the comments received, and will decide whether it should withdraw the order or make it final.

This matter involves the respondents' marketing of their Sunday Riley brand cosmetic products. The respondents have sold their cosmetic products through Sephora's website, www.sephora.com, which provides consumers the opportunity to leave product reviews. According to the complaint, on multiple occasions, Sunday Riley Skincare managers, including Ms. Riley, posted reviews of Sunday Riley brand cosmetic products on the Sephora website using fake accounts created just for that purpose or requested that other employees do so. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by misrepresenting that certain reviews of Sunday Riley brand products on the Sephora website reflected the independent experiences or opinions of impartial ordinary users of the products, when they were written by Ms. Riley and her employees. The complaint further alleges that the respondents deceptively failed to disclose that certain online consumer reviews were written by Ms. Riley or her employees.

The order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Provision I prohibits the respondents, in connection with the sale of any product, from misrepresenting the status of any endorser or person providing a review of the product, including misrepresenting that the endorser or reviewer is an independent or ordinary user of the product.

Provision II prohibits the respondents from making any representation about any consumer or other endorser of a product without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between the consumer or endorser and (1) any respondent, or (2) any other individual or entity affiliated with the product. The order defines the terms "clearly and conspicuously," "close proximity," and "unexpected material connection."

Provision III requires that the respondents instruct their employees, officers, and agents as to their responsibilities for disclosing their connections to any respondent's product they endorse and that the respondents obtain signed acknowledgements from them. **Provision IV** mandates that the respondents acknowledge receipt of the order, distribute the order to principals, officers, and certain employees and agents, and obtain signed acknowledgments from them. **Provision V** requires that the respondents submit compliance reports to the FTC one year after the order's issuance and submit notifications when certain events occur. **Provision VI** requires the respondents to create certain records for twenty years and retain them for five years. **Provision VII** provides for the FTC's continued compliance monitoring of the respondents' activity during the order's effective dates. **Provision VIII** provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

STRYKER CORPORATION,
AND
WRIGHT MEDICAL GROUP N.V.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4728; File No. 201 0014
Complaint, November 3, 2020 – Decision, December 11, 2020

This consent order addresses the $4 billion acquisition by Stryker Corporation of certain assets of Wright Medical Group N.V. The complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for total ankle replacements and finger joint implants. The consent order requires Stryker to divest all rights and assets related to its total ankle replacement and finger joint implant businesses to DJO Global, Inc.

Participants

For the *Commission*: *Jeff Dahnke, Yan Gao, Sebastian Lorigo, Jacqueline Mendel,* and *Jonathan Ripa.*

For the *Respondents*: *Clifford Aronson, Skadden, Arps, Slate, Meagher & Flom LLP; Michael McFalls, Ropes & Gray LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Stryker Corporation ("Stryker"), a corporation subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of Wright Medical Group N.V., Inc. ("Wright"), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Stryker is a corporation organized, existing, and doing business under, and by virtue of the laws of, the state of Michigan with its executive offices and principal place of business located at 2825 Airview Boulevard, Kalamazoo, Michigan 49002. Stryker is engaged in the development, manufacture, sale, and distribution of medical devices used in a broad range of medical specialties.

2. Respondent Stryker is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 5 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. Respondent Wright is a corporation organized, existing, and doing business under, and by virtue of, the laws of The Netherlands with its principal place of business located at Prins Bernhardplein 200, Amsterdam, The Netherlands, 1097 JB and its United States address for service of process is Michael McFalls, Ropes & Gray, 2099 Pennsylvania Avenue, NW, Washington, D.C. 20006. Wright is engaged in the development, manufacture, sale, and distribution of medical devices used in a broad range of medical specialties.

4. Respondent Wright is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. Pursuant to a Purchase Agreement dated November 4, 2019, Stryker agreed to acquire all of the voting securities of Wright (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

6. The relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, license, marketing, distribution, and sale of the following reconstructive joint implants: (1) total ankle replacements and (2) finger joint arthroplasty implants.

7. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKET

8. Total ankle replacements are used to treat end-stage ankle arthritis, which typically develops when cartilage on the bones of the ankle joint wears away and causes bone-on-bone grinding. The U.S. market for total ankle replacements is highly concentrated. Wright and Stryker are the first and third largest suppliers, respectively, of total ankle replacements, while Integra LifeSciences ("Integra") is the second-largest supplier. Exactech, Inc. and Zimmer Biomet also supply total ankle replacement products, but have only small shares of the market. Together, a combined Stryker and Wright would account for approximately 75% of the total U.S. ankle replacement market.

9. Finger joint arthroplasty implants are used to treat advanced osteoarthritis and are implanted into a patient's proximal interphalangeal joints or metacarpophalangeal joints through a surgical procedure to replace damaged bone and cartilage. The U.S. market for finger joint arthroplasty implants is highly concentrated. Stryker and Wright are two of only three significant suppliers for finger joint arthroplasty implants. Integra is the leading supplier while Stryker and Wright are the second and third largest suppliers, respectively. BioPro Implants ("BioPro") is the only other supplier of finger joint arthroplasty implants in the United States, but has a very small share of the market. The combined Stryker and Wright would have a finger joint arthroplasty implant market share in the United States in excess of 50%.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 6 and 7 would not be likely or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Acquisition. *De novo* entry would not take place in a timely manner because product development times, U.S. Food and Drug Administration approval requirements, and market adoption times are lengthy. A potential entrant into the relevant markets would also need to develop a reputation for consistent quality and service before surgeons would substitute them for currently marketed devices.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Stryker and Wright in the markets for total ankle replacements and finger joint arthroplasty implants, thereby increasing the likelihood in these markets that: (1) a combined Stryker-Wright would be able to unilaterally exercise market power; (2) research and development would be reduced; and (3) customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

12. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of November, 2020 issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Stryker Corporation ("Stryker") of the voting securities of Wright Medical Group N.V. ("Wright"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission, having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Stryker Corporation is a corporation organized, existing, and doing business under, and by virtue of the laws of the state of Michigan with its executive offices and principal place of business located at 2825 Airview Boulevard, Kalamazoo, Michigan 49002.

2. Respondent Wright Medical Group N.V. is a corporation organized, existing, and doing business under, and by virtue of the laws of The Netherlands with its principal place of business located at Prins Bernhardplein 200, Amsterdam, The Netherlands, 1097 JB and its United States address for service of process of the Complaint, the Decision and Order, and this Order to Maintain Assets, is Michael McFalls, Ropes & Gray, 2099 Pennsylvania Avenue, NW, Washington, D.C. 20006.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated therein by reference and made a part hereof, shall apply:

A. "Stryker" means Stryker Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Stryker Corporation (including Wright Medical Group N.V. after the Acquisition), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Wright" means Wright Medical Group N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Wright Medical Group N.V. and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Colfax" means Colfax Corporation, a corporation organized, existing, and doing business under, and by virtue of the laws of, the state of Delaware, with its office and principal place of business located at 420 National Business Parkway, 5th Floor, Annapolis Junction, Maryland.

D. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.

E. "Orders" means this Order to Maintain Assets and the Decision and Order.

F. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to the Decision and Order and this Order to Maintain Assets.

II. Asset Maintenance

IT IS FURTHER ORDERED that until the Implant Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under this Order to Maintain Assets, ensure that the Implant Assets and Implant Business are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Implant Assets and Implant Business, to minimize any risk of loss of competitive potential of the Implant Assets and Implant Business, to operate the Implant Assets and Implant Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Implant Assets and Implant Business, except for ordinary wear and tear. Respondents shall not sell, transfer,

encumber, or otherwise impair the Implant Assets and Implant Business (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Implant Assets and Implant Business; and

B. Not terminate the operations of the Implant Assets and Implant Business, and shall conduct or cause to be conducted the operations of the Implant Assets and Implant Business in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Implant Assets and Implant Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Implant Assets and Implant Business.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Implant Assets and consistent with the purposes of the Orders.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Implant Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Implant Assets to the Acquirer, and (ii) assist the Acquirer in operating the Implant Assets and Implant Business in all material respects in the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall Provide Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Cost; and

3. For a period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 36 months after the

Divestiture Date; *provided however*, that upon the Acquirer's request, Respondent must file with the Commission a written request to extend the time period.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of the Divestiture Agreement.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Implant Assets to evaluate independently and offer employment to the Implant Business Employees.

B. Until one year after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Implant Business Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Implant Business Employees, and to make offers of employment to any of the Implant Business Employees;

3. Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Implant Business Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Implant Business Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Implant Business Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Implant Business Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Implant Business Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Implant Business Employee by the Acquirer.

C. Respondents shall not, for a period of 2 years following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Implant Business Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Implant Business Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

V. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees), and (ii) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders, or the Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions

threatened or brought against the Implant Assets or Implant Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph V.A of this Order to Maintain Assets, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A of this Order to Maintain Assets, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph, including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Mazars LLP as the Monitor to observe and report on Respondents' compliance with the terms of the Orders. The Monitor shall serve pursuant to the agreement between the Monitor and Respondents contained in the Monitor Agreement Appendix to the Orders, *provided, however,* such agreement shall not limit, or be construed to limit, the terms of the Monitor Paragraph of the Orders.

B. No later than one day after the Commission issues this Order to Maintain Assets, Respondents shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders as set forth in the Monitor Paragraph of the Orders; and

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in the Monitor Paragraph of the Orders.

C. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Within 30 days after this Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission regarding Respondents' compliance with their obligations under the Orders and, where relevant, each Acquirer's progress toward obtaining the product approvals necessary to manufacture each Implant Product acquired by that Acquirer, independently of Respondent; and

9. Shall serve until 30 days after all Divestiture Agreements to provide Transition Assistance have expired or been terminated or until such other time as may be determined by the Commission or its staff.

D. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the Monitor to monitor Respondents' compliance with its obligations under the Orders, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.

E. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or in connection with, any claim concerning the Monitor's performance of the Monitor's duties under the Orders, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph, the term "Monitor" shall

include all persons retained by the Monitor in the performance of his or her duties under the Orders.

F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, provided, however, that such agreement does not restrict the Monitor from providing any information to the Commission.

G. Respondents shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any other Person with whom the Monitor communicates in the performance of the Monitor's duties.

H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute Monitor shall be afforded all rights, powers, and authorities and be subject to all obligations of the Monitor Paragraph of the Orders:

1. The Commission shall select the substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor to Respondents, Respondents have not opposed, in writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement attached as Monitor Agreement Appendix to the Orders, or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under the Monitor Paragraph of the Orders.

I. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

VII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II of the Decision and Order, the Commission may appoint a Divestiture Trustee to divest the Implant Assets and perform Respondents' other obligations in a manner that satisfies the requirements of the

Decision and Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of the Decision and Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Decision and Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order to Maintain Assets, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by the Decision and Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Implant Assets and perform Respondents' other obligations in a manner that satisfies the requirements of the Decision and Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trust agreement described herein to accomplish

the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by the Decision and Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to the Acquirer as required by the Decision and Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for

the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by the Decision and Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VII.E.6, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to this Order to Maintain Assets;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Implant Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph VII.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Decision and Order.

VIII. Prior Notice

IT IS FURTHERED ORDERED that:

A. Respondents shall not, without providing advance written notification to the Commission ("Notification") in the manner described in this Paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any assets of, or financial interest in, any Person that researches, develops, manufactures, markets, or sells a product that competes with an Implant Product.

B. With respect to the Notification:

1. The Notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

3. Early termination of the waiting periods in this Paragraph VIII may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior Notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IX. Compliance Reports

IT IS FURTHER ORDERED that Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

A. Respondents shall submit interim compliance reports 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until the Commission issues a Decision and Order in this matter.

B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are complying with their obligations under this Order to Maintain Assets. Conclusory statements are insufficient. Respondents shall include in their compliance reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that Respondents have complied or will comply with each paragraph of this Order to Maintain Assets.

C. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under this Order to Maintain Assets and provide copies of these documents to Commission staff upon request; and

D. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov; provided, however, that Respondents need only file electronic copies of the 30-day reports required by Paragraph IX.A of this Order to Maintain Assets. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

X. Change in Respondent

IT IS FURTHER ORDERED that Respondent Stryker shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Stryker Corporation;

B. Any proposed acquisition, merger, or consolidation of Stryker Corporation; or

C. Any other change in Respondent Stryker, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order to Maintain Assets.

XI. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order to Maintain Assets which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XII. Purpose

IT IS FURTHER ORDERED that that the purpose this Order to Maintain Assets is to ensure the continued use of the Implant Assets in the same Implant Business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

XIII. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate three days after the Decision and Order is made final in this matter;

Provided, however, that if the Commission, pursuant to Paragraph II of the Decision and Order, requires Respondent to rescind the divestiture to Colfax, then upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Stryker Corporation ("Stryker") of the voting securities of Wright Medical Group N.V. ("Wright"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Stryker Corporation is a corporation organized, existing, and doing business under, and by virtue of the laws of, the state of Michigan with its executive offices and principal place of business located at 2825 Airview Boulevard, Kalamazoo, Michigan 49002.

2. Respondent Wright Medical Group N.V. is a corporation organized, existing, and doing business under, and by virtue of, the laws of The Netherlands with its principal place of business located at Prins Bernhardplein 200, Amsterdam, The Netherlands, 1097 JB and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, is Michael McFalls, Ropes & Gray, 2099 Pennsylvania Avenue, NW, Washington, D.C. 20006.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Stryker" means Stryker Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Stryker Corporation (including Wright Medical Group N.V. after the Acquisition), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Wright" means Wright Medical Group N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Wright Medical Group N.V. and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means: (i) Colfax or (ii) any other Person that acquires the Implant Assets pursuant to this Order.

E. "Acquisition" means the proposed acquisition described in the Purchase Agreement among Stryker Corporation, Stryker B.V. and Wright Medical Group N.V. dated as of November 4, 2019.

F. "Acquisition Date" means the date the Acquisition is consummated.

G. "Business Information" means books, records, data, and information, wherever located and however stored, including documents, written information, graphic materials, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), and operations. For clarity, Business Information includes Respondents' rights and control over information and material provided to any other Person.

H. "Colfax" means Colfax Corporation, a corporation organized, existing, and doing business under, and by virtue of the laws of, the state of Delaware, with its office and principal place of business located at 420 National Business Parkway, 5th Floor, Annapolis Junction, Maryland.

I. "Competing Products" means any products as of the Divestiture Date that compete with the Implant Products anywhere in the world, including new versions of such products.

J. "Confidential Business Information" means all Business Information not in the public domain that is related to or used in connection with the Implant Assets or the conduct of the Implant Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

K. "Consent" means any approval, consent, ratification, waiver, or other authorization.

L. "Contract" means all agreements, contracts, licenses, leases, consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.

M. "Cost" means costs not to exceed the actual cost of labor, goods and material, travel, third-party vendors, and other expenditures that are directly incurred to provide Transition Assistance.

N. "Divestiture Agreement" means the Asset Purchase Agreement by and between Colfax Corporation and Stryker Corporation, dated October 15, 2020, including related ancillary agreements, amendments, joinders, schedules, exhibits, and attachments, thereto and contemplated therein, that have been approved by the Commission to accomplish the requirements of this Order, attached as Non-Public Appendix I; or (ii) any other agreement between Respondents (or a Divestiture Trustee) and the Acquirer that receives the prior approval of the Commission to divest the Implant Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto that have received the Commission's prior approval.

O. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Implant Assets.

P. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph IX of this Order.

Q. "Employee Information" means for each Implant Business Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

R. "Finger Joint Implant Products" means Respondent Stryker's finger joint arthroplasty products, including all products marketed or sold under the following names: Surface Replacement ("SR") Proximal Interphalangeal ("PIP"), SR Metacarpophalangeal ("MCP"), Silicone PIP, Silicone MCP and TACTYS, and the instruments related thereto.

S. "Governmental Permit" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Implant Assets to the Acquirer and for such Acquirer to operate the Implant Business.

T. "Implant Assets" means all of Respondent Stryker's right, title, and interest in and to all assets, of every kind and description, wherever located, relating to the Implant Business, including:

1. all Inventory;

2. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

3. all Governmental Permits and all pending applications therefor or renewals thereof, to the extent transferable;

4. all Business Information; *provided, however,* that in cases in which Business Information included in the Implant Assets contain information: (a) that relates both to the Implant Assets and to other, retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Implant Assets, or (b) where Respondents have a legal obligation to retain the original copies,

then Respondents shall be required to provide only copies of the materials containing such information with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes;

5. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone and telecopy listings; and

6. molds and tooling related to the manufacture of the Implant Products.

Provided further, however, that the Implant Assets need not include the Retained Assets or the Shared Intellectual Property.

U. "Implant Business" means all business activities conducted by Respondent Stryker prior to the Acquisition Date relating to the manufacture and sale of Implant Products anywhere in the world, including researching, developing, manufacturing, and selling Implant Products.

V. "Implant Business Employee" means any full-time, part-time, or contract individual employed by Respondents whose job responsibilities relate or related to any aspect of the Implant Business, as of and after the date of the announcement of the Acquisition.

W. "Implant Products" means:

1. Total Ankle Replacement Products; and

2. Finger Joint Implant Products.

Provided, however, that the Implant Products shall not include the Precision Falcon Blade, K-Wire Tube, X-fuse 2.3 mm Burr, 1/1 Size Silicone Mat VariAx2, Modular Tray Half Size Drawer, and Lower Tray I Level.

X. "Intellectual Property" means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

Y. "Inventory" means all inventories of every kind and nature for retail sale associated with the Implant Assets.

Z. "License" means a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights.

AA. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

BB. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

CC. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

DD. "Products" means any raw materials, partially finished products, supplies, and any other products relating to the Implant Business that Respondents produce at, or provide from, a facility or a third-party source that is not included in the Implant Assets.

EE. "Retained Assets" means those assets listed on Appendix II.

FF. "Shared Intellectual Property" means the intellectual property identified on Non-Public Appendix V.

GG. "Third Party" means any Person other than the Respondents or the Acquirer.

HH. "Total Ankle Replacement Products" means Respondent Stryker's total ankle joint implant products, including all products marketed or sold under the following name: Scandinavian Total Ankle Replacement System ("STAR"), and the instruments related thereto, and any pipeline products, including those set forth on Non-Public Appendix VI.

II. "Transition Assistance" means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Implant Assets from the Respondents to the Acquirer, including maintaining existing design controls, regulatory affairs maintenance and support, complaint handling, clinical study support, sales force training, revalidation support, new packaging supply, software issue support, knowledge transfer support, FDA approval support, transfer support, and retrospective data collection support.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Implant Assets, absolutely and in good faith, as an ongoing business, to Colfax pursuant to the Divestiture Agreement.

Provided, however, that Respondents may receive a License back from Acquirer under any Intellectual Property included in the Implant Assets needed by Respondents to operate any business conducted by Stryker prior to the Acquisition that Respondents are not required to divest;

Provided further, however, the Respondents need not divest that portion of a Contract that is not related to the Implant Business, and may exclude the entire Contract, if Acquirer is able to enter into a Contract comparable to the portion relating to the Implant Business;

Provided further, however, the Respondents may need to divest Retained Assets if the Commission, in its sole discretion and within 12 months of the date of this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Implant Assets in a manner that achieves the purpose of this Order.

B. No later than the date the Implant Assets are divested, Respondents shall grant a License to Acquirer under the Shared Intellectual Property sufficient to operate the Implant Business including the freedom to extend existing products and services and develop new products and services anywhere in the world; *provided, however,* that the License granted to Acquirer shall prohibit Respondents from using the relevant Shared Intellectual Property in any business that competes with the post-divestiture Implant Business.

C. If Respondents have divested the Implant Assets to Colfax prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Colfax is not acceptable as the acquirer of the Implant Assets, then Respondents shall immediately rescind the Divestiture Agreement, and shall divest the Implant Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Implant Assets to Colfax was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the

manner of divestiture of the Implant Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

D. Respondents shall obtain, no later than the Divestiture Date and at their sole expense, all Consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Implant Assets to the Acquirer and for the Acquirer to operate any aspect of the Implant Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from Third Parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Permits relating to the Implant Assets that are not transferable or not transferred on the Divestiture Date, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the Implant Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

E. Notwithstanding any other provision of this Order, with respect to any Intellectual Property owned by Stryker or Wright, existing, pending, or issued on or before the Acquisition Date, for which there may be an infringement claim relating to the Intellectual Property owned by the other party, Respondents:

1. Shall not join, file, prosecute, or maintain any suit, in law or equity, against the Acquirer, its licensees, or its customers under any Intellectual Property acquired by Stryker in the Acquisition if such suit would limit or impair the Acquirer's freedom to manufacture, distribute, market, sell, or offer for sale any Implant Products anywhere in the world, including new versions of the Implant Products; and

2. May enter into an agreement with the Acquirer in which the Acquirer shall not join, file, prosecute, or maintain any suit, in law or equity, against Respondents, their licensees, or their customers under Intellectual Property included in the Implant Assets or licensed Shared Intellectual Property used in any Competing Products acquired by Stryker from Wright in the Acquisition.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Implant Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Implant Assets to the Acquirer, and (ii) assist the Acquirer in operating the Implant Assets and Implant Business in all material respects in the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall Provide Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Cost; and

3. For a period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 36 months after the Divestiture Date. *Provided however,* that upon the Acquirer's request, Respondent must file with the Commission a written request to extend the time period.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent’s breach of the Divestiture Agreement.

IV. Divestiture Agreement

IT IS FURTHERED ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of

the Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

V. Asset Maintenance

IT IS FURTHER ORDERED that until the Implant Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Implant Assets and Implant Business are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Implant Assets and Implant Business, to minimize any risk of loss of competitive potential of the Implant Assets and Implant Business, to operate the Implant Assets and Implant Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Implant Assets and Implant Business, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Implant Assets and Implant Business (other than in the manner prescribed in this Order and the Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Implant Assets and Implant Business; and

B. Not terminate the operations of the Implant Assets and Implant Business, and shall conduct or cause to be conducted the operations of the Implant Assets and Implant Business in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Implant Assets and Implant Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Implant Assets and Implant Business.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Implant Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until one year after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Implant Assets to evaluate independently and offer employment to the Implant Business Employees.

B. Until one year after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Implant Business Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Implant Business Employees, and to make offers of employment to any of the Implant Business Employees;

3. Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Implant Business Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Implant Business Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Implant Business Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Implant Business Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Implant Business Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Implant Business Employee by the Acquirer.

C. Respondents shall not, for a period of 2 years following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Implant Business Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Implant Business Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Paragraph.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees), and (ii) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Implant Assets or Implant Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph VII.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Paragraph as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph,

including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Mazars LLP as the Monitor to observe and report on Respondents' compliance with the terms of the Orders. The Monitor shall serve pursuant to the agreement between the Monitor and Respondents contained in the Monitor Agreement Appendix to the Orders, *provided, however,* such agreement shall not limit, or be construed to limit, the terms of the Monitor Paragraph of the Orders.

B. No later than later than one day after the Commission issues the Order to Maintain Assets, Respondents shall:

1. Confer on the Monitor all rights, power, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of the Orders as set forth in the Monitor Paragraph of the Orders; and

2. Consent to the terms and conditions regarding such rights, powers, and authorities of the Monitor set forth in the Monitor Paragraph of the Orders.

C. The Monitor:

1. Shall have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Shall act in consultation with the Commission or its staff;

3. Shall serve as an independent third party and not as an employee, agent, or fiduciary of Respondents or of the Commission;

4. Shall serve at the expense of Respondents, without bond or other security;

5. May employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Shall enter into a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into such a confidentiality agreement;

7. Shall notify Respondents and staff of the Commission, in writing, of any potential financial, professional, personal, or other conflicts of interest within 5 days should they arise;

8. Within 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission regarding Respondents' compliance with their obligations under the Orders and, where relevant, each Acquirer's progress toward obtaining the product approvals necessary to manufacture each Implant Product acquired by that Acquirer, independently of Respondent; and

9. Shall serve until 30 days after all Divestiture Agreements to provide Transition Assistance have expired or been terminated or until such other time as may be determined by the Commission or its staff.

D. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the Monitor to monitor Respondents' compliance with its obligations under the Orders, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.

E. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, and expenses (including attorneys' fees and out of pocket costs) that arise out of, or in connection with, any claim concerning the Monitor's performance of the Monitor's duties under the Orders, whether or not such claim results in liability, *except*, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor in the performance of his or her duties under the Orders.

F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, *provided, however,* that such agreement does not restrict the Monitor from providing any information to the Commission.

G. Respondents shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any other Person with whom the Monitor communicates in the performance of the Monitor's duties.

H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor and such substitute

Monitor shall be afforded all rights, powers, and authorities and be subject to all obligations of the Monitor Paragraph of the Orders:

1. The Commission shall select the substitute Monitor, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor if, upon notice by staff of the Commission of the identity of the substitute Monitor to Respondents, Respondents have not opposed, in writing, including the reasons for opposing the selection of the substitute Monitor within 10 days after such notice; and

2. No later than 5 days after the Commission appoints a substitute Monitor, Respondents shall enter into an agreement with the substitute Monitor that (i) contains substantially the same terms as the agreement attached as Monitor Agreement Appendix to the Orders, or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under the Monitor Paragraph of the Orders.

I. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the Implant Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Implant Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere

with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to the Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the

Divestiture Trustee. For purposes of this Paragraph IX.E.6, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Implant Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to this Paragraph IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Notice

IT IS FURTHERED ORDERED that:

A. Respondents shall not, without providing advance written notification to the Commission ("Notification") in the manner described in this Paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any assets of, or financial interest in, any Person that researches, develops, manufactures, markets, or sells a product that competes with an Implant Product.

B. With respect to the Notification:

1. The Notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

3. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior Notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date, and;

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III; annual compliance reports one year after the date this Order is issued, and annually for the

next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance a full description of the measures Respondents have implemented or plan to implement to ensure that Respondents have complied or will comply with each paragraph of the Order;

3. Respondents shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov; provided, however, that Respondents need only file electronic copies of the 30-day reports required by Paragraph XI.B.1. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

IT IS FURTHER ORDERED that Respondent Stryker shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Stryker Corporation;

B. Any proposed acquisition, merger, or consolidation of Stryker Corporation; or

C. Any other change in Respondent Stryker, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose this Order is to ensure the continued use of the Implant Assets in the same Implant Business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on December 11, 2030.

By the Commission.

Non-Public Appendix I

Divestiture Agreement

[Redacted from the Public Version but Incorporated by Reference]

Appendix II

Retained Assets

A. Real property interests owned, leased or otherwise held, including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto;

B. Stryker corporate or business logos, trademarks, service marks, domain names, trade or other names or any deviation thereof not exclusively related to the Implant Business;

C. Manufacturing, inspection, testing, validation, calibration or other types of equipment or fixtures, including power tools, surgical accessories, medical models, and equipment located at a third-party manufacturer not included in Paragraph I.S. (unless any such item is requested by Acquirer);

D. Cash, cash equivalents, accounts receivable, intercompany accounts and any bank or credit card accounts;

E. Pre-paid marketing expenses, grants and donations; tax assets; employee benefit plans; insurance and self-insurance policies and retentions and claims thereunder;

F. Computer hardware and enterprise software that Respondents also use in their businesses other than the Implant Business;

G. Software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings); and

H. All books, records, files and data relating to (A) income taxes of Respondent Stryker, (B) non-income taxes other than those solely imposed on the Implant Assets, and (C) corporate charters, minute books and similar corporate books and records of any Person.

Appendix III

Monitor Agreement

[Redacted from the Public Version but Incorporated by Reference]

Concurring Statement

Non-Public Appendix IV

Monitor Compensation

[Redacted from the Public Version but Incorporated by Reference]

Non-Public Appendix V

Shared Intellectual Property

[Redacted from the Public Version but Incorporated by Reference]

Non-Public Appendix VI

Pipeline Total Ankle Replacement Products

[Redacted from the Public Version but Incorporated by Reference]

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Independent monitors and watchdogs are shadow regulators that promise to impartially report to the government. These individuals are typically paid by companies engaged in alleged wrongdoing as part of a settlement. Monitors typically have relevant expertise in an industry and are often former government officials.

In this matter, the Federal Trade Commission is resolving allegations that the merger between Stryker and Wright is unlawful by requiring divestitures and other provisions that will be overseen by an independent monitor. I write separately to detail some of my ongoing concerns regarding the lack of adequate protections against independent monitor conflicts of interest in FTC orders.

Concurring Statement

Monitor Independence

Over the last twenty years, there has been substantial concern about whether auditors and other third parties are truly independent, or whether they are influenced by seeking additional fees for future business.[1] When it comes to monitors of settlements, an independent monitor ideally believes its primary responsibilities are to the government agency that relies on their work to ensure compliance with a settlement or order.

Unfortunately, they are not always so independent, given potential incentives for their firms to seek additional business with companies subject to monitoring. For example, in the FTC's investigation of Facebook for compliance with its privacy obligations under a 2012 Commission order, the FTC alleged major violations of the order even though PriceWaterhouseCoopers (PwC) was supposedly providing an independent assessment of the company's compliance.[2] In fact, I am unable to identify any recent case where a monitor has identified a material order violation that led to a subsequent penalty action.

The Commission's practice is to have the party alleged to have engaged in a law violation propose a monitor, subject to Commission approval. The party is also responsible for paying the monitor's fees, which can be substantial.

In this matter, the Commission has appointed a monitor who is an employee of a French-based global advisory business, Mazars, which provides consulting, accounting, tax, and other services.[3] The agency's order requires the monitor to simply self-report any potential conflicts of interest. While this is better than nothing, it is not adequate, particularly when the monitor is employed by a large firm that offers a wide array of consulting and compliance-related services to companies like the targets in this matter. For example, will the monitor need to self-report a conflict when other units of Mazars bid for business with the merged entity? Many of these questions are unclear.

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1 Ken Brown & Ianthe Jeanne DuganStaff, *Arthur Anderson's Fall From Grace Is a Sad Tale of Greed and Miscues,* WALL ST. J. (June 7, 2002), https://www.wsj.com/articles/SB1023409436545200; Ben Protess & Jessica Silver-Greenberg, *New York Regulator Moves to Suspend Promontory Financial,* N.Y. TIMES: DEALBOOK/ BUSINESS & POL'Y (Aug . 3, 2015), https://www.nytimes.com/2015/08/04/business/dealbook/new-york-regulator-moves-to-suspend-promontory-financial.html; Jeff Horowitz, *US to fire monitor overseeing formerly for-profit colleges,* THE SEATTLE TIMES (Mar. 14, 2016), https://www.seattletimes.com/business/trouble-remains-following-failed-for-profit-schools-revival-3/.

2 *See* Nitasha Tiku, *Facebook's 2017 Privacy Audit Didn't Catch Cambridge Analytica,* WIRED (Apr. 19, 2010), https://www.wired.com/story/facebooks-2017-privacy-audit-didnt-catch-cambridge-analytica/; *see also* Dissenting Statement of Commissioner Rohit Chopra In re Facebook, Inc., Comm'n File No. 1823109 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

3 Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Stryker I Wright Medical,* File No. 191-0039; *see also About Us,* MAZARS (last visited Nov. 2, 2020), https://mazarsusa.com/about/.

Protecting the Public from Conflicts of Interest

The Commission should strengthen the conflict-of-interest and transparency provisions in our orders related to monitors across the FTC's mission by exploring whether to:

- Require monitors and their employers to agree to non-solicit provisions for a period of time after the completion of a monitoring engagement.[141]
- Publish certain work products of monitors that detail their activities to ensure order compliance.[142]
- Create open application processes for potential monitors to detail their qualifications, as the Commission pursued in the Herbalife matter.[143]
- Require monitors to attest, under penalty of perjury, that they hold no financial interests in the industry of the companies subject to monitoring.

I am skeptical that the Commission can truly remedy anticompetitive harm with complex settlements that require independent monitors. While many monitors certainly provide independent advice and analysis, it is critical that their actions are never distorted by any real or perceived conflicts of interest.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Stryker Corporation ("Stryker") designed to remedy the anticompetitive effects resulting from Stryker's proposed acquisition of Wright Medical Group N.V. ("Wright"). The proposed Decision and Order

141 *See* Statement of Commissioner Rohit Chopra Regarding Miniclip and the COPPA Safe Harbors, Comm'n File No. 1923129, (May 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1575579/192_3129_miniclip_-_statement_of_cmr_chopra.pdf.

142 *See* Statement of Commissioner Rohit Chopra ln the Matter of Uber Technologies Inc., Comm'n File No. 1523054, (Oct. 26, 2018), https://_www.ftc.gov/system/files/documents/public_statements/1418195/152_3054_c-4662_uber_technologies_chopra_statement.pdf.

143 *See* In the Matter of Federal Trade Commission, Plaintiff, v. Herbalife International of America, Inc., Applications for Compliance Auditors, (Aug. 31, 2016), https://www.ftc.gov/public-statement/s2016/08/applications-herbalife-independent-compliance-auditor.

("Order") contained in the Consent Agreement requires Stryker to divest all rights and assets related to its total ankle replacement and finger joint implant businesses to DJO Global, Inc. ("DJO").

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

Under the terms of the Purchase Agreement dated November 4, 2019, Stryker will acquire all of the outstanding shares of Wright for a total equity value of approximately $4 billion ("the Acquisition"). The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for total ankle replacements and finger joint implants. The proposed Consent Agreement would remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

THE PARTIES

Stryker is a global medical device company based in Kalamazoo, Michigan. Stryker organizes its business operations into three segments: orthopedics; medical and surgical; and neurotechnology and spine.

Headquartered in Amsterdam, the Netherlands, Wright is a global medical device company focused on extremities and biologics products. Wright divides its business into four categories: upper extremities; lower extremities; biologics products; and sports medicine.

THE RELEVANT PRODUCTS AND MARKET STRUCTURES

I. Total Ankle Replacements

Total ankle replacements are used to treat end-stage ankle arthritis, in which the cartilage on the tibia (shin), talus (top of the foot), and fibula (calf) bones that form the ankle joint has worn away to create bone-on-bone grinding. Patients with end-stage ankle arthritis—typically aged fifty and older—experience severe pain and swelling of the ankle along with difficulty walking. Total ankle replacements reduce pain while maintaining, and even increasing, ankle motion. In a total ankle replacement procedure, a surgeon removes damaged portions of bone and cartilage and replaces it with a three-piece system. A metal tibial tray, a metal talar dome, and a plastic insert (polyethylene bearing) mimic the cartilage in the joint. In a fixed bearing total ankle replacement, the polyethylene bearing is locked to the tibial component, while in a mobile bearing system it moves independently. Physicians and their patients would not switch to an alternative product or therapy in response to a small but significant increase in the price of total ankle replacements.

Wright and Stryker are the first and third-largest suppliers in the United States, respectively, of total ankle replacements, while Integra LifeSciences ("Integra") is the second-largest supplier. Exactech, Inc. and Zimmer Biomet also supply total ankle replacement products but have only small shares of the U.S. ankle replacement market. Together, Stryker and Wright would account for approximately 75 percent of the market.

II. Finger Joint Implants

Finger joint implants are used to treat advanced osteoarthritis and are implanted into a patient's proximal interphalangeal joints or metacarpophalangeal joints through a surgical procedure to replace damaged bone and cartilage. Arthritis is a gradual, progressive condition typically treated in stages. Physicians seek to use the least invasive treatment option possible to meet each patient's needs, using finger joint implants only when all other options have failed. Physicians and their patients would not switch to an alternative product or therapy in response to a small but significant increase in the price of finger joint implants.

Stryker and Wright are two of only three significant suppliers for finger joint implants in the United States. Integra is the leading supplier while Stryker and Wright are the second and third-largest suppliers, respectively. BioPro Implants ("BioPro") is the only other supplier of finger joint implants in the United States but has a very small share of the U.S. finger joint implant market. The combined Stryker and Wright would have a market share in the United States in excess of 50 percent.

THE RELEVANT GEOGRAPHIC MARKETS

The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition. Total ankle replacements and finger joint implants are medical devices regulated by the U.S. Food and Drug Administration ("FDA"). As such, total ankle replacements and finger joint implants sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in substantial competitive harm to consumers in the markets for total ankle replacements and finger joint implants. As suppliers of close substitutes in each relevant market, Stryker and Wright respond directly to competition from each other with improved products, better service, and lower prices. By eliminating this direct and substantial head-to-head competition, the proposed Acquisition likely would allow the combined firm to exercise market power unilaterally, resulting in less innovation and higher prices for consumers.

ENTRY CONDITIONS

Entry in the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. To enter or effectively expand in either relevant market successfully, a supplier

would need to design and manufacture an effective product, obtain FDA approval, and develop clinical history supporting the long-term efficacy of its product. The new entrant or expanding firm would also need to develop and foster product loyalty and establish a nationwide sales network capable of marketing the product and providing on-site service at hospitals nationwide. Establishing a track record for quality, service, and consistency is difficult, expensive, and typically requires several years.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring the parties to divest to DJO all of the rights and assets needed for it to become an independent, viable, and effective competitor in the U.S. markets for total ankle replacements and finger joint implants. The divestitures will maintain the competition that currently exists in each of the relevant markets.

DJO is well positioned to restore the competition that otherwise would be lost through the proposed Acquisition. Headquartered in Vista, California, DJO is a global medical device company that has experience manufacturing, marketing, and distributing orthopedic devices in the United States, and a track record for quality, service, and consistency. DJO's lower and upper extremity product portfolio is also highly complementary to Stryker's total ankle replacements and finger joint implants.

The Order requires Stryker to divest all assets related to the divested businesses other than real property and tangible personal property. The divested assets include all inventory, contracts, permits, intellectual property ("IP"), and business information related to Stryker's total ankle replacement and finger joint implant products. Certain IP, which Stryker uses for both the divested products as well as retained products, will be retained by Stryker and licensed to DJO.

To ensure continuity for customers, the Order requires that Stryker supply DJO with transition assistance sufficient to efficiently transfer the total ankle replacement and finger joint implant assets to DJO and to assist DJO in operating the assets and business, in all material respects, in the manner in which Stryker did prior to the proposed Acquisition. Until DJO obtains FDA approval to become the legal manufacturer of the products, Stryker will act as an intermediary supplier for DJO. Further, the Order requires that the parties transfer all confidential business information to DJO, as well as provide access to employees who possess or are able to identify such information. DJO also will have the right to interview and offer employment to employees associated with the relevant products.

The parties must accomplish these divestitures and relinquish their rights to DJO no later than ten days after the proposed Acquisition is consummated. If the Commission determines that DJO is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the parties to unwind the sale of rights to DJO and then divest the products to a Commission-approved acquirer within six months of the date the Order becomes final. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

The Order also requires the parties to appoint Justin Menezes, from Mazars, as interim monitor to ensure the parties comply with the obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the assets and rights to DJO.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

METHODIST LE BONHEUR HEALTHCARE,
AND
TENET HEALTHCARE CORPORATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9396; File No. 191 0189
Complaint, November 12, 2020 – Decision, December 29, 2020

This case addresses the $350 million acquisition by Methodist Le Bonheur Healthcare of certain assets of Tenet Healthcare Inc. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for general acute care inpatient hospital services in the Memphis metropolitan area. Respondents publicly announced that they abandoned Methodist's proposed acquisition of certain healthcare facilities, assets, and operating rights from Tenet and its subsidiaries and withdrew their Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition. Complaint Counsel and Respondents Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation jointly moved to dismiss the complaint. The order dismisses the Complaint as moot.

Participants

For the *Commission*: *Henry Hauser, Laura Krachman, Christopher Megaw, Jeanne Nichols, Rohan Pai, Marsha Richard, Amy Ritchie,* and *Gary Schorr.*

For the *Respondents*: *Victor Domen,* and *Amanda Wait, Norton Rose Fulbright LLP; Dave Wales, Skadden, Arps, Slate, Meagher & Flom, LLP; Norman Armstrong,* and *Jeffrey Spigel, King & Spalding LLP; Richard H. Cunningham* and *Matthew J. Reilly, Kirkland & Ellis.*

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 Methodist Le Bonheur Healthcare ("Methodist") and Tenet Healthcare Corporation ("Tenet"), have executed an asset sale 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, 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. Pursuant to an asset sale agreement, Methodist plans to acquire certain healthcare facilities, assets, and operations, including Saint Francis Hospital – Memphis ("Saint Francis-Memphis") and Saint Francis Hospital – Bartlett ("Saint Francis-Bartlett") (collectively, "Saint Francis") from Tenet and its subsidiaries (the "Proposed Transaction") for $350 million. Methodist and Saint Francis are two of only four providers of general acute care ("GAC") inpatient hospital services in the Memphis Metropolitan Statistical Area ("the Memphis Area"). The Proposed Transaction will substantially lessen competition in the market for GAC inpatient hospital services sold and provided to commercial insurers and their insured members ("GAC inpatient hospital services"). The relevant geographic market in which to assess the competitive impact of the Proposed Transaction is the Memphis Area, and includes all the GAC inpatient hospitals in and around Memphis.

2. Only four hospital systems currently provide GAC inpatient hospital services in the Memphis Area; the Proposed Transaction would reduce that number to three and result in a single entity with control of seven out of twelve GAC inpatient hospitals in the Memphis Area.

3. Following the Proposed Transaction, Methodist would control over 50 percent of the market for GAC inpatient hospital services in the Memphis Area. Only one other major hospital system, Baptist Memorial Health Care ("Baptist"), will meaningfully compete with Respondents to provide GAC inpatient hospital services to commercial insurers in the Memphis Area. Regional One Health ("Regional One") also operates a single GAC inpatient hospital in the Memphis Area, but it provides a more limited set of services and primarily serves a patient population that lacks commercial insurance.

4. Methodist and Saint Francis are close competitors today, directly competing with one another both for inclusion in insurers' networks and for patients. The Proposed Transaction would immediately eliminate this direct competition, and would increase Methodist's bargaining leverage with commercial insurers, enhancing Methodist's ability to negotiate more favorable reimbursement terms, including reimbursement rates (*i.e.*, prices). Commercial insurers will have to pass on at least some of those higher healthcare costs to employers and their insurance plan members in the form of increased premiums, co-pays, deductibles, and other out-of-pocket expenses. "Self-insured" employers that pay the cost of their employees' healthcare claims directly will bear the full and immediate burden of higher reimbursement rates and other less favorable terms. In addition to competing to be in insurers' networks by offering more favorable price and reimbursement terms to commercial insurers, Methodist and Saint Francis also compete with each other to attract patients by improving quality, expanding services offerings, and increasing access for patients in the Memphis Area. This non-price competition would also be lost post-transaction.

5. The Proposed Transaction will substantially lessen competition in GAC inpatient hospital services in the Memphis Area and cause significant harm to consumers. If Respondents consummate the Proposed Transaction, healthcare costs will rise, and the incentive to expand

service offerings, invest in technology, improve access to care, and focus on the quality of healthcare provided in the Memphis Area will diminish.

6. Entry or significant expansion by other GAC inpatient hospitals is not likely, nor will it be timely or sufficient to offset the adverse competitive effects that will result from the Proposed Transaction.

7. Respondents have not substantiated verifiable, merger-specific efficiencies that would be sufficient to rebut the strong presumption of harm and other evidence of the Proposed Transaction's likely significant anticompetitive effects.

II.

JURISDICTION

8. Respondents, and each of their relevant operating entities and subsidiaries 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.

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

III.

BACKGROUND

A.

Respondents

10. Respondent Methodist, the largest healthcare provider in the Memphis Area based on GAC inpatient admissions, is a not-for-profit, faith-based health system headquartered in Memphis, Tennessee. Methodist operates four GAC inpatient hospitals and one children's hospital in Shelby County, Tennessee, as well as one GAC inpatient hospital in DeSoto County, Mississippi. Methodist's flagship hospital, Methodist University Hospital, is located in Memphis. Methodist North Hospital, Methodist South Hospital, and Le Bonheur Children's Hospital are also located in Memphis. Methodist Le Bonheur Germantown Hospital is located in Germantown, Tennessee, to the east of Memphis, and Methodist Olive Branch Hospital is located in Olive Branch, Mississippi, about 23 miles from Memphis. Methodist has 1,703 licensed beds across all its locations. Methodist also operates 84 outpatient facilities, employs approximately 280 physicians, and aligns with approximately 216 physicians. In fiscal year 2018, Methodist generated approximately $2 billion in revenue and approximately $81 million in operating income.

11. Respondent Tenet is a national for-profit health system headquartered in Dallas, Texas. Tenet operates 65 acute care and specialty hospitals and over 500 outpatient centers and other healthcare facilities. Tenet employs approximately 110,000 employees and garnered approximately $18.5 billion in revenue in 2019.

12. Tenet and its subsidiaries operate two GAC inpatient hospitals in the Memphis Area: Saint Francis-Memphis and Saint Francis-Bartlett. Saint Francis-Memphis is a 479-bed acute care hospital located in Memphis, and Saint Francis-Bartlett is a 156-bed acute care hospital in Bartlett, Tennessee, a northern suburb of Memphis. Tenet also operates six MedPost urgent care centers and three outpatient imaging centers in the Memphis area, and employs approximately 62 physicians in Memphis. In fiscal year 2018, Saint Francis-Memphis and Saint Francis-Bartlett generated $270 million and $143.9 million in net patient revenue, respectively.

B.

The Proposed Transaction

13. Tenet, via its subsidiaries, entered into a definitive asset sale agreement with Methodist on December 12, 2019, pursuant to which Methodist will acquire the assets and operating rights associated with Saint Francis-Memphis and St. Francis-Bartlett, their associated physician practices and urgent care centers, and other ancillary providers, for an aggregated purchase price of $350 million, subject to adjustment.

IV.

THE RELEVANT SERVICE MARKET

14. The relevant service market is GAC inpatient hospital services sold and provided to commercial insurers and their insured members. This service market encompasses a broad cluster of medical and surgical diagnostic and treatment services offered by both Methodist and Saint Francis to patients age 18 and older that require an overnight hospital stay. GAC inpatient hospital services include, but are not limited to, many emergency services, internal medicine services, and surgical procedures offered by both Respondents.

15. Although the Proposed Transaction's likely effect on competition could be analyzed separately for each individual inpatient service, it is appropriate to evaluate the Proposed Transaction's likely effects across this cluster of GAC inpatient hospital services because these services are offered to patients in the Memphis Area under similar competitive conditions. Thus, grouping the hundreds of individual GAC inpatient hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects without forfeiting the accuracy of the overall analysis.

16. Outpatient services are not included in the GAC inpatient hospital services market because commercial insurers and patients cannot substitute outpatient services for inpatient services in response to a price increase for GAC inpatient hospital services. Additionally,

outpatient services are offered by a different set of competitors under different competitive conditions than GAC inpatient hospital services.

17. The GAC inpatient hospital services market does not include services related to psychiatric care, substance abuse, or rehabilitation services. Furthermore, the GAC inpatient hospital services market does not include services provided to patients under the age of 18. These services are offered by a different set of competitors under different competitive conditions than GAC inpatient hospital services in the Memphis Area and are not substitutes for them.

V.

THE RELEVANT GEOGRAPHIC MARKET

18. The relevant geographic market in which to analyze the effects of the Proposed Transaction is the Memphis Metropolitan Statistical Area, and includes all the GAC inpatient hospitals in and around Memphis. The Memphis Area includes Fayette, Shelby, and Tipton counties in Tennessee, DeSoto, Marshall, Tate, and Tunica counties in Mississippi, and Crittenden County in Arkansas.

19. The appropriate geographic market for analyzing the Proposed Transaction is the area where a hypothetical monopolist of the relevant services could profitably impose a small but significant and non-transitory increase in price ("SSNIP") on the relevant services. If a hypothetical monopolist of the relevant services could profitably impose a SSNIP, the boundaries of the geographic area constitute an appropriate geographic market.

20. Memphis Area residents strongly prefer to obtain GAC inpatient hospital services close to where they live. Therefore, it would be very difficult for a commercial insurer to successfully market a health plan to patients in the Memphis Area that excluded all hospitals located within the Memphis Area. Because a hypothetical monopolist of all hospitals in the Memphis Area that provide GAC inpatient hospital services could impose a SSNIP on insurers, an area no broader than the Memphis Area is a relevant geographic market in which to analyze the Proposed Transaction.

21. The Memphis Area is also the main area of competition between Methodist and Saint Francis for GAC inpatient hospital services. Methodist and Saint Francis each analyze competition within the Memphis Area and identify hospitals within the Memphis Area as their competitors.

VI.

MARKET STRUCTURE AND THE PROPOSED TRANSACTION'S PRESUMPTIVE ILLEGALITY

22. The Proposed Transaction will substantially increase concentration in an already highly concentrated market for GAC inpatient hospital services in the Memphis Area.

23. Based on commercial GAC inpatient admissions for patients seeking care at Memphis Area hospitals, post-transaction, Methodist would control more than 50 percent of GAC inpatient hospital services in the Memphis Area.

24. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") provide a framework for interpreting and applying antitrust laws. The Merger Guidelines explain that transactions are likely to create or enhance market power—and are presumptively unlawful—based on the transaction's impact on the Herfindahl-Hirschman Index ("HHI"), which courts and antitrust agencies commonly use to measure market concentration. Specifically, a transaction is presumptively unlawful if it increases the HHI by more than 200 points and results in a post-acquisition HHI above 2,500 points.

25. The Proposed Transaction would increase the HHI in this market by well over 1,000 points, resulting in a post-transaction HHI of over 4,500, far exceeding the threshold over which the Proposed Transaction is presumed likely to create or enhance market power and to be presumptively unlawful. As such, the Proposed Transaction is presumptively unlawful.

VII.

ANTICOMPETITIVE EFFECTS

A.

Competition Between Hospitals Benefits Consumers

26. Competition between hospitals occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial insurers' health plan provider networks. Second, in-network hospitals compete to attract patients, including commercial insurers' health plan members.

27. In the first stage of hospital competition, hospitals compete to be included in commercial insurers' health plan provider networks. To become an "in-network" provider, a hospital negotiates with a commercial insurer and, if mutually agreeable terms can be reached, enters into a contract. The financial terms under which a hospital is reimbursed for services rendered to a health plan's members are a central component of those negotiations, regardless of whether reimbursements are based on fee-for-service contracts, risk-based contracts, or other types of contracts.

28. Health plan members typically pay far less to access in-network hospitals than those that are out-of-network. In-network status thus benefits hospitals because, all else being equal, an in-network hospital will attract more patients from a particular health plan than an out-of-network one. This dynamic motivates hospitals to offer lower rates and other more favorable terms to commercial insurers to win inclusion in their networks.

29. From the insurers' perspective, having hospitals in-network is beneficial because it enables the insurer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

30. A critical determinant of the relative bargaining positions of a hospital and a commercial insurer during contract negotiations is whether other, nearby comparable hospitals, or combinations of hospitals, are available to the commercial insurer and its health plan members as alternatives in the event of a negotiating impasse. Alternative hospitals limit a hospital's bargaining leverage and constrain its ability to obtain more favorable reimbursement terms from commercial insurers. The more attractive alternative hospitals are to a commercial insurer's health plan members in a local area, the greater the constraint on a hospital's bargaining leverage. Where there are fewer meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

31. These bargaining dynamics apply to both "broad" and "narrow" network health plan negotiations. Broad network health plans are health plans that include most or all hospitals in an area. Narrow network health plans are health plans that do not include all area hospitals and are usually marketed at lower prices than broad health plans, which include most or all hospitals. To the extent that commercial insurers are willing to create, and members are willing to purchase, narrow network health plans that limit the number of providers included in the network, hospital providers may be willing to offer lower rates or provide more favorable terms in order to be included within, rather than excluded from, the narrow network and increase overall patient volume. The availability of comparable and proximate hospitals, or a combination of hospitals, with which an insurer could create an alternative narrow network limits the leverage that the bargaining hospital has during contract negotiations relating to narrow networks.

32. A merger between hospitals that are substitutes in the eyes of commercial insurers and their health plan members tends to increase the merged entity's bargaining leverage. Similarly, a merger between hospitals also tends to increase the merged entity's bargaining leverage when one of the merging parties serves as a significant component of a network that is a close substitute for the other merging party in the eyes of commercial insurers and their members. Such mergers lead to higher reimbursement rates by eliminating an available alternative for commercial insurers. This increase in leverage is greater when the merging hospitals are closer substitutes for (and competitors to) each other; however, the merging hospitals need not be each other's closest competitors in order for a merger to increase the merged entity's bargaining leverage.

33. Changes in the reimbursement terms negotiated between a hospital and a commercial insurer, including increases in reimbursement rates, significantly impact the commercial insurer's health plan members. "Fully-insured" employers pay premiums to commercial insurers—and employees pay premiums, co-pays, and deductibles—in exchange for the commercial insurer assuming financial responsibility for paying hospital costs generated by the employees' use of hospital services. When hospital rates increase, commercial insurers

generally pass on a significant portion of these increased rates to their fully-insured customers in the form of higher premiums, co-pays, and deductibles. "Self-insured" employers rely on a commercial insurer for access to its health plan provider networks and negotiated rates, but these employers pay the cost of their employees' healthcare claims directly and bear the full and immediate burden of any rate increase in the healthcare services used by their employees. Employees may bear some portion of the increased cost through increased premiums, co-pays, and deductibles.

34. In the second stage of hospital competition, hospitals compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket costs for in-network hospitals, hospitals in the same network compete to attract patients on non-price features, including, but not limited to, quality of care, access to services and technology, reputation, physicians and faculty members, amenities, convenience, and patient satisfaction. Hospitals compete on these non-price dimensions to attract all patients, regardless of whether they are covered by commercial insurance (including Medicare Advantage and Medicaid Managed Care), traditional Medicare and Medicaid, or are patients without any insurance. A merger of competing hospitals eliminates this competition for patients and reduces the merged entity's incentive to improve and maintain service, access, and quality.

B.

The Proposed Transaction Would Eliminate Beneficial Head-to-Head Competition between the Respondents

35. Methodist and Saint Francis are close competitors for GAC inpatient hospital services. Methodist's internal documents refer to Saint Francis as one of only two "direct competitors" and Saint Francis's internal documents identify Methodist as one of its two closest competitors. [redacted] Methodist and Saint Francis also closely track each other's quality scores, advertising, and brand recognition. In addition, they regularly oppose each other's certificate of need ("CON") applications, seeking to stifle competitively beneficial technology investments or facility expansions that might draw patients from one to the other. The Proposed Transaction would eliminate this significant head-to-head competition between Respondents, which at present incentivizes the Respondents to keep prices lower and quality of care higher than they would without this competition.

36. Economic analysis confirms that Methodist and Saint Francis are close competitors for GAC inpatient hospital services. Diversion analysis is an economic tool that uses data on where patients receive hospital services to determine the extent to which hospitals are substitutes. Diversion analysis shows that if Saint Francis's hospitals were to become unavailable to patients for GAC inpatient services, a majority of patients that previously went to Saint Francis would seek care at a Methodist hospital. Likewise, if Methodist hospitals were to become unavailable to patients for GAC inpatient hospital services, a significant fraction of patients that previously went to one of Methodist's hospitals would receive care at one of Saint Francis's hospitals.

37. Today, this close head-to-head competition between the Respondents incentivizes them to keep prices lower and quality of care higher than they would without this competition.

C.

The Proposed Transaction Would Increase Methodist's Bargaining Leverage

38. The reduction in competition caused by the Proposed Transaction would increase Methodist's bargaining leverage in contract negotiations with commercial insurers. This increase in bargaining leverage would apply to contract negotiations for both narrow and broad network health plans, and would result in Methodist commanding higher reimbursement rates and more favorable reimbursement terms.

39. In the Memphis Area, commercial health insurers may offer a health plan that provides in-network access to all four GAC hospital systems, and/or one or more narrow network health plans that provide in-network access to a subset of the four GAC hospital systems. Narrow network and "tiered" health plans offer customers a tradeoff by including fewer participating hospitals (or fewer participating hospitals in a preferred benefit tier), but often at significantly discounted prices relative to broader provider networks. Hospitals are willing to accept lower reimbursement rates to participate in narrow and tiered networks based on the expectation that they will gain increased patient volume.

40. Narrow network health plans are prevalent in the Memphis Area. Today, commercial insurers in the Memphis Area can, and most do, offer a narrow network that includes one of the two largest provider systems in the Memphis Area – Methodist, or the second largest provider, Baptist – as well as Saint Francis and/or Regional One.

41. Competition between Methodist and Saint Francis to be in-network providers and to exclude each other from commercial insurance networks directly drives down reimbursement rates in the Memphis Area today. Methodist has provided price concessions to commercial insurers to exclude Saint Francis from narrow network products or otherwise disadvantage Saint Francis. Such competition would be eliminated as a result of the Proposed Transaction, thereby reducing Methodist's incentive to offer lower rates and leading to increased prices. Acquiring Saint Francis will enhance Methodist's leverage when negotiating reimbursement rates and terms with commercial insurers and lead to higher reimbursement rates and terms that are more favorable to Methodist.

42. The Proposed Transaction would also increase Methodist's bargaining leverage vis-à-vis commercial insurers by weakening commercial insurers' ability to offer an attractive narrow network product that excludes Methodist. Today, an insurer can build a narrow network product that excludes Methodist and offers in-network access to Baptist, Saint Francis, and Regional One. Post-transaction, if an insurer sought to build a narrow network product excluding the combined Methodist/Saint Francis, it could offer (at most) in-network access to Baptist and Regional One. Removing Saint Francis as a component of such a network would reduce the attractiveness of the network, and would therefore increase Methodist's bargaining leverage in contract negotiations with commercial insurers.

D.

The Proposed Transaction Would Eliminate Vital Quality and Service Competition

43. Methodist and Saint Francis compete with one another to attract patients, which incentivizes them to improve the quality of care they provide, enhance access, recruit high quality physicians, and expand their service offerings. The Proposed Transaction would eliminate this competition, which has provided GAC inpatient hospital services patients in the Memphis Area with higher quality care, better access to care, and more extensive healthcare service offerings.

44. Methodist and Saint Francis track and respond to one another's quality achievements and hiring decisions. Methodist tracks Saint Francis's quality recognitions and considers these achievements when developing its own strategy. In response to learning that Saint Francis Bartlett was the only local hospital to receive an "A" ranking from the Leapfrog Group, an organization that assesses hospital quality, a Methodist employee observed that this report [redacted] Saint Francis has also focused on improving patient access and experience to retain volume. For example, in 2018, after Methodist hired a bariatric surgeon away from Saint Francis to help launch Methodist's bariatric program, Saint Francis focused on improving services to patients and access to operating rooms in an attempt to retain patients. Furthermore, Saint Francis has invested in technology and expanded or added services lines in order to better compete with Methodist (as well as Baptist). For example, Tenet invested in a da Vinci Xi Robot to better compete with Methodist and Baptist for surgical patients, aiming in particular to shift surgery volumes from locations such as Methodist Germantown hospital to Saint Francis. Saint Francis also proposed to recruit orthopedic surgeons, market its robotic surgery options, and potentially add a robotic surgery option for Saint Francis-Bartlett in order to convince patients to go to Saint Francis rather than other hospitals.

45. Patients benefit from this direct non-price competition. The Proposed Transaction will diminish the combined firm's incentive to compete on quality of care, access to care, and service offerings to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.

VIII.

ENTRY BARRIERS

46. Neither entry by new market participants nor expansion by current market participants is likely to deter or counteract the Proposed Transaction's likely harm to competition for GAC inpatient hospital services in the Memphis Area.

47. New entry into GAC inpatient hospital services or significant expansion by current GAC inpatient hospital providers in the Memphis Area is not likely, nor would such entry or expansion be timely or sufficient to offset the Proposed Transaction's likely harmful competitive effects. Entry or significant expansion in the Memphis Area is unlikely due to high

costs and risks associated with constructing and opening GAC hospitals or significantly expanding GAC inpatient hospital services in Tennessee. Construction of a new GAC hospital or substantial expansion of an existing one would involve high costs and significant financial risk, including the time and resources to conduct studies, develop plans, acquire land or repurpose a facility, obtain regulatory approvals, including a CON, and build and open the facility.

48. Even if *de novo* hospital construction or significant expansion by incumbent providers were likely, such entry or significant expansion would not be timely. In addition to the time and costs associated with planning and constructing a hospital or significantly expanding existing facilities, Tennessee's CON regulations pose a significant barrier to entry. Tennessee's CON regulations require anyone seeking to build a new hospital or modify an existing hospital or healthcare facility, as well as hospitals seeking to add licensed beds by more than 10 percent every three years per specific bed category, to undergo an extensive application process and justify the need for such additions. Obtaining CON approval is a time-consuming process and there is no guarantee such approval will be granted.

49. Even a successful entrant would be unlikely to counteract the loss of competition resulting from the Proposed Transaction, as a new provider would face significant challenges to replicate Saint Francis's competitiveness and reputation in the Memphis Area.

IX.

EFFICIENCIES

50. Respondents have not substantiated verifiable, merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Proposed Transaction's likely significant anticompetitive effects.

X.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

51. The allegations of Paragraphs 1 through 50 above are incorporated by reference as though fully set forth herein.

52. The Proposed Transaction 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

53. The allegations of Paragraphs 1 through 50 above are incorporated by reference as though fully set forth.

54. The Proposed Transaction, 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 eighteenth day of May, 2021, at 10:00 a.m. Eastern is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC, 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 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 Proposed Transaction 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 Proposed Transaction 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 Methodist and Tenet were offering and planning to offer prior to the Proposed Transaction.

2. A prohibition against any transaction between Methodist and Tenet that combines their businesses, or any part of their businesses or operations, in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Methodist and Tenet provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses, or any part of their businesses or operations, in the relevant market, as defined in paragraphs 14 through 21 of this complaint, 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 Tenet 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 twelfth day of November, 2020.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. Having considered the motion, it is hereby **ORDERED:**

The Joint Motion to Dismiss Complaint, dated December 23, 2020, is **GRANTED;**

and the complaint is **DISMISSED** without prejudice.

By the Commission.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, July 1, 2020

Order governing public accessibility to evidentiary hearings during the pandemic.

COMMISSION ORDER ON PUBLIC ACCESS TO THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a). Accordingly,

IT IS HEREBY ORDERED THAT:

(1) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone conference or live streaming;

(2) all hearings in this proceeding before the Chief Administrative Law Judge that involve the testimony of witnesses will take place in Room 532 of the Federal Trade Commission Headquarters Building; and

(3) no more than ten people will be allowed in Room 532 during the taking of witness testimony, limited to:

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020)

i. the Chief Administrative Law Judge and his two Attorney Advisors;
ii. the testifying witness;
iii. Complaint Counsel (no more than two people);
iv. Respondent's counsel (no more than two people);
v. the witness' counsel (no more than one person); and
vi. a court reporter.

By the Commission.

IN THE MATTER OF

PEABODY ENERGY CORPORATION,
AND
ARCH COAL, INC.

Docket No. 9391. Order, July 1, 2020

Order governing public accessibility to evidentiary hearings during the pandemic.

COMMISSION ORDER ON PUBLIC ACCESS TO THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a). Accordingly,

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020)

IT IS HEREBY ORDERED THAT:

(1) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone conference or live streaming;

(2) all hearings in this proceeding before the Chief Administrative Law Judge that involve the testimony of witnesses will take place in Room 532 of the Federal Trade Commission Headquarters Building; and

(3) no more than ten people will be allowed in Room 532 during the taking of witness testimony, limited to:

i. the Chief Administrative Law Judge and his two Attorney Advisors;

ii. the testifying witness;

iii. Complaint Counsel (no more than two people);

iv. Respondent's counsel (no more than two people);

v. the witness' counsel (no more than one person); and

vi. a court reporter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

THOMAS JEFFERSON UNIVERSITY,
AND
ALBERT EINSTEIN HEALTHCARE NETWORK

Docket No. 9392. Order, July 1, 2020

Order governing public accessibility to evidentiary hearings during the pandemic.

COMMISSION ORDER ON PUBLIC ACCESS TO THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a). Accordingly,

IT IS HEREBY ORDERED THAT:

(1) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone conference or live streaming;

(2) all hearings in this proceeding before the Chief Administrative Law Judge that involve the testimony of witnesses will take place in Room 532 of the Federal Trade Commission Headquarters Building; and

(3) no more than ten people will be allowed in Room 532 during the taking of witness testimony, limited to:

i. the Chief Administrative Law Judge and his two Attorney Advisors;

ii. the testifying witness;

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020)

iii. Complaint Counsel (no more than two people);

iv. Respondent's counsel (no more than two people);

v. the witness' counsel (no more than one person); and

vi. a court reporter.

By the Commission.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, July 1, 2020

Order governing public accessibility to evidentiary hearings during the pandemic.

COMMISSION ORDER ON PUBLIC ACCESS TO THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a). Accordingly,

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020)

IT IS HEREBY ORDERED THAT:

(1) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone conference or live streaming;

(2) all hearings in this proceeding before the Chief Administrative Law Judge that involve the testimony of witnesses will take place in Room 532 of the Federal Trade Commission Headquarters Building; and

(3) no more than ten people will be allowed in Room 532 during the taking of witness testimony, limited to:

i. the Chief Administrative Law Judge and his two Attorney Advisors;

ii. the testifying witness;

iii. Complaint Counsel (no more than two people);

iv. Respondent's counsel (no more than two people);

v. the witness' counsel (no more than one person); and

vi. a court reporter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, September 1, 2020

Supplemental Order governing public accessibility to evidentiary hearings during the pandemic.

SUPPLEMENTAL COMMISSION ORDER ON PUBLIC ACCESS TO THE EVIDENTIARY HEARING IN LIGHT OF THE PUBLIC HEALTH EMERGENCY

Because of the declared public health emergency[1] associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), also known as SARS-CoV-2, and because it has been advised that gatherings of people in close proximity may facilitate the spread of the disease, the Commission has determined that it is in the public interest to mitigate the transmission and impact of COVID-19, and that good cause exists to issue an order addressing public access to the evidentiary hearing pursuant to Commission Rule 3.41(a), 16 C.F.R. § 3.41(a). Accordingly,

IT IS HEREBY ORDERED THAT:

(1) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone or live web streaming (audio and/or video), in either instance, only for monitoring purposes;

(2) all hearings in this proceeding before the Chief Administrative Law Judge that involve the testimony of witnesses will take place in Room 532 of the Federal Trade Commission Headquarters Building or virtually via live web streaming (audio and/or video), as determined by the Chief Administrative Law Judge; and

(3) no more than ten people will be allowed in Room 532 during the taking of witness testimony, limited to:

i. the Chief Administrative Law Judge and his two Attorney Advisors;

1 Pursuant to the Public Health Services Act, 42 U.S.C. § 247d, on January 31, 2020, the Secretary of the Department of Health and Human Services issued a declaration that a health emergency exists because of COVID-19; and on March 13, 2020, the President of the United States issued a proclamation that a national emergency exists concerning COVID-19. Remarks by President Trump, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/ (Mar. 13, 2020).

ii. the testifying witness;

iii. Complaint Counsel (no more than two people);

iv. Respondent's counsel (no more than two people);

v. the witness' counsel (no more than one person); and

vi. a court reporter.

By the Commission, Commissioner Slaughter not participating.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, September 3, 2020

Order denying the motion to disqualify the Administrative Law Judge.

ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Respondent Axon Enterprise, Inc. ("Axon") moves under Rule 3.42(g)(2) to disqualify and remove the Administrative Law Judge ("ALJ") in this proceeding on the basis that the ALJ's dual-for-cause tenure protection violates Article II of the United States Constitution and the separation of powers. Complaint Counsel urge us to dismiss the Motion[1] as procedurally improper and untimely. We deny the Motion on the merits.

A. PROCEDURAL REQUIREMENTS

Rule 3.42(g)(2) allows a party to move to disqualify and remove the ALJ "[w]henever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding . . .." 16 C.F.R. § 3.42(g)(2). Complaint Counsel assert that this rule is not the appropriate vehicle for Axon's arguments about

1 We use the following abbreviations for citations to the pleadings:
Motion: Respondent's Renewed Motion to Disqualify the Administrative Law Judge
Response: Complaint Counsel's Response to Respondent's Motion to Disqualify the Administrative Law Judge

constitutional authority because the rule applies to disqualify "a *particular* judge in a *particular* proceeding and Axon's arguments are not specific to this particular proceeding, or this particular judge." Response at 1. Nothing in Rule 3.42(g)(2), however, precludes disqualification based on constitutional infirmity. On the contrary, the rule provides for motions to disqualify "for any reason." 16 C.F.R. § 3.42(g)(2). Complaint Counsel have identified no other, more appropriate avenue for Axon to seek removal of the ALJ on constitutional grounds.[2] Accordingly, we regard the issue as properly before us on a motion under Rule 3.42(g)(2).

Complaint Counsel also argue that the Motion is untimely. Motions to disqualify an ALJ under Rule 3.42(g) must be filed "at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification." 16 C.F.R. § 3.42(g)(3). The Commission issued its administrative complaint on January 3, 2020. On January 6, an order designating the ALJ was issued. Axon filed an answer on January 21 and included, as a defense, the contention that constraints on removal of the ALJ violate Article II of the Constitution and the separation of powers.[3] On March 19, the Commission issued the first of a series of orders that stayed this proceeding through July 6, 2020, in light of the COVID-19 public health crisis. Axon filed this Motion to disqualify on July 8, 2020.[4] Axon has not adequately explained its failure to file during the nearly two months that elapsed between assertion of its defense and the stay of this proceeding. Nonetheless, in view of the public health exigencies that began to emerge during portions of that period, and given the details of the timing, we will not reject Axon's Motion as untimely and will consider it on the merits.

B. COMMISSION AUTHORITY TO RULE ON THE MOTION

Although Axon moves us to remove the ALJ on constitutional grounds, it simultaneously argues that we lack authority to rule on constitutional matters. This is not the first time Axon has made that argument. Axon previously argued in federal district court that the Commission cannot resolve constitutional questions, but the district court correctly rejected that argument.

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2 Complaint Counsel cite our decision in *North Carolina Board of Dental Examiners,* 151 F.T.C. 644 (Feb. 16, 2011), in asserting that jurisdictional arguments are not properly raised in a Rule 3.42(g) disqualification motion. *See* Response at 1-2. In *North Carolina Board of Dental Examiners,* the respondent moved the Commission to disqualify and remove itself as the adjudicator, arguing, among other things, that the Commission lacked the legal authority to rule on the constitutionality of its exercise of jurisdiction. *N.C. Bd. a/Dental Examr's,* 151 F.T.C. at 644. The Commission explained that "[a]lthough crafted by Respondent as an argument to disqualify, lack of jurisdiction is not an argument for disqualification. Rather, jurisdiction regards the power of the Commission to entertain this dispute in the first instance." *Id.* at 645 n.3. That reasoning, however, does not apply here, because Axon's Motion seeks only to disqualify the ALJ; it does not implicate Commission jurisdiction but only the ALJ's role. Disqualification of the ALJ would not preclude proceeding under a different presiding official. *See* 16 C.F.R. § 3.42(a).

3 Although Axon subsequently amended its Answer, the amendments changed only the numbering of the defense regarding constraints on removal of the ALJ, not its wording. *Compare* Amended Answer and Defenses of Respondent Axon Enterprise, Inc., Defense 15 (Mar. 2, 2020) *with* Answer and Defenses of Respondent Axon Enterprise, Inc., Defense 14 (Jan. 21, 2020).

4 Axon states that it initially attempted to file its motion on April 24, 2020, but the FTC's Secretary refused to accept it while the proceeding was stayed. *See* Motion at 2 n.3.

The court asked "whether Congress, by enacting the FTC Act, intended to require constitutional challenges to the FTC's structure and processes to be brought via the FTC Act's adjudicatory framework," and it answered in the affirmative. *Axon Enter. Inc. v. Fed. Trade Comm 'n,* No. CV-20-00014-PHX-DWL, 2020 WL 1703624, at *1, *3 (D. Ariz. Apr. 8, *2020), pet. for review pending,* No. 20-15662 (9th Cir.). Similarly in *North Carolina Board of Dental Examiners,* 151 F.T.C. at 648, the Commission explained that it had authority to entertain what was allegedly a constitutional question, when its ruling would be fully reviewable by a court of appeals.[5] We will therefore address Axon's arguments that the ALJ's dual-for-cause tenure protection is unconstitutional.

C. CONSTITUTIONALITY OF ALJ TENURE PROTECTIONS

The Administrative Procedure Act provides that "[a]n action may be taken against an administrative law judge ... by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). Merit System Protection Board ("MSPB") members, in tum, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Axon argues this statutory structure shields the ALJ from the President with two layers of good-cause protection in violation of Article II of the Constitution, which vests the President with "[t]he executive Power" and charges him with the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3.

The Supreme Court addressed dual-for-cause removal protections in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477. In that case, the Court considered a separation-of-powers challenge to the Sarbanes-Oxley Act of 2002, which established the Public Company Accounting Oversight Board ("PCAOB" or "Board"), on grounds that it "conferr[ed] wide-ranging executive power on Board members without subjecting them to Presidential control." *Id.* at 487. The Board, comprising five members appointed by the Securities and Exchange Commission, possessed "expansive powers to govern an entire industry," including registering and routinely inspecting all accounting firms that audit public companies, promulgating auditing and ethics standards, initiating formal investigations, and issuing "severe sanctions" in disciplinary matters. *Id.* at 484-85.[6] Although the Board's issuance

5 Axon also asserts, with little elaboration or support, that any Commission ruling on this Motion would be invalid because, like the constraints on removal of the ALJ, the constraints on removal of the Commissioners violate Article II and the separation of powers. The Supreme Court has already considered and upheld the limitations on the President's authority to remove FTC Commissioners. *See Humphrey's Ex'r v. United States,* 295 U.S. 602, 629-32 (1935); *cf Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477,501, 508-09 (2010) (explaining that the Court does not take issue with one-layer for-cause removal limitations and adopting a remedy that leaves the President separated from the at-issue officers by a single level of good-cause tenure); *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 140 S. Ct. 2183, 2206 (2020) ("[W]e do not revisit *Humphrey's Executor[.]").* But we need not rule on Axon's arguments regarding constraints on removal of Commissioners, as these arguments are not the basis of a motion.

6 As the Court explained, "[T]he Board may regulate every detail of an accounting firm's practice . . .." *Free Enter. Fund,* 561 U.S. at 485. It "promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. The

of rules and imposition of sanctions were subject to Commission approval and alteration, *id.* at 486, the Commission could not start, stop, or alter Board investigations. *Id.* At 504. Further, Board members could be removed only upon a Commission finding that the member "willfully violated" the Sarbanes-Oxley Act, the securities law, or the Board's rules; "willfully abused" his or her authority; or "without reasonable justification or excuse," failed to enforce compliance with the statutes, rules, or Board standards. *Id.* at 486 (quoting 15 U.S.C. § 7217(d)(3)); *see also id.* at 503. The SEC Commissioners themselves, in tum, could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 487 (quotation omitted). The Court sought to resolve the following question: "May the President be restricted in his ability to remove a principal officer, who is in tum restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?" *Id.* at 483-84. The Court held that two-layer removal protections were not permissible for officers who "exercise significant executive power." *Id.* at 514.

In *Free Enterprise Fund,* the Court specifically carved ALJs, who are also subject to two-layer removal protections, out from its holding, distinguishing them because, "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers." *Id.* at 507 n.10 (citation omitted). Further, the Court asserted that such employees do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." *Id.* at 506.[7]

Despite the care the Court took to distinguish ALJs, Axon asks us to extend the Court's holding to the ALJ here and to disqualify him on that basis. We decline to do so.

1. The ALJ Performs Adjudicative Functions

The ALJ's removal protections do not inhibit the President in ensuring faithful execution of the laws because, as the Supreme Court suggested, the ALJ does not engage in enforcement or policymaking but rather performs adjudicative functions. *See Free Enter. Fund,* 561 U.S. at 507 n.10. The FTC's ALJ does not bring enforcement matters or initiate investigations or cases. He does not establish agency policies or priorities. Instead, he presides over adjudicative proceedings in whatever cases may come before him after initiation by the Commission, and he applies the law to the facts. His position is "functionally comparable to that of a judge." *Butz v.*

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willful violation of any Board rule is . . . a federal crime punishable by up to 20 years' imprisonment or $25 million in fines ($5 million for a natural person). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration ... and money penalties of $15 million ($750,000 for a natural person)." *Id.* (citations and quotation marks omitted).

7 The Court also distinguished ALJs because it was disputed whether they were necessarily "Officers of the United States." *Id.* In a subsequent decision, however, the Court addressed that dispute, holding that the SEC's ALJs were in fact "Officers." *See generally Lucia v. S.E.C.,* 138 S. Ct. 2044 (2018). We do not rely on this distinction but focus on the other distinctions identified by the Court. *See id.* at 2061 (Breyer, J. concurring in judg't in part and dissenting in part) (noting that the majority's holding that the SEC's ALJs are "Officers" removes that as a basis for distinction between ALJs and PCAOB members but that "[t]he other two distinctions remain.").

Economou, 438 U.S. 478, 513 (1978) (internal quotation marks omitted). The ALJ's function, therefore, differs from the executive functions within the President's domain.

Axon suggests that the FTC's ALJ does engage in policymaking because he "is also authorized 'to conduct rulemaking proceedings under section 18(a)(l)(B) of the Federal Trade Commission Act' and 'other rulemaking proceedings as directed,' and to serve as the 'Chief Presiding Officer.'" Motion at 5 (quoting 16 C.F.R. § 0.14). The ALJ's limited participation in Commission rulemakings-ensuring that the rulemaking proceeds in an orderly fashion and maintaining the rulemaking and public record-does not place him in the role of a policymaker; that role is reserved for the Commission. *See* 16 C.F.R. § 1.13. The ALJ cannot initiate a rulemaking proceeding, decide on its subject, determine whether a rule should issue, or establish the content of the rule. The Commission does all that. *See id.* §§ 1.9, l.13(i), 1.14, 1.25, 1.26(d). The ALJ does provide the Commission with his "recommended decision" in trade regulation rule proceedings, *id.* § 1.13(g), but that is, by definition, an exercise of only "recommendatory powers." *Free Enter. Fund,* 561 U.S. at 507 n.10; *see also infra* Section C.2. In any case, any purported insufficiency in the President's oversight of the ALJ's role in rulemaking proceedings is not a basis to disqualify him from presiding over the adjudication of a matter involving an alleged statutory violation.

2. The Commission is Responsible for All Final Decisions

The Supreme Court also distinguished ALJs from officers whose two-layer removal protections are unconstitutional because ALJs may have only "recommendatory powers." *Free Enter. Fund,* 561 U.S. at 507 n.10. Removal protections for persons who only make recommendations do not impede the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the President can fulfill that duty by overseeing the officers who actually make the final decisions. Axon argues that the FTC's ALJ does not exercise "purely recommendatory" powers because he issues not "recommendations" but "initial decisions." Motion at 5. For present purposes, however, that is a distinction without a difference. The ALJ's decisions do not become final agency action in the absence of Commission approval, either tacit or express, and the Commission can modify or set aside any aspect of the ALJ's decision with which it disagrees. *See* 16 C.F.R. §§ 3.51(a), (b), 3.54(a), (b). The Commission is thus responsible for all final agency decisions, so the ALJ's removal protections do not interfere with the President's constitutional duties.

This is in contrast to *Free Enterprise Fund,* where the Court took issue with the PCAOB's removal protections because the President could not "hold the [Securities and Exchange] Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board's actions." *Free Enter. Fund,* 561 U.S. at 496. Here, because all of the ALJ's findings, rulings, and conclusions are subject to review and modification by the Commission, the Commission can be held accountable for any ALJ decision that becomes final to the same extent as if the Commission had authored it.

Unlike in *Free Enterprise Fund,* the Commission maintains controls over the case from beginning to end. The Commission authorizes all use of compulsory process in investigations. 16

C.F.R. § 2.7. The Commission itself issues the complaint. *Id.* § 3.1 l(a). The ALJ has no authority to initiate investigations or issue complaints. *See id.* §§ 2.1, 3.1 l(a). By contrast, the PCAOB initiated its own investigations, and the SEC had no power "to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch . . . The Board thus ha[d] significant independence in determining the priorities and intervening in the affairs of regulated firms . . . without Commission preapproval or direction." *Id.* at 504-05.

As for the administrative hearing, the Commission typically delegates to the ALJ responsibility for "the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice." 16 C.F.R. § 0.14.[8] The Commission, however, generally directly decides motions to dismiss filed before the evidentiary hearing, motions for summary decision, and motions to strike portions of the pleadings. *See id.* § 3.22(a).

In cases where the ALJ issues an initial decision, the Commission can overturn or modify that decision as it finds appropriate. The Commission reviews the ALJ's factual findings, legal conclusions, and discretionary decisions *de nova;* it "exercise[s] all the powers which it could have exercised if it had made the initial decision." *Id.§* 3.54(a); *see also* 5 U.S.C. § 557(b). The Commission can "adopt, modify, or set aside" the ALJ's findings, conclusions, rules or orders in the initial decision. 16 C.F.R. § 3.54(b). The Commission can also request additional information. *Id.* § 3.54(c). Commission review of the initial decision is mandatory if either party requests it. *Id.* § 3.52(b). But even when no party requests review of the initial decision, the Commission may review and modify it or set it aside on its own accord. *Id.§§* 3.5l(a), 3.53. The initial decision only becomes "the decision of the Commission" if the Commission so chooses. *See id.* § 3.51(a).[9]

Axon also contends that the ALJ's authority is not recommendatory because the ALJ can issue sanctions for failure to comply with discovery obligations. Motion at 5. But unlike the "severe sanctions" that could be issued by the Board in *Free Enterprise Fund,* 561 U.S. at 485, none of the sanctions available to the ALJ are monetary. Instead, such "sanctions" generally take the form of evidentiary rulings-e.g., orders that a matter be admitted, evidence be excluded, or a pleading be stricken. 16 C.F.R. § 3.38(b). And, as with other ALJ determinations, these rulings are subject to *de nova* Commission review. *Id.* § 3.54(a).

Because the Commission is responsible for every final decision in this adjudication, the ALJ's removal protections are constitutionally sound and provide no basis for his disqualification.

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8 The Commission or one of the Commissions can preside in lieu of the ALJ. 16 C.F.R. § 3.42(a); 5 U.S.C. § 556(b).

9 The Commission's role in considering Axon's Motion exemplifies its comprehensive oversight. Under Commission Rule 3.42(g)(2), if an ALJ fails to disqualify himself in response to a motion, the Commission is responsible for determining the validity of the grounds alleged. 16 C.F.R. § 3,42(g)(2).

3. The "Good Cause" Removal Standard Allows for Adequate Oversight of the ALJ

The Court in *Free Enterprise Fund* responded to concerns about applying the holding to ALJs by stating that they do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." *Free Enter. Fund,* 561 U.S. at 506. The ALJ here is subject to much more oversight, not only because, as discussed above, the Commission can at its option modify or reverse the ALJ's findings, rulings, and conclusions, but also because the "good cause" removal protections at issue here do not provide the type of insulation that the Court found problematic in *Free Enterprise Fund.*

ALJs are much less shielded from removal than PCAOB members in *Free Enterprise Fund.* PCAOB members could be removed only upon a finding by the SEC that the member "willfully violated" the Sarbanes-Oxley Act, the securities law, or the PCAOB's rules; "willfully abused" his or her authority; or "without reasonable justification or excuse," failed to enforce compliance with the statutes, rules, or PCAOB standards. *Free Enter. Fund,* 561 U.S. at 486 (quoting 15 U.S.C. § 7217(d)(3)); *see also id.* at 503. The Court regarded these bases as "an unusually high standard" for removal and, consequently, a "more serious threat to executive control than an 'ordinary' dual for-cause standard." *Id.* at 502-03. The bases for removal were found to be too confining, as they could not be read to allow the SEC to remove Board members over disagreements on "policies or priorities." *Id.* at 502. ALJ removal, however, is governed by a more flexible "good cause" standard. *See* 5 U.S.C. § 7521 (an agency may take action against an ALJ "for good cause established and determined" by the MSPB).[10] This is far more permissive than willful violation or abuse and can include an ALJ's failure to perform adequately or to follow agency policies, procedures, or instructions.[11] When the "good cause" standard is so construed and the MSPB's role is limited to determining whether a factual basis exists for the agency's proffered grounds for removal, the President wields a constitutionally adequate degree of control over ALJs, to the extent Presidential oversight over persons with adjudicative functions is necessary. *See Otto Bock HealthCare N Am., Inc.,* 2019 FTC LEXIS 79, *150-51 (F.T.C. Nov. 1, *2019), pet. for review pending,* No. 19-1265 (D.C. Cir.); *1-800 Contacts, Inc.,* 2018 WL 6078349, at *54 (F.T.C. Nov. 7, *2018), pet. for review pending,* No. 18-3848 (2d Cir.); *see also United States v. Jin Fuey Moy,* 241 U.S. 394,401 (1916) (a statute must be construed, if fairly possible, so as to avoid the conclusion that it is unconstitutional).

For all these reasons, we deny Axon's Motion.

Accordingly,

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10 "Good cause" is also broader than the "inefficiency, neglect of duty, or malfeasance" standard, discussed in *Humphrey's Executor,* that did not allow for removal based on disagreements on policy and agency administration. *Humphrey's Ex'r,* 295 U.S. at 619, 625-26.

11 Indeed, the MSPB already construes "good cause" as "including all matters which affect the ability and fitness of the ALJ to perform the duties of office." *Abrams v. Soc. Sec. Admin.,* 703 F.3d 538, 543 (Fed. Cir. 2012) (quotation omitted).

IT IS ORDERED THAT Respondent's Renewed Motion to Disqualify the Administrative Law Judge is **DENIED.**

By the Commission.

IN THE MATTER OF

AXON ENTERPRISE, INC.,
AND
SAFARILAND, LLC

Docket No. 9389. Order, October 8, 2020

Order staying the commencement of the evidentiary hearing.

ORDER STAYING COMMENCEMENT OF EVIDENTIARY HEARING

On January 3, 2020, Respondent Axon Enterprise, Inc. ("Axon") filed suit in the United States District Court for the District of Arizona seeking a declaration that Axon's acquisition of VieVu LLC was lawful and that the FTC's structure and administrative procedures are unconstitutional, and requesting injunctive relief against Commission adjudication of a challenge to the acquisition. On April 8, 2020, the district court dismissed Axon's complaint due to a lack of subject matter jurisdiction. Axon appealed to the United States Court of Appeals for the Ninth Circuit. That appeal has now been fully briefed and argued.

On September 29, 2020, Axon filed an "Emergency Motion to Stay Administrative Trial" with the Ninth Circuit, asking the court to temporarily stay the evidentiary hearing scheduled before this Commission pending consideration of Axon's appeal. On October 2, 2020, the Ninth Circuit granted Axon's motion. Accordingly,

IT IS HEREBY ORDERED that the evidentiary hearing in this proceeding, scheduled to commence on October 13, 2020, is stayed until further order of the U.S. Court of Appeals for the Ninth Circuit and the Commission.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

THOMAS JEFFERSON UNIVERSITY,
AND
ALBERT EINSTEIN HEALTHCARE NETWORK

Docket No. 9392. Order, November 6, 2020

Order granting a continuance until March 8, 2021 and extension of prehearing deadlines.

ORDER GRANTING CONTINUANCE

On October 29, 2020, Complaint Counsel and Respondents Thomas Jefferson University ("Jefferson") and Albert Einstein Healthcare Network ("Einstein") moved to postpone by sixty days commencement of the administrative hearing in this proceeding, currently scheduled to begin on January 5, 2021, and to stay all pre-hearing deadlines by corresponding 60-day periods. Joint Expedited Motion for a Continuance of Administrative Proceedings ("Joint Motion") at 1, 5.

This follows the Commission's issuance on February 27, 2020, of an administrative complaint challenging a proposed transaction whereby Jefferson would become the sole member and ultimate parent entity of Einstein ("the Proposed Transaction"). The Commission at that time also filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania seeking a preliminary injunction barring the Proposed Transaction until completion of the administrative proceeding. The preliminary injunction hearing and post-hearing filings have concluded in the federal district court action. The parties presented their closing arguments on October 26, 2020. The parties anticipate a decision in the federal district court action before the end of the year. *Id.* at 2.

Respondents affirm that "if they are enjoined from consummating the transaction after all appeals in the federal proceeding are exhausted, they will abandon the proposed transaction." *id.; see also id.* At 5. Moreover, the parties state that "[i]f the motion for preliminary injunction is denied, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the Complaint," resulting in an automatic withdrawal or stay. Joint Motion at 5.

The parties argue that granting the requested continuance and extending pre-hearing deadlines would protect the parties and third parties from unnecessary burdens and expense, without prejudicing the Commission. *Id.* at 3-5. They explain that third parties will soon have to review voluminous documents, submit line-by-line proposed redactions of confidential information, and prepare legal memoranda requesting *in camera* treatment of those materials. *Id.* at 3-4. Furthermore, all parties will have to bear the expense of preparing for a full trial, including document and data review, depositions and motion practice. *Id.* at 3. And party and third-party witnesses face the burden and disruption of preparing to testify and making travel arrangements. *Id.* at 4. According to the parties, these witnesses include operators of skilled

nursing facilities and hospitals and clinicians, whose burdens are of particular concern during a time of global pandemic. *Id.* at 3-4.

Commission Rule 3.4l(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.4l(f). This reflects the Commission's commitment to move forward as expeditiously as possible with its administrative hearings. *See, e.g.,* 16 C.F.R. §§ 3.1, 3.ll(b)(4), 3.41(b), 3.46, 3.51-3.52.

Yet, as we have explained in the past, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. *See, e.g., In re Sanford Health,* Docket No. 9376, 2017 WL 5845596, at *1 (F.T.C. Nov. 21, 2017). Commission Rule 3.41(b) authorizes the Commission to delay a hearing date, upon a showing of good cause. 16 C.F.R. § 3.4l(b). Under the circumstances presented, we find that the requested continuance and the extension of pre-hearing deadlines are justified. Deferring the start of trial and extending pre-hearing deadlines by 60 days, will provide additional time for resolution of the district court action, which could obviate the need for an administrative hearing without unduly delaying the Commission proceeding. We have granted continuances under comparable circumstances in the past. *See, e.g., In re* RAG-Stiftung, Docket No. 9384, 2020 WL 91294 (F.T.C. Jan. 2, 2020); *In re Sanford Health,* Docket No. 9376, 2017 WL 6604532 (F.T.C. Dec. 21, 2017); *Sanford Health,* 2017 WL 5845596; *in re The Penn State Hershey Med. Ctr.,* Docket No. 9368, 2016 WL 3345405 (F.T.C. June 10, 2016); *In re Advocate Health Care Network,* Docket No. 9369, 2016 WL 3182774 (F.T.C. June 2, 2016). Accordingly,

IT IS HEREBY ORDERED that the Joint Expedited Motion for a Continuance of Administrative Proceedings is **GRANTED;** and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. March 8, 2021, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 60 days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LINDE AG, PRAXAIR, INC., AND LINDE PLC

Docket No. C-4660. Order, November 10, 2020

Letter approving the applications of the Respondents proposed modifications to agreements subject to the Commission's Order in this matter.

LETTER APPROVING APPLICATIONS

VIA EMAIL

Thomas A. McGrath, Esq.
Linklaters LLP

Re: In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Docket No. C-4660

Dear Mr. McGrath:

This is in reference to the Applications for Approval of Proposed Modifications filed by Linde AG, Praxair, Inc. and Linde PLC ("Linde") and received on June 16, 2020, and September 4, 2020 ("Applications"). Pursuant to the Decision and Order in Docket No. C-4660, Linde requests Commission approval of its proposal to modify a reverse supply agreement, and the Operations and Maintenance Agreement that are part of the asset purchase agreement between Linde and Messer Industries, GmbH. Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Applications and waive the 30-day public comment period. In according its approval to Linde, the Commission has relied upon the information submitted by Linde, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission, Commissioner Chopra dissenting.

STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

The Commission has approved minor modifications of two confidential agreements between Linde AG and Messer Group that are designed to effectuate the divestitures ordered by the Commission in *Linde AG et al., C-4660*, Decision and Order (issued February 26, 2019). The parties requested one extension due to the unforeseen effects of economic disruptions associated with the global COVID-19 pandemic, as well as a short extension of another ancillary agreement. Neither of these modifications affect the achievement of the Order's remedial purpose of remedying the anticompetitive effects of the merger, and the modifications are in the public interest.

What is unusual in this matter is Commissioner Chopra's desire to reject these short-term extensions and announce an apparently more burdensome standard for such modifications: parties must show that "modifications are necessary to ensure competitive intensity." The goal of any divestiture is to replace the competition that was potentially to be lost by the merger. After the Commission approves a divestiture, our primary concern is to ensure that the divestiture succeeds in order to protect and promote competition. In appropriate circumstances, achieving this goal may entail providing the acquirer with sufficient transitional support.

In the face of the ongoing health and economic crisis caused by the COVID-19 pandemic, we believe that the requested modification of the agreement relating to Transitional Assistance is reasonable, will not affect the remedial purposes of the order, and is in the public interest.[1] The other request is to extend an ancillary agreement relating to the divestiture of the industrial gas business from Linde to Messer. We believe that maintaining the progress toward transferring these assets to Messer is also in the public interest.

Putting differences aside, we agree with Commissioner Chopra's observation in 2018 that "the proposed order requires substantial divestitures that might preserve or even increase competition in some product markets."[2] Modifications to the Order through Rule 2.41(f) enable the Commission to protect the competition that the Order restored. Contrary to Commissioner Chopra's unsupported concerns, the Commission's Rule 2.41(f) procedures are a strength of the divestiture process, not a weakness; they enable the Commission to react to changed circumstances and address requests such as these in order to preserve the efficacy of the ordered relief. Considering the large number of Commission-approved divestitures and the overall dearth

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1 *See, e.g.,* https://thedailyphiladelphian.com/uncategorized/20282/liquid-argon-market-segmentation-with-top-competitors-prax-air-air-liquide-messer-group-air-products-basf-yingde-gases-group-linde/. This report on the Liquid Argon market where Linde and Messer are major competitors notes "several restraints due to the entry of COVID-19." (This particular report is not part of the requested modifications.) Notably, the requested extension of the agreement is still within the Commission's allowable transition period pursuant to the Order. *Linde AG et al.*, C-4660, at Paragraph II.E.1.

2 Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Comm'n File No. 1710068 (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

of 2.41(f) modifications, we do not agree with Commissioner Chopra's view that the Commission has been relegated to a regulatory micromanager.

Finally, as Commissioner Chopra noted in 2018, "[w]hile the divestitures go a long way to address the anticompetitive concerns, the decision to approve this remedy was still a close call."[3] Although this case was difficult and involved complex divestitures, there has been no suggestion that the divestitures have failed. In fact, the very small number of order modification requests in such a complex case suggests the opposite: that Messer is performing as anticipated. The Commission should focus on ensuring the ongoing success of these divestitures, rather than re-litigating past Commission decisions.

3 *Id*.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In October 2018, the Commission gave the go-ahead for Linde's acquisition of Praxair, two of the world's dominant industrial gas producers. The circumstances surrounding the Commission's investigation, settlement, and accommodation of multiple modifications by the merging parties provide a unique window into the FTC's approach. In many ways, this demonstrates how the Commission acts too often with the mindset of a deal proponent, rather than that of a law enforcement agency. I believe this should change.

I respectfully disagree with my colleagues that the latest petition for modifications are in the public interest, as it will extend contractual entanglements between competitors and it cannot be justified by issues related to COVID-19.

I. The Transaction and the Commission's Approval

The $80 billion proposed merger between Linde and Praxair was clearly anticompetitive, as outlined in the agency's complaint. Indeed, there were many individual gas markets where the Commission had good reason to believe that competition would have been harmed.

There was a particularly unusual aspect of the transaction: under German law, the transaction would dissolve unless all approvals were obtained by October 24, 2018.[1] This timeline would have precluded resolving outstanding concerns in court. In ordinary circumstances, agencies often have to reach resolutions that are suboptimal, due to resource constraints and litigation uncertainties. But in this matter, the FTC would not have to factor in the costs and uncertainties associated with litigation that might lead to an unfavorable outcome for consumers and businesses.[2]

In many ways, this proved to be a natural experiment for the Commission given that resource constraints and litigation risk would not be a factor. Would the agency approach the matter with a law enforcement mindset and ensure that all necessary precautions were taken to remedy threats to competition over both the short-term and the long-term? Or would the agency approach the matter with a different mindset and shift risk to those that could be harmed by a reduction in competition, so that the merging parties could capture certain gains?

The Commission ultimately accepted an extremely complex settlement that had a number of risky features.[3] For example, the Commission agreed to allow the merged entity to divest assets after closing. In these situations, the merged entity has an incentive to allow the assets to

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1 William McConnell, *Praxair, Linde Likely to Make Divestitures for FTC OK*, THESTREET (Aug. 30, 2017), https://www.thestreet.com/markets/regulation/praxair-linde-likely-to-make-divestitures-for-ftc-ok-14287977.

2 It is typical for agencies to consider litigation risk when determining a fair resolution. Here, it would only be good government for the Commission to ensure no unnecessary risks were borne by the public.

3 *See generally* Analysis of Agreement Containing Consent Orders to Aid Public Comment *In the Matter of Praxair, Inc., and Linde AG*, File No. 171-0068, https://www.ftc.gov/system/files/documents/cases/1710068_praxair_linde-analysis.pdf.

deteriorate, since they will ultimately go to a future competitor.[4] The Commission even ended up extending the deadline for these divestitures to occur, prolonging the period of overlap.

In addition, the Commission also approved, as a buyer, a private equity-backed joint venture, that raised questions about its long-term wherewithal to make appropriate investments and about whether it might engage in opportunistic asset sales.[5] In the past several years, there have been several incidents where Commission-approved divestiture buyers failed to restore competition. Some of these buyers had risks associated with restrictive financing arrangements or their investment strategy.[6] Such risks are not uncommon when a financial buyer is involved and relies on high levels of debt financing. Given these recent incidents, the Commission should have carefully managed these risks in this matter, including the fact that the joint venture buyer's financing might dampen its incentives to invest and to compete aggressively.

The settlement here also included requirements that the merged firm provide certain transitional services and supplies to one of the divestiture buyers for multiple years.[7] In theory, the joint venture could eventually emerge as a fully independent competitor. But all of these aspects shifted risk to the public.[8]

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4 While the Commission issued an Order to Hold Separate requiring the appointment of a monitor, and requiring Praxair and Linde to operate separately and to continue to maintain the assets until the divestitures were completed, the parties' adverse economic incentive nonetheless remains. *See id*. at 1. This puts tremendous burden on the Commission to ensure compliance, unnecessarily using up the agency's scarce resources. For precisely these reasons, Commission officials have stated their concerns about these post-close divestitures. *See* Ian Conner, *The uphill case for a post-Order divestiture*, FED. TRADE COMM'N (Mar. 21, 2019) (noting that "upfront divestitures minimize the risks that acquired assets will lose value (due to the loss of employees, customers, and business opportunities) or that competition will be diminished while ownership of the assets remains uncertain"), https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/uphill-case-post-order-divestiture; *see also Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N at Q.8 (last visited Nov. 10, 2020) ("The Commission will, by requiring a buyer up front, attempt to minimize the risk that the remedy will be ineffective. Buyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy"), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Buyer%20Up%20Front.

5 *See* Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Comm'n File No. 1710068 (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

6 FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECON., at 24 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition- economics/p143100_ftc_merger_remedies_2006-2012.pdf.

7 Modified Decision & Order, *In the Matter of Linde AG, Praxair, Inc. and Linde PLC*, File No. 171-0068 (Docket No. C-4660) ¶ 11.E.1 (issued Feb. 26, 2019), https://www.ftc.gov/system/files/documents/cases/c4660_decision_and_ordermodified_593725_public_redacted.pdf.

8 In situations like this, where the divested business relies on significant support from the merged firm to remain operational and viable at the outset, there is strong reason to reject a post-order divestiture, because of increased risk of asset deterioration from ongoing entanglements between the two firms that are supposed to be competing. BC staff specifically identifies this circumstance as weighing against accepting a post-order divestiture. *See* Ian Conner,

II. The Petitions

Today, the Commission is agreeing to *additional* modifications to agreements between the merged firm and its joint venture competitor. The petitions approved today will extend the time that the joint venture will be entangled with its larger competitor.[9] I appreciate that minor modifications to Commission orders, particularly those that are technical in nature, may be required from time to time. This is an important part of the Commission's process to ensure that a remedy does not fail. However, we should be wary about allowing entanglements between a merged party and a divestiture buyer to persist over long periods of time.

Petitioners should have to prove that modifications are necessary to ensure competitive intensity. It should not be the FTC's concern as to whether this makes the parties more or less profitable. Based on my assessment of the facts, while the modifications may help the petitioners' profitability, they will reduce the short-term incentives for the joint venture to quickly make the appropriate capital investments, so that it can stand on its own two feet. I do not believe that our approval can be reasonably justified by issues related to the COVID-19 crisis.

Now, the Commission and its staff are continuing to devote our limited resources to ongoing oversight of the transaction and adjudicating multiple petitions. I do not believe this is the appropriate role for law enforcement – this is more akin to regulatory micromanagement. The Commission is better off managing all potential risks to competition and setting clear expectations for ensuring a divestiture buyer *fully* replaces any competitive intensity lost by the transaction.

III. Conclusion

Since the transaction closed, Linde has announced substantial price increases.[10] It is critical that the joint venture buyer emerge as an independent competitor as quickly as possible.

The Linde-Praxair matter is an important natural experiment that is quite telling. I do not believe that allocating substantial resources and shifting considerable risk to the public through

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supra note 4 (explaining factors weighing against post-order divestiture, including, among other things, if the business relies on significant support from the merged firm to remain operational and viable).

9 Pet. For Approval of Amendments to Certain Ancillary Agreements Relating to the Divestiture of the Indus. Gases Assets and Helium Assets to Messer Indus., GMBH, *In the Matter of Linde AG, Praxair, Inc., Linde PLC*, File No. 171-0068 (Docket No. C- 4660) (June 16, 2020); *see also* Pet. For Approval of Amendments to Certain Ancillary Agreements Relating to the Divestiture of the Indus. Gases Assets to Messer Indus., GMBH, *In the Matter of Linde AG, Praxair, Inc., Linde PLC*, File No. 171-0068 (Docket No. C-4660) (Sept. 4, 2020).

10 *See* Press Release, Linde Announces Price Increases Effective December 1, 2019 (Nov. 19, 2019), https://www.linde.com/news-media/press-releases/2019/linde-announces-price-increases-effective-december-1-2019; *see also* Reuters Staff, *Linde eyes further profit gain in 2020 on volumes, price hikes*, REUTERS (Feb. 13, 2020), https://www.reuters.com/article/us-linde-results/linde-eyes-further-profit-gain-in-2020-on-volumes-price-hikes-idUSKBN2071JJ.

complex settlements, in order to preserve the ability for the merged firm to achieve speculative benefits, is the best use of taxpayer resources and our talented staff. It will be critical to carefully evaluate whether the agency is truly adhering to its role as a law enforcement agency.

For these reasons, I respectfully dissent.

CONCURRING STATEMENT OF COMMISSIONERREBECCA KELLY SLAUGHTER

I am in favor of modifying divestiture orders where appropriate and necessary to ensure divestitures are successful. I believe the minor modifications at issue here will facilitate that goal, which is why I support them. This case, however, is instructive about the difficulties associated with complicated and entangled divestitures, and may provide a cautionary tale for the Commission when considering such remedies in the future.

IN THE MATTER OF

CORELOGIC, INC.

Docket No. C-4458. Order, November 30, 2020

Letter approving an amendment to Respondent's Data License Agreement.

LETTER APPROVING AMENDMENT

Courtney Dyer, Esq.
O'Melveny & Myers LLP

RE: *In re CoreLogic, Inc.*, Docket No. C-4458

Dear Ms. Dyer:

This letter is in reference to an application for approval of an amendment filed by CoreLogic, Inc. ("CoreLogic") on September 25, 2020. CoreLogic requests Commission approval of its proposed amendment to the Data License Agreement, incorporated by reference into the Decision and Order entered into in this case.

Concurring Statement

After consideration of CoreLogic's application and other available information, the Commission has determined to approve the proposed change as set forth in CoreLogic's application. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with CoreLogic's application and has assumed them to be accurate and complete.

By direction of the Commission.

JOINT STATEMENT OF COMMISSIONERS CHRISTINE S. WILSON AND NOAH JOSHUA PHILLIPS

We support the Commission's unanimous decision to approve the amendment to the previously- approved remedial agreement. This amendment ends the remedial agreement early, because its beneficiary—Attom Data Solutions, LLC (formerly RealtyTrac)—no longer needs to rely on the agreement and no longer wishes to pay for the data license the agreement provides. Attom is competing effectively, independently of CoreLogic. We write to highlight this example of the FTC's success in monitoring compliance and ensuring that Commission-ordered merger remedies will be effective.

In 2014, the Commission voted unanimously to order a remedy to address harm resulting from the acquisition of DataQuick Information Systems, Inc. by CoreLogic, Inc., affecting the market for national assessor and recorder bulk data.[1] The remedy required CoreLogic to license bulk data to Attom pursuant to a Data License Agreement.

Attom discovered that it was missing data that DataQuick had provided to bulk data customers and licensed from third parties, and CoreLogic failed to provide Attom, Commission staff, or the Monitor with complete and accurate information regarding the manner in which DataQuick provided bulk data to customers.[2] CoreLogic apparently also did not provide all of the support to Attom that was required by the Order. According to the Commission's Analysis to Aid Public Comment, CoreLogic's actions violated the Order and interfered with its remedial goal of maintaining competition in the market affected by CoreLogic's acquisition of DataQuick.[3]

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1 Press Release, FTC Puts Conditions on CoreLogic, Inc.'s Proposed Acquisition of DataQuick Information Systems, March 24, 2014, https://www.ftc.gov/news-events/press-releases/2014/03/ftc-puts-conditions-corelogic-incs-proposed-acquisition-dataquick.

2 CoreLogic Inc.; Analysis To Aid Public Comment, 83 FED. REG. 12,578 (Mar. 22, 2018).

3 *Id.* at 12,580.

Concurring Statement

In 2018, the Commission voted unanimously to modify the Order to enhance three elements of the remedy: the data delivery period, the service and quality levels, and the technical transfer.[1]

The modifications succeeded. According to CoreLogic's Application for Modification of Confidential Agreement, Attom has become an independent competitor and is now prepared to end its reliance on CoreLogic earlier than anticipated, suspending ongoing entanglements and strengthening Attom's competitive position.

The Commission's decision today allows Attom to shorten the term of the Data License Agreement, which Attom deems unnecessary to compete effectively. The agreement also contains a contingency plan, eliminating the risk to Attom and the public if Attom's transition entirely to another company as its bulk data supplier does not go fully as planned.

In short, due to the efforts of Attom, the Monitor, and the FTC's Compliance team – and despite the alleged initial violation by CoreLogic – the remedy is effective.

In cases involving remedies, the job of the antitrust enforcer does not conclude when a merger investigation is completed, or when an order is entered. Where remedies are appropriate, they must be effective, or the job is incomplete.

The Commission has long recognized that effective remedies play an integral role in the merger enforcement regime. To this end, the FTC has conducted two extensive merger remedy studies to analyze the efficacy of remedies and how best to restore competition that a merger would otherwise extinguish.[2] It has embedded that learning into practice.[3] Between studies, every experience with a divestiture order provides new insights that the Compliance Division of the Bureau of Competition uses to close loopholes, speed implementation, ensure accountability and transparency during the order implementation process, and verify compliance.[4] A quick

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1Press Release, FTC Approves Final Order Adding Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies, June 15, 2018, https://www.ftc.gov/news-events/press-releases/2018/06/ftc-approves-final-order-adding-requirements-2014-order-remedy.

2 Staff of the Bureau of Competition of the Federal Trade Commission, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999); Staff of the Bureaus of Competition and Economics, THE FTC'S MERGER REMEDIES 2006-2012 (January 2017).

3 *See, e.g.*, Dan Ducore & Naomi Licker, *Looking back (again) at FTC merger remedies*, COMPETITION MATTERS (Feb. 3, 2017) ("Released in 1999, the Divestiture Study led to a number of significant reforms to the FTC's remedy approach: requiring upfront buyers more often; shortening the time for post-order divestiture to 6 months; appointing an independent monitor more often; and instituting a program to follow up with buyers about their progress. There are lessons from the new study as well. The study confirmed that the Commission's practices related to designing, drafting and implementing its merger remedies are generally effective. But it also identified certain areas in which improvements can be made—so we have made them. The report includes a list of Best Practices that convey how we are already using the learning from the study to continue to improve our remedies.").

4 Some of these insights become public in guidance and other statements by the Commission and its staff. See, e.g., Bureau of Competition, A Guide for Respondents: What to Expect During the Divestiture Process (June 2019), https://www.ftc.gov/system/files/attachments/merger- review/a_guide_for_respondents.pdf; Bureau of Competition,

review of orders involving merger remedies in the pharmaceutical industry provides an excellent example of this continual refinement.[5]

The agency's ongoing analysis and refinement does not ensure perfect outcomes, but it does demonstrate the FTC's keen commitment to delivering effective remedies for the benefit of consumers. One key aspect of that commitment is ascertaining the existence of problems and moving quickly to address them, as the Commission did here. The result is effective competition.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Today, the Federal Trade Commission is taking an action related to a 2014 merger settlement, where a Commission-approved remedy failed to work as planned. We have now voted to modify a licensing agreement between CoreLogic (NYSE: CLGX) and Renwood RealtyTrac (now known as ATTOM Data Solutions). The Commission ordered this agreement as part of a 2014 settlement to resolve charges surrounding CoreLogic's unlawful acquisition of DataQuick. The licensing agreement was intended to quickly allow Renwood RealtyTrac to emerge as a competitor to the newly merged CoreLogic and DataQuick.

Unfortunately, after the settlement was struck, the licensing process was chaotic and anything but quick, given CoreLogic's failures to comply with the FTC's order. These failures then led to a separate 2018 agreement with the FTC with additional terms. Now, six years later after the original settlement, RealtyTrac/ATTOM is finally ready to be an independent competitor, and the Commission's vote marks the conclusion of this fiasco.

The CoreLogic saga is another sign that complex settlements to address unlawful mergers are risky for the public, especially when the merged firm has an incentive to sabotage its competitor. The Commission needs to be wary of these remedies and do more to ensure compliance with its orders.

Potential Buyers; A Guide for Potential Buyers: What to Expect During the Divestiture Process (June 2019), https://www.ftc.gov/system/files/attachments/merger- review/a_guide_for_potential_buyers.pdf; Roberta Baruch and Bruce Hoffman, *Compliance reports: Reinforcing a commitment to effective orders*, COMPETITION MATTERS (Mar. 11, 2019); Maribeth Petrizzi, *Real deadlines and real consequences*, COMPETITION MATTERS (Aug. 6, 2020).

5 Staff of the Bureaus of Competition and Economics, THE FTC'S MERGER REMEDIES 2006-2012 (January 2017) at 31 ("[S]taff has been incorporating its ongoing learning with respect to divestitures in the pharmaceutical industry. For example, in more recent orders involving generic drug overlaps, when evaluating whether proposed respondents should be required to divest the assets of the acquiring firm or the target firm, the Commission has required divestiture of the easier-to-divest products where possible, particularly when the product was manufactured under a third-party agreement that could transfer to a buyer.").

The Unlawful Transaction and the 2014 FTC Settlement

In 2010, TPG Global, one of the globe's largest private equity funds, purchased DataQuick, which compiled real estate data from various sources and licensed it to a wide range of players.[1] This data is a critical input for many products and services in the real estate and mortgage markets. DataQuick was one of very few players in the market for certain data. The Commission would later note that "DataQuick aggressively competes head-to-head against CoreLogic and Black Knight…offering lower prices and less restrictive license terms than its competitors."[2]

In 2013, TPG agreed to sell certain businesses including DataQuick to CoreLogic. DataQuick and CoreLogic were head-to-head competitors in a critical market. Since the transaction would shrink the number of competitors in that market from three to two, it was clear that the agreement would violate the antitrust laws. The Commission settled the case, requiring a complex remedy. CoreLogic and DataQuick would be allowed to merge, as long as the merged company licensed certain data for several years to another real estate data firm, RealtyTrac, that did not currently compile the datasets in question.[3]

Failure to Comply with the FTC Order

Since the Commission's remedy required the newly merged CoreLogic-DataQuick to provide data to its new competitor, RealtyTrac, the merged firm would have a strong incentive to sabotage the data that was required to be licensed. The Commission even explained that "[n]either CoreLogic or Black Knight has any incentive to offer such a license to a potential entrant that will compete against them."[4] The Commission appointed an independent monitor to watch over the data transfer, but it didn't work. Almost immediately, RealtyTrac noticed that the data that CoreLogic was supposed to deliver was missing required data.[5] Problems persisted over multiple years.[6]

In March 2018, the Commission outlined its charges that CoreLogic was failing to adhere to the requirements of the FTC's order. According to the Commission's show cause order, "CoreLogic's actions violated the Order and interfered with its remedial goals. CoreLogic

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1 *TPG Capital to buy MDA property information subsidiaries*, HOUSINGWIRE (Nov. 5, 2010, 5:25 pm), https://www.housingwire.com/articles/tpg-capital-buy-mda-property-information-subsidiaries/; Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of CoreLogic, Inc*., File No. 131-0199, https://www.ftc.gov/system/files/documents/cases/140324corelogicanalysis.pdf.

2 *Id*.

3 *See id.* at 3.

4 *Id*.

5 Order to Show Cause and Order Modifying Order, *In the Matter of CoreLogic, Inc*., Docket No. C-4458, at 2 (Mar. 15, 2018), https://www.ftc.gov/system/files/documents/cases/c4458_corelogic_modifying_order.pdf.

6 *Id.*

slowed RealtyTrac's acquisition of the full scope of DataQuick bulk data and the information necessary to provide data in the same manner as DataQuick."[7]

In these situations, the Commission can be faced with an extremely difficult decision: (1) quickly settle the matter with a modified no-money, no-fault order, or (2) pursue penalties and other relief for order violations, which may lead to further harms to competition if it requires prolonged litigation. In June 2018, the Commission finalized a resolution to the alleged compliance breakdowns. CoreLogic agreed to a modified order to extend its data-sharing agreement with RealtyTrac/ATTOM for multiple years. CoreLogic would not pay any civil penalties or remediate any of the harm to business customers that it may have caused.

Lessons Learned

The FTC's vote to wind down the licensing agreement between CoreLogic and its new competitor will finally begin the process of bringing this ordeal to an end. Hopefully, competition lost by the merger will eventually be restored. Unfortunately, the Commission's original 2014 settlement failed to achieve the goal of immediate restoration of competition lost by a merger. As with other settlements that failed to work as intended, it will be important for the Commission to take steps to avoid outcomes like this in the future.

In addition to close and careful scrutiny of proposed remedies, the Commission must be unequivocal that FTC orders are not suggestions.[8] Based on my review of the evidence, it is clear that CoreLogic violated its obligations under the agency's 2014 order. This led to serious harms, and the Commission was forced to expend significant resources to resolve these compliance deficiencies.

We must carefully examine whether our orders sufficiently incentivize firms to comply. For example, we will need to explore whether the Commission should include so-called crown jewel provisions that trigger additional asset divestitures when a firm fails to fully adhere to a divestiture order.[9] If firms face the prospect of being forced to give up a core business asset, there will be fewer compliance failures. We should also consider provisions that give senior executives and business decision-makers more skin in the game to ensure timely compliance. These and other steps will reduce taxpayer burdens and protect our markets from anticompetitive harms.

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7 *Id.* at 3.

8 Memorandum 2018-01 from Commissioner Rohit Chopra to Commission Staff and Commissioners Regarding Repeat Offenders (May 14, 2018), https://www.ftc.gov/public-statements/2018/05/commissioners-memorandum-2018-01-repeat-offenders.

9 *See* Letter to Robert C. Rech from Donald S. Clark Regarding Approving Application to Divest Refludan Assets, In the Matter of Adventis, S.A. (Sept. 26, 2001) (the Commission required divestiture of the alternate crown jewel assets, and appointed a trustee to accomplish that divestiture, when the respondent failed to divest the original assets on time), https://www.ftc.gov/sites/default/files/documents/cases/2001/09/010926aventisletter.htm.

This experience is another reminder that the Commission's role is not to be a proponent or a facilitator of mergers.[10] Our role is to be an antitrust enforcer. We should not accept proposed remedies that are too complex, risky, or otherwise unworkable, and we should have no tolerance for violations of our orders.

10 Dissenting Statement of Commissioner Rohit Chopra Regarding Petitions for Modification, In the Matter of Linde AG and Praxair LLC, File No. 171-0068 (Nov. 13, 2020), https://www.ftc.gov/public-statements/2020/11/dissenting-statement-commissioner-rohit-chopra-regarding-petitions.

Interlocutory Orders, Etc.

IN THE MATTER OF

PAR PETROLEUM CORPORATION

Docket No. C-4522. Order, December 23, 2020

Letter approving a modification of the Honolulu Terminal Agreement attached to the Order in this Matter.

LETTER APPROVING MODIFICATION

Via Email:
Marc G. Schildkraut, Esq.
Baker Hostetler

Re: *In re Par Petroleum Corporation*, Docket No. C-4522

Dear Mr. Schildkraut:

This is in reference to the petition of Par Pacific Holdings, Inc. (formerly Par Petroleum Corporation, hereafter "Par") dated December 11, 2019, requesting prior Commission approval of a proposed modification to the Amended Honolulu Terminal Agreement relating to the storage of petroleum products at the Barbers Point Terminal ("Proposed Modification") as required by Paragraph II.B. of the Decision and Order in *In re Par Petroleum Corporation,* Docket No. C-4522 ("Order"). The Commission placed the petition on the public record for 30 days, until February 24, 2020. We received ten public comments; only three of the comments were germane to this matter. The Commission has considered Par's petition and all supporting materials, as well as other available information, and has concluded that Par has not demonstrated that the Proposed Modification is consistent with the remedial purposes of the Order. Accordingly, the Commission has determined to deny Par's petition to modify the Amended Honolulu Terminal Agreement.

In 2014, Par sought to acquire Koho'oha Investments, Inc.'s wholly-owned subsidiary Mid-Pac Petroleum, LLC ("Mid-Pac") for roughly $107 million ("Acquisition"). The Commission found that the Acquisition would likely substantially lessen competition and lead to higher prices for bulk supply of Hawaii grade gasoline blendstock ("HIBOB").[1] Moreover, the potential for competitive harm from the Acquisition stemmed from the importance of

1 *In re Par Petroleum Corp.,* FTC Docket No. C-4522 (Mar. 18, 2015), Complaint ¶ 5, available at https://www.ftc.gov/system/files/documents/cases/150312parpetroleumcmpt.pdf.

imports in establishing HIBOB prices (*i.e.*, Aloha and Mid-Pac's import capabilities served to constrain the local refiners' bulk supply prices of HIBOB).[2]

Specifically, the Commission determined that Par's acquisition of Mid-Pac's storage rights at the Barbers Point Terminal could grant Par the ability to limit Aloha's use of that terminal. Par, via the inherited Mid-Pac rights, could therefore hamper Aloha's ability to import bulk supply of HIBOB, thus weakening Aloha's ability to use its import capability to obtain better bulk supply prices from the local refiners. Ultimately, the Commission found that Par's acquisition of Mid-Pac likely would increase the price of bulk supply of HIBOB, which would likely lead to higher gasoline prices for Hawaii consumers.[3]

In order to resolve the competition concerns in the bulk supply of HIBOB as alleged in the Complaint, the Order required Par to terminate its petroleum products storage rights at the Barbers Point Terminal.[4] Further, among other things, the Order requires that Par receive the prior Commission approval of any new agreement relating to storage or throughput between Par and Aloha at the Barbers Point Terminal.[4] Accordingly, Par terminated its petroleum products storage rights at the Barbers Point Terminal with the execution of the First Amendment to the Terminaling Agreement dated January 8, 2015.[5]

Par now seeks prior Commission approval to the Proposed Modification of the Amended Honolulu Terminal Agreement that would effectively reinstate the petroleum products storage rights at the Barbers Point Terminal, rights that the Commission had previously required Par to terminate as a part of the original consent. Par argues that the changed market conditions for HIBOB in the intervening years warrant a modification. Specifically, Par states that, without the modification, "competition to import and store HIBOB would be unduly restricted. This could result in higher prices in Hawaii."[6]

Par makes three main arguments to support its request for Commission approval of the Proposed Modification. First, Par argues that the Island Energy Services, LLC ("IES") refinery shutdown irrevocably changed the HIBOB landscape to the detriment of consumers, necessitating the need for a Proposed Modification.[7] Second, Par maintains that its refinery alone

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2 *In re Par Petroleum Corp.,* FTC Docket No. C-4522 (Mar. 18, 2015), Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, available at https://www.ftc.gov/system/files/documents/cases/150318parpetroleumanalysis.pdf.

3 *Id.* at 3.

4 *In re Par Petroleum Corp.,* FTC Docket No. C-4522 (Mar. 18, 2015), Decision and Order ¶ II.A, available at https://www.ftc.gov/system/files/documents/cases/150312parpetroleumdo.pdf.

5 *Id*. ¶ II.B.

6 *In re Par Petroleum Corp.,* FTC Docket No. C-4522 (Jan. 22, 2020), Petition of Respondent Par Pacific Corporation for Prior Approval at 2, available at https://www.ftc.gov/system/files/documents/cases/c4522parpetroleumpetition_0.pdf.

7 *Id.* at 5.

cannot meet the current supply obligations required by its customer contracts,[8] and therefore requests that the Commission approve the Proposed Modification. Lastly, Par implies that Aloha cannot import HIBOB cost effectively, and therefore will not do so.[9] Par submitted eleven documents in support of its petition. Additionally, Par submitted white papers on March 18, 2020, April 9, 2020, September 28, 2020, and December 4, 2020.

Par filed the petition under Rule 2.41(f)(1) of the Commission's Rules of Practice. The Rule requires Par to obtain prior Commission approval of all proposed modifications to a previously approved remedial agreement unless the Commission waives the approval process.[10] Accordingly, "[a]ll applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders (including modifications to previously approved transactions) shall fully describe the terms of the transactions or modification and shall set forth why the transaction or modification merits Commission approval."[11] In other words, Par has the burden of demonstrating that the proposed modification is procompetitive and consistent with the remedial purposes of the Order.

Par does not argue that the relevant product market (*i.e.*, bulk supply of HIBOB) should change nor is there a dispute that the relevant geographic market remains the state of Hawaii. Thus, when evaluating the competitive effects that Par's access to storage at Barbers Point may have on the competition for the supply of HIBOB, the Commission must evaluate the current market conditions for HIBOB demand. In reviewing all materials, we find that there has been no material change in the HIBOB market conditions since 2015. Although IES is no longer a local refiner after the refinery shutdown, we find that there are still three market participants in the bulk supply of HIBOB (*i.e.,* Par, Aloha, and IES) and that flexibility in import capabilities still affects an importer's ability to compete for customers.

We also note that, due to the coronavirus pandemic and related stay at home orders, the demand for fuel fell to approximately a quarter of normal demand at the peak of the lockdowns.[12] In particular, the pandemic-related closures have hit Hawaii hard, as HIBOB demand materially decreased given the drastically reduced ground and air travel since the pandemic began.[13] Thus, because the pandemic has negatively affected the demand for the

8 *Id.* at 9.

9 *Id*. at 17.

10 16 C.F.R. § 2.41(f)(5). A proposed modification qualifies for a waiver if the modification is "purely ministerial, or unlikely under any plausible facts to affect achieving the remedial purposes" of the relevant order. Par's Proposed Modification does not qualify for a waiver.

11 16 C.F.R. § 2.41(f)(1).

12 Ahmad Ghaddar et al., *Coronavirus surge, renewed lockdowns fan fresh worries about global fuel demand*, Business News, https://www.reuters.com/article/us-global-oil-demand-gasoline/coronavirus-surge-renewed-lockdowns-fan-fresh-worries-about-global-fuel-demand-idUSKCN24I0GR (last visited Dec. 23, 2020).

bulk supply for HIBOB, we cannot conclude that Par has a need for additional storage at Barbers Point in the near term.

Moreover, several public commenters and market participants have advised the Commission against approving the petition. Both IES and Aloha filed public comments that either directly contradicted certain representations made by Par[14] or otherwise cautioned that Par's access to storage at Barbers Point may have detrimental effects on HIBOB competition in the future.[15] Additionally, the Hawaii Attorney General filed a public comment expressing deep reservations regarding the proposed modification.[16]

Ultimately, we find that Par has not met its burden in demonstrating that the Proposed Modification is necessary. We do not find that the HIBOB market has materially changed since 2015, nor has Par established that the Proposed Modification would result in any new procompetitive benefit. For those reasons, and in light of the negative comments and additional competition concerns expressed by various third parties, we cannot conclude that the Proposed Modification, on balance, is consistent with the remedial purposes of the Order.

In summary, the Commission has determined to deny Par's petition for approval of the Proposed Modification of the Amended Honolulu Terminal Agreement.

By direction of the Commission.

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13 As of early October 2020, the Big Island has opted out of reopening the island to tourism travel, and Kauai is still undecided. Rick Daysog, *County mayors in disagreement over state's tourism relaunch plan*, News, https://www.hawaiinewsnow.com/2020/10/08/county-mayors-disagreement-over-states-tourism-relaunch-plan/ (last visited Dec. 23, 2020).

14 Aloha Comment at 1 ("Aloha is concerned that Par's petition overstates the costs and obstacles that Aloha would face in importing HIBOB and that the Commission might conclude that Aloha should be compelled to continue to offer Par HIBOB storage services after the Par Supply Agreement expires."). *See* https://www.regulations.gov/document?D=FTC-2020-0005-0005.

15 IES Comment at 9 ("IES believes that modifying the Agreement under the 2015 Order would be detrimental to competition in the Hawaii petroleum product market and to the reliability of supply to Hawaii consumers. IES strongly urges the FTC to reject the petition by Par."). *See* https://www.regulations.gov/document?D=FTC-2020-0005-0004.

16 Hawaii AG Comment at 2 ("Thus, we express deep reservations that the proposed transaction between Par and Aloha would only further entangle two key market participants in the provision of HIBOB into Hawaii to the detriment of a truly competitive market."). *See* https://www.regulations.gov/document?D=FTC-2020-0005-0003.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

BEAM FINANCIAL, INC.

FTC File No. 182 3177 – Decision, August 17, 2020

RESPONSE TO BEAM FINANCIAL, INC.'S PETITION TO QUASH OR MODIFY A CIVIL INVESTIGATIVE DEMAND DATED MAY 21, 2020

ORDER DENYING IN PART AND GRANTING IN PART PETITION TO QUASH OR MODIFY CIVIL INVESTIGATIVE DEMAND

By PHILLIPS, Commissioner:

Beam Financial, Inc. ("Beam") petitions to quash or modify a civil investigative demand issued on May 21, 2020, in connection with the Commission's investigation into Beam's business practices. Specifically, Beam seeks to quash the CID on the grounds that the Commission's leadership structure is unconstitutional. Alternatively, claiming undue burden, Beam asks us to quash the CID to the extent it is duplicative of a Commission request for information two years ago and to extend the CID return date until four months from now.

For the reasons stated below, the Commission denies the petition with respect to Beam's arguments that the CID should be quashed in whole or in part. With respect to Beam's requested time extension, the Commission grants the petition in part and will modify the CID return date accordingly.

I. Background

Beam is a San Francisco-based company that offers mobile, high-interest, FDIC-insured bank accounts. Petition ("Pet.") at 1. Beam launched a mobile banking app to the public in September 2019. Prior to the official launch of its app, Beam had released a "beta" version of the app.

On July 6, 2018, Commission staff sent Beam a letter (the "access letter") requesting voluntary production of information and documents in connection with the beta version of the app. Pet. Exhibit ("Exh.") B. The focus of that inquiry was whether consumers were receiving the advertised interest rate returns on their deposits. The access letter sought production by August 3, 2018, but staff and Beam subsequently agreed to a rolling production, which Beam completed in early September 2018. Staff determined that no further action was warranted at that time. At the request of Beam's counsel, staff destroyed Beam's responses to the access letter.

On May 21, 2020, the Commission issued a CID to Beam in support of an investigation into whether Beam has engaged in deceptive or unfair practices related to its financial products or services, including the accessibility of consumer funds, the advertised rates of return and

interest, and the functionality of the company's mobile apps. Pet. Exh. A.[1] Unlike the 2018 access letter, which sought information about the beta version of the app, the CID is focused on the app officially released in September 2019 and seeks information from October 1, 2019, to the present. The CID return date is June 22, 2020.

The CID was delivered to Beam's San Francisco office on May 26, 2020. When staff received no reply from Beam, it sent the CID to Beam's counsel on June 16, 2020.[2] In response, Beam's counsel claimed that the COVID-19 pandemic has created substantial logistical difficulties for the company, [redacted], impeding Beam's ability to comply with the CID. *See* Pet. Exh. C. Beam proposed to resubmit the material that it previously produced in response to the 2018 access letter and, by August 1, to respond in part to three interrogatories addressing a topic that staff identified as a particular concern: that consumers have reportedly been unable to withdraw, or easily to withdraw, their funds deposited with Beam. Beam proposed that all other responses to the CID specifications be deferred until December 15, 2020. *Id*. Staff found unacceptable an almost six-month deferral of substantive responses on thirty-three of the thirty-six specifications in the CID. But staff offered to modify the production schedule to address Beam's claims of hardship, proposing that the parties develop a schedule for a rolling production. Staff also asked Beam to address the extent to which the 2018 materials would satisfy the CID requests, and whether Beam's proposed near-term response would sufficiently address concerns about customers' access to their deposited funds. *See* E-mail from Gregory Madden to Erik Kosa and Allen Denson (July 6, 2020). Rather than engage with staff on these issues, Beam filed this petition to quash on July 6, 2020.

II. Analysis

Beam raises two objections to the CID. *See* Pet. at 4. First, it asserts that the Supreme Court's recent decision in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2184 (2020), renders the FTC's leadership structure unconstitutional and, by extension, invalidates the CID. Second, Beam argues that the CID deadlines for compliance are unreasonable in light of the effects of the COVID-19 pandemic on Beam and its 2018 productions. We address each of these arguments in turn.

1 The CID was issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and was authorized by an August 1, 2016, Commission Resolution permitting the use of compulsory process in agency investigations into possible FTC Act violations in connection with Internet-related goods or services. *See* Pet. Exh. A (third-to-last page).

2 Rule 2.10 of our Rules of Practice provides that a petition to quash is due "within 20 days after service of the Commission compulsory process." 16 C.F.R. § 2.10(a)(1). Staff took the position that service was accomplished on May 26, but offered to extend the deadline for a petition to quash to July 6, 2020, to accommodate discussions with Beam's counsel.

B. The Supreme Court Has Not Overturned Its Precedent Upholding the FTC's Constitutionality.

Beam claims that the FTC lacks authority to issue or enforce the CID because the agency's leadership structure—specifically, the for-cause removal protections afforded FTC Commissioners[3]—is unconstitutional. Pet. at 4-6. The Supreme Court upheld the constitutionality of the FTC's for-cause removal provisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Beam argues, however, that under the Court's recent decision in *Seila Law*, any agency that exercises "quintessentially executive power" (like the present-day FTC, Beam says) must be directly accountable to the President, making for-cause limitations on the President's removal power constitutionally impermissible.

The Court's holding in *Seila Law*, however, is narrower than Beam asserts. *Seila Law* involved a challenge to the for-cause removal protections for the Director of the Consumer Financial Protection Bureau ("CFPB"), which, unlike the multi-member Federal Trade Commission, is led by a single official. The Court described the question it faced as whether Congress could restrict the President's power to remove the head of "an independent agency that wields significant executive power *and is run by a single individual*." *Seila Law*, 140 S. Ct. at 2192 (emphasis added). The Court held that the CFPB's single-director structure violated constitutional principles of separation of powers; Congress could not restrict the President's authority to remove the Director of the agency at will. *Id*.

In *Seila Law*, the Court expressly declined the petitioner's invitation to overturn *Humphrey's Executor,* its precedent sustaining the constitutionality of the FTC's for-cause removal provisions. *Id*.[4] It also declined to extend that precedent "to the novel context of an independent agency led by a single Director." *Id*.; *see id*. at 2211 ("While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power."). The Court distinguished *Humphrey's Executor* in substantial part on the ground that the CFPB is a single-director agency, whereas the FTC is a bipartisan, multimember body. The Court found that the CFPB's single-director structure "forecloses certain indirect methods of Presidential control." *Id*. at 2204. A single agency head with a five-year term means some Presidents "may *never* appoint" a CFPB Director, nor will the President "have the opportunity to appoint any other leaders . . . who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies." *Id*. And because the CFPB's budget is supplied by the Federal Reserve Board, rather than through the appropriations process, "no . . . opportunity exists for the President to influence the CFPB Director," by "recommend[ing] or veto[ing] spending bills that affect the operation of" the agency. *Id*. In short, the CFPB's structure violated the Constitution "by vesting significant governmental power in the hands of a single individual accountable to no

3 *See* 15 U.S.C. § 41 (Commissioners "shall be appointed for terms of seven years," which expire on a staggered basis, and "may be removed by the President" only "for inefficiency, neglect of duty, or malfeasance in office").

4 *See* Brief for the Petitioner at 31-34, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (No. 19-7), available at https://www.supremecourt.gov/DocketPDF/19/19-7/124949/20191209155012780_Seila%20Law%20brief%20for%20petitioner.pdf.

one." *Id*. at 2203. None of this characterizes the FTC, with its multi-member and bipartisan leadership, staggered terms, presidentially-designated Chairman, and congressionally appropriated funding. All these attributes give the FTC a degree of political and presidential accountability that the Court found was lacking in the CFPB.

Because the Supreme Court expressly refused to overrule *Humphrey's Executor*, we decline to do so in considering this petition to quash a CID. Accordingly, we deny Beam's request to quash the CID.

C. Beam Has Not Shown Undue Burden that Would Warrant Quashing the CID in Part and Deferring Compliance Entirely for Four Months.

1. The CID Is Not Duplicative of the FTC's 2018 Request.

Next, Beam claims that certain of the CID specifications are duplicative of information requested in the 2018 access letter, arguing that "[i]t is unreasonable to ask the same questions twice." Pet. 7-9. Beam asks the Commission to quash the CID "to the extent it is duplicative of the Inquiry Letter." *Id*. at 11.

But the CID, on its face, is not duplicative of the 2018 access letter. The two seek information for different time periods and probe Beam's conduct in connection with different versions of its mobile banking app. Thus, Beam's assertion that it "must start from scratch to produce the same information over again" (Pet. at 8-9) rings hollow.

Beam faults staff for "not articulat[ing] . . . why the Inquiry Letter materials are stale or otherwise insufficient for purposes of the investigation." *Id*. It is Beam, however, who bears the burden of substantiating its claim of unreasonableness. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) ("The burden of showing that the request is unreasonable is on the subpoenaed party."). And it is Beam, not staff, who has the most information about its operations and documents and thus is in a position to explain whether, and how, its 2018 production suffices to answer the CID's inquiries about its current activities. The Petition provides no such explanation, nor did Beam offer any such explanation to staff during the meet-and-confer process, despite staff's invitations to do so.

Thus, we deny the request to quash the CID in part.

2. Beam Has Not Substantiated its Claims of Undue Burden.

Finally, Beam argues that the CID's compliance deadlines are unduly burdensome in light of the [redacted] the company is experiencing due to the COVID-19 pandemic. The Petition identifies several factors complicating Beam's task of responding to the CID: [redacted]. Pet. at 3, 9-10.

The standard for assessing the burden imposed by agency investigative process is well established. Agency process is not unduly burdensome unless compliance "threatens to unduly disrupt or seriously hinder" the normal operations of the recipient's business. *Texaco*, 555 F.2d at 882; *see also EEOC v. Maryland Cup Corp*., 785 F.2d 471, 479 (4th Cir. 1986). This test is "not easily met" because "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, 555 F.2d at 882. Moreover, the recipient of process must make "a record . . . of the measure of [its] grievance rather than ask [the court] to assume it." *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950). Beam has not made such a showing.

We do not doubt that the COVID-19 pandemic has created complications for Beam's task of complying with the CID. But Beam fails to show that present circumstances preclude it from making any meaningful response to the CID until mid-December. For instance, Beam claims that [redacted]. Pet. at 9. But that argument is premised on "[c]omplying with the current CID deadlines." *Id*. Beam fails to acknowledge the possibility of a rolling production (as FTC staff proposed) and thus provides no explanation as to why [redacted] renders infeasible incremental progress toward compliance with the CID in the near term.

Nor are we persuaded by Beam's argument that [redacted] require deferring CID compliance entirely until the end of the year. While [redacted] unquestionably imposes complications, complications of this nature are rarely insurmountable in the year 2020. If there are reasons why this is not the case for Beam, the Petition does not present them.

Beam also points to [redacted], which it attributes to the COVID-19 pandemic, as another factor supporting its claim of undue burden. But other than a general assertion that [redacted] (Pet. at 3), Beam does not support its argument that [redacted] leave no room for a response to the CID. Beam does not contend, for example, that [redacted]. And, here again, Beam fails to address the possibility of incremental progress toward compliance through a rolling production. Absent a concrete showing by Beam that [redacted] to make any efforts toward compliance with the CID at present, we decline to put on hold entirely the Commission's investigation into business practices that may be causing ongoing consumer injury.

Despite Beam's failure to carry its burden, we will grant a modest extension of the CID return date to facilitate Beam's compliance. Beam has now been in possession of the CID for two months and therefore has had an opportunity to study and develop a plan for responding. From the outset, Commission staff offered to work with Beam to develop a schedule for a rolling production that would accommodate Beam's concerns while still providing the Commission the information it needs. If Beam doubts its ability to comply in full with the CID by the deadline as hereby extended, it may wish to take staff up on that offer.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Beam Financial, Inc.'s Petition to Quash or Modify Civil Investigative Demand be, and hereby is, **DENIED IN PART AND GRANTED IN PART**.

IT IS FURTHER ORDERED THAT Beam Financial, Inc., shall comply in full with the Commission's Civil Investigative Demand no later than 15 days from the date of this order, subject to any modifications as to scope or timing that Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

INTUIT INC.

FTC File No. 192 3119 – Decision, August 17, 2020

RESPONSE TO INTUIT INC.'S PETITION TO QUASH IN PART A CIVIL INVESTIGATIVE DEMAND DATED MAY 18, 2020

ORDER DENYING PETITION TO QUASH IN PART CIVIL INVESTIGATIVE DEMAND

By PHILLIPS, Commissioner:

Intuit Inc. petitions the Commission to quash in part a Civil Investigative Demand (CID) issued on May 18, 2020 (and served on Intuit on May 19, 2020), in connection with the Commission's investigation into whether Intuit has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq*.[1]

Specifically, Intuit requests the elimination of two of the topics designated in the CID for corporate investigational hearing testimony. *Petition*, at 2-3. Intuit seeks elimination of IH Topic

1 The Commission initiated the Intuit investigation pursuant to a resolution to determine whether unnamed parties have been or are engaged in deceptive or unfair Internet-related practices, in violation of Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 52. *See Resolution Directing Use of Compulsory Process in Non-Public Investigation of Unnamed Persons, Partnerships or Corporations Engaged in the Deceptive or Unfair Use of E-Mail, Metatags, Computer Code or Programs, or Deceptive or Unfair Practices Involving Internet-Related Goods or Services*, File No. 9923259 (Aug. 1, 2016). The investigation also seeks to determine whether Commission action to obtain equitable monetary relief for injury to consumers or others would be in the public interest. *Id*.

12, which seeks information about the benefits that Intuit has sought, claimed, or received from offering a free tax filing product as part of the "Free File Program" administered by the Internal Revenue Service (IRS). *Id*. at 2. It also seeks elimination of IH Topic 16, which seeks testimony about Intuit's responses to the interrogatories served on it in both the May 18, 2020 CID and a prior CID issued on July 1, 2019. *Id*. at 3. For the reasons set forth below, we deny Intuit's petition.

I. Background

Intuit offers two products that provide consumers tax-filing services for free—to those individuals who meet certain eligibility requirements. *Petition*, at 3. The first product is Intuit's "IRS Free File Program Delivered by TurboTax." *Id*. at 3-5. That product is offered as a result of Intuit's participation, along with other electronic tax preparation and filing companies, in an IRS program to deliver free online tax software to low and middle-income consumers. *Id.* at 1-2. Intuit offers its Free File product via freefile.intuit.com. The second free product is Intuit's "TurboTax Free Edition." *Petition*, at 5-6. Intuit offers that product via its primary website, turbotax.intuit.com.

In May 2019, the Commission initiated an investigation into whether Intuit had engaged, or was engaging, in violations of the FTC Act. *Petition*, at 7. On July 1, 2019, the Commission issued the first CID to Intuit, seeking the production of documents and responses to interrogatories. On May 18, 2020, the Commission issued a second CID to Intuit seeking further documents and responses to interrogatories and requiring Intuit to designate a corporate representative to testify in an investigational hearing (IH) set for July 14, 2020. The second CID was modified several times to accommodate Intuit's concerns and schedule. The most recent modification, on July 8, 2020, affected, among other things, the scope of IH Topics 12 and 16—the subject of Intuit's current petition. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated July 8, 2020).

As modified, IH Topic 12 concerns Intuit's involvement in the IRS Free File program, specifically: (a) preventing, avoiding, or limiting state or federal government "encroachment" into the online tax preparation market; and (b) the tax deductions or other tax benefits that Intuit has sought, claimed, or received for offering its Free File product. *Id*. at 2.

As modified, IH Topic 16 concerns the "substance, meaning of, and factual basis for" a subset of Intuit's responses to the interrogatories served on it in the July 1, 2019 CID (namely, Interrogatory No. 2(a), 3(a)-(b), 4(a), 5(a), 5(e)), and the May 18, 2020 CID (Interrogatory No. 1, 2, 4(a)-(e), 13, 21, 22, 25). *Id*. at 3.

On July 7, 2020—the deadline date for challenging IH Topics 12 and 16, *see Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 29, 2020), at 1—Intuit transmitted by email to the Commission's Acting Secretary its current petition to quash. *See Letter from David Gringer to April Tabor* (dated July 7, 2020). Intuit requested that the Commission "afford [its cover] letter, the accompanying Petition, and any written order in response with confidential treatment pursuant to 16 C.F.R. § 4.9(c)." *Id*. at 1. Intuit did not submit with its initial transmission a redacted public version of the petition that it sought to be

treated as confidential, as required by Rule 4.2(d)(4) of our Rules of Practice, 16 C.F.R. § 4.2(d)(4). The following day, July 8, pursuant to the Acting Secretary's notice of deficiency, Intuit submitted a redacted public version of its petition to quash.

II. Analysis

A. Timeliness of Intuit's Petition

On July 7, 2020, Intuit attempted to file its current petition. Intuit sought confidential treatment of the petition pursuant to 16 C.F.R. § 4.9.[2] Its attempted filing was rejected, however, because Intuit had failed to include a redacted version of the petition for public disclosure—as required by Rule 4.2 of our Rules of Practice. That rule provides that when a petition to quash is filed as confidential, "it will be rejected for filing pursuant to § 4.2(g), *and will not stay compliance* with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files * * * [a] redacted public version of the document that is clearly labeled 'Public'." 16 C.F.R. § 4.2(d)(4)(ii) (emphasis added).

Intuit attempted to cure this deficiency, by submitting a redacted public version, but it did so on July 8, the day after the deadline for filing had expired. Intuit's petition to quash is, therefore, procedurally untimely. *In the Matter of Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W.L. Gore & Associates, Inc.*, 151 F.T.C. 687, 689, 2011 FTC LEXIS 180, *4 (May 23, 2011).

Intuit's claim that its failure initially to include a redacted public version is justified by its request for confidential treatment of the entire petition, including any information that would identify the petitioner, *see Email from David Gringer to April Tabor* (dated July 8, 2020 at 9:26 AM), is contrary to our rules and precedent. Rule 4.2(d)(4) applies to "petitions labeled 'confidential' * * * [where the accompanying public versions] redact the identity of the petitioner or matter name, or lack an accompanying public redacted version." *W.L. Gore*, 151 F.T.C. at 689, 2011 FTC LEXIS 180 at *5. Indeed, "the identity of the petitioner and the matter name * * * *may not be redacted*." *Id*. n.6 (emphasis added).

Notwithstanding the untimeliness of Intuit's petition, the Commission, through the Acting Secretary, exercised its discretion to recognize documents filed on July 8th as timely. *See Email from April Tabor to David Gringer* (dated July 8, 2020 at 10:20 AM). For the reasons stated below, we conclude that it should be denied on the merits.

2 Pursuant to authority delegated by the Commission, the Commission's Principal Deputy General Counsel addressed Intuit's request for confidential treatment in two separate letters, granting in part and denying in part Intuit's request for confidential treatment of the redacted material. *See Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 16, 2020); *Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 22, 2020).

B. IH Topic 12

1. Relevance

Intuit first challenges IH Topic 12 on relevance grounds. *Petition*, at 10-12. It asserts that, even as modified, IH Topic 12 "simply is not 'reasonably relevant' to the FTC's investigation." *Id*. at 11. According to Intuit, information about the benefits that Intuit may have sought, claimed or received from its participation in the IRS Free File program, including limiting governmental encroachment into its market, "say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products." *Id*. Although Intuit is correct that the investigation, at its core, seeks to determine whether its advertising and marketing practices have been deceptive or unfair, Intuit's conception of relevance to that investigation is unduly limited.

In *United States v. Morton Salt Co*., 338 U.S. 632 (1950), the Supreme Court held that an FTC compulsory process demand for information or documents is permissible "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id*. at 652. Courts have long confirmed, moreover, that an FTC investigation is lawful where the Commission seeks to learn whether there is *reason to believe* that the law has been violated and, if so, whether issuance of a complaint would be in the public interest. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (citing *Morton Salt Co.*, 338 U.S. at 642-43). The standard for the relevance of administrative compulsory process is, therefore, "broader and more relaxed" than would be in an adjudicatory discovery demand. *In the Matters of Civil Investigative Demand to Johnson & Johnson Dated August 19, 2019, and Subpoena Duces Tecum to Johnson & Johnson Dated August 19, 2019*, FTC File No. 191-0152, 2019 FTC LEXIS 95 (Oct. 18, 2019), at *7 (citing *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). Indeed, the Commission's compulsory process need not be limited to information necessary to prove a specific charge; it can demand, instead, any documents or information "relevant to the investigation—the boundary of which may be defined quite generally" by the Commission. *Invention Submission*, 965 F.2d at 1090; *see Johnson & Johnson*, *supra*, 2019 FTC LEXIS 95, at *8.

IH Topic 12, as modified, easily meets those relaxed standards of relevance. Intuit's participation in the IRS Free File program, as part of its efforts to prevent or limit the government's "encroachment" into the online tax preparation market, is highly relevant, for example, to understanding the market relationship between Intuit's participation in the IRS Free File Program, Intuit's other free product, and Intuit's paid tax preparation products. The more consumers that the IRS program draws away from, say, Intuit's "TurboTax Free Edition," the stronger are Intuit's economic incentives to lure those consumers to its own products—whether free or not—by means of deceptive or unfair practices. To be sure, evidence of "intent" is not required for a deception or unfairness violation under the FTC Act. *See, e.g.*, *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.,* 401 F.3d 1192, 1202 (10th Cir. 2005); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968). But such evidence is undoubtedly

"relevant to the proper scope of the remedial order" that the Commission may seek if its investigation results in the filing or issuance of a complaint against Intuit. *Chrysler Corp.*, 561 F.2d at 363. For example, such evidence would support a remedial order that Intuit affirmatively disclose the availability of its Free File product to its other customers who otherwise would be eligible for that program.

Likewise relevant is the information regarding Intuit's tax benefits from participating in the IRS Free File program. In its discussions with the Commission staff, Intuit has raised two possible defenses to a potential Commission complaint that would implicate the tax benefits it may have received. First, Intuit has claimed that its participation in the IRS program is charitable in nature, and that the product that Intuit administers in that program—the IRS Free File Program Delivered by TurboTax—is not owned by Intuit. Any tax benefits that Intuit claims or receives from participating in that program is likely to shed light on that claim. Second, Intuit has invoked the doctrine of derivative sovereign immunity as a possible defense, which would require Intuit to establish—as a factual predicate for that doctrine—a valid contract between Intuit and the IRS, including mutual consideration. Any Intuit tax benefits are plainly relevant to the question whether such a contractual relationship in fact exists.

Intuit's tax benefits, if any, are also relevant to whether Intuit's conduct is unfair. An act or practice is unfair under the FTC Act if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see, e.g.*, *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010). The tax benefits that Intuit may have gained from participating in the IRS Free File program—while at the same time offering its other products, both free and paid—are relevant, in the unfairness analysis, to understanding the costs and countervailing benefits to consumers or to competition. They are also relevant to any remedy that the Commission may seek if a violation is proven. *See FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008) ("The potential costs of the proposed remedy on the parties and society in general are balanced against the benefits of avoiding injury to consumers.").

2. The First Amendment

Intuit asserts that testifying on the issue of whether it has sought, claimed or received any tax benefits for participating in the IRS program would intrude on its First Amendment right against compelled disclosure of political activity. *Petition*, at 12-14. Specifically, it argues that that First Amendment privilege "extends to petitioning the government with regard to taxes and tax policy," and that IH Topic 12 "creates precisely the type of chilling effect the First Amendment privilege is intended to protect." *Id*. at 13. We are unconvinced that the testimony sought in the CID would in fact have the chilling effect that Intuit claims. Even if it does, moreover, the testimony is still permissible and the confidentiality safeguards in our statute and Rules of Practice are sufficient to ameliorate any such fears.

As Intuit acknowledges, the party invoking the First Amendment privilege against compelled testimony must first show that enforcing the testimonial demand would have the claimed chilling effect on that party's First Amendment rights. *Petition*, at 12 (citing *Perry v.*

Schwarzenegger, 591 F.3d 1126, 1140 (9th Cir. 2009)). Only if that *prima facie* burden is met will the party seeking the testimony be required to articulate a compelling governmental interest that is rationally related to the information that the testimony seeks, and show that the testimony is the least restrictive means of obtaining that information. *Id*. Notably, that "second step of the analysis is meant to make discovery that impacts First Amendment * * * rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it." *Perry*, 591 F.3d at 1140.

Intuit's petition does not satisfy those standards. Even assuming that the Commission's seeking of information about Intuit's tax benefits somehow implicates a government petitioning activity,[3] Intuit has not presented any evidence that "the CID, if enforced, would burden Intuit's exercise of that right." *Petition*, at 13. Nor has it explained how testifying about the tax benefits of the IRS program would chill its future protected activities, including petitioning of the government for like benefits. The cases that Intuit cites to support its otherwise-naked chilling claim are inapposite. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), struck down a bar admission requirement that compelled the disclosure of membership in political parties. *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168 (D.C. Cir. 2003), invalidated a regulation that compels the disclosure of a political campaign's staff, volunteers, and election strategies. Neither case concerned petitioning the government for tax benefits. And both involved the compelled public disclosure of the claimants' political memberships and associations. It hardly strains the imagination to see how such public disclosure would have a chilling effect on the claimants' First Amendment political rights.

Here, Intuit has not identified any nexus between the disclosure of a for-profit business's tax benefits, as part of a *non-public* government investigation, and that business's willingness to seek future tax benefits. Nor can we detect any. Indeed, it seems to defy common sense that a for-profit business might forgo seeking some (presumably lawful) tax benefits merely out of fear that those benefits may one day be the subject of testimony in a government investigation. We conclude, therefore, that Intuit has failed to carry its *prima facie* burden of showing that testifying on IH Topic 12 would chill its First Amendment rights.

Moreover, as we discussed above, Intuit's tax benefits information is highly relevant to the Commission's investigation—specifically, to Intuit's own purported defenses. Intuit cannot, on the one hand, claim that its participation in the IRS Free File program is purely charitable and derivatively immune while, on the other hand, refusing to supply the information (which only Intuit can supply) that would support or rebut those claims. *See, e.g., P.& B. Marina, Ltd. P'ship v. Logrande,* 136 F.R.D. 50, 61-62 (E.D.N.Y. 1991) (plaintiffs entitled to discovery of information bearing on whether petitioning activities were a sham in response to defendant's raising the Noerr-Pennington doctrine as a defense). Thus, even if compelled testimony on IH Topic 12 were deemed to have some chilling effect, the testimony is still necessary, and thus permissible, because the information sought is highly relevant to the compelling government

3 The only case that Intuit cites, without discussion (*Petition*, at 13) for general support of that proposition—*Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 790 (6th Cir. 2007)—expressly declined to decide the issue. *Id*.

interest in law enforcement, and it is the least restrictive means of obtaining that information. *Perry*, 591 F.3d at 1140. We also note that the FTC Act and our Rules of Practice provide Intuit with ample protections against the public disclosure of information obtained via compulsory process. *See, e.g.*, 15 U.S.C. §§ 46(f), 57b-2(b); 16 C.F.R. §§ 2.7(f)(3), 4.10(d)-(g). *See also Perry*, 591 F.3d at 1140 n.6 ("protective order limiting the dissemination of disclosed * * * information may mitigate the chilling effect and could weigh against a showing of [First Amendment] infringement.").

C. IH Topic 16

1. Attorney-Client Privilege

Intuit first challenges IH Topic 16 on privilege grounds. It claims that because its interrogatory responses were prepared with the assistance of counsel, providing testimony on the substance, meaning, and factual basis of those responses "would implicate privileged attorney-client communications made in the process of preparing those responses." *Petition*, at 14. Intuit's position is unusual: although interrogatory responses are often drafted with the assistance of counsel, "depositions typically provide an opportunity to further probe the facts elicited through interrogatories." *English v. WMATA*, 323 F.R.D. 1, 26 (D.D.C. 2017); *see, e.g.*, *FDIC v. Giancola*, No. 13-C-3230, 2015 WL 5559804, at *4 (N.D. Ill. Sept. 18, 2015); *FDIC v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *3 (N.D. Fla. Oct. 29, 2013).

At any rate, Intuit is mistaken. The attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Thus, "an objective fact is not privileged merely because it happened that * * * legal advice was ultimately sought about that fact." *Intervet, Inc. v. Merial Ltd.*, 256 F.R.D. 229, 232 (D.D.C. 2009). Intuit, having provided responses to the Commission's CID interrogatories, should reasonably expect to be queried about those responses. A corporate testimonial designee "must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs * * * includ[ing] the entity's interpretation of events and documents." *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98-C-3952, 2000 WL 116082, *9 (N.D. Ill. Jan. 24, 2000).

Of course, to the extent that, during its corporate testimony, Intuit's designee is asked a question that in fact elicits privileged information, Intuit's counsel "may protect against the disclosure * * * by interposing appropriate objections and giving instructions on a question-by-question basis." *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). But the mere existence of such a possibility is no reason to preclude all questioning concerning Intuit's responses. *See United States v. Matsura*, No. 14-CR-388, 2015 WL 10912346, at *5 (S.D. Cal. July 10, 2015) (withholding privileged information, not quashing entire subpoena request, is proper recourse to address privilege concerns).

Intuit's citation to *Smithkline Beecham, supra*, in support of its position, is misplaced. *See Petition*, at 14. The corporate deposition topic challenged in that case covered the entirety of Smithkline's responses to interrogatories and requests for production, and Smithkline's objection

to it rested solely on burden, "because it would require having a witness study the vast amount of discovery pertaining to the case." *Smithkline Beecham*, 2000 WL 116082, at *9. To be sure, the court—noting that "answering requests for production and interrogatories customarily is performed with the assistance of counsel"—stated that "the proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege." *Id*. But, contrary to Intuit's claim, the court did not strike the challenged topic on that basis. Instead, it found the topic notice "[i]n its present form, * * * overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information." *Id.* at *10. Thus, we read that court's sweeping statement about privilege as mere dicta. At any rate, to the extent that the decision is read (as Intuit apparently reads it) as holding that potential privilege concerns in corporate testimony about discovery responses justifies categorically striking down the entire inquiry—rather than dealing with privilege claims during the testimony on a question-by-question basis—we disagree with it as contrary to the weight of authority.

2. Overbreadth and Undue Burden

Finally, Intuit claims that IH Topic 16 is overbroad and unduly burdensome. *Petition*, at 15-16. It presses that claim even though the Commission staff already has agreed to reduce the number of interrogatory responses subject to corporate testimony—using Intuit's own method of counting parts and subparts—from 211 interrogatories to 30. *Id*. at 15, 16. Intuit argues that, even as modified, IH Topic 16 "still lacks reasonable particularity because it does not identify with specificity the information sought," and would be "requiring Intuit to prepare multiple corporate designees." *Id*. at 16. We disagree.

Reasonable particularity "merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents." *Nippo Corp./Int'l Bridge Corp. v. AMEC Earth & Environmental, Inc.*, No. 09-CV-0956, 2009 WL 4798150, at *3 (E.D. Pa. Dec. 11, 2009); *accord Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, No. 15-CV-3183, 2018 WL 9919939, at *8 (D. Minn. Jan. 23, 2018). Intuit fails to point to any specific interrogatory where the language is so lacking in specificity as to make Intuit unable to prepare its corporate designee for testimony. Nor has our own review of the modified interrogatories revealed any such deficiency. For example, Intuit cites as burdensome testimony on "Intuit's use of subject advertising keywords," *Petition*, at 16, but the original interrogatory designated only 50 such keywords (out of thousands that Intuit has used), and even that number was later reduced to only 15. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 15, 2020), at 5.

Nor does Intuit's complaint about having to prepare multiple corporate designees suffice to show undue burden. "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc*., 555 F.2d 862, 882 (D.C. Cir. 1977). It is to be expected, therefore, that "[i]f a deponent is unable to testify about certain relevant areas of inquiry, the business entity must designate additional parties to satisfy a [corporate testimonial] notice." *Smithkline Beecham*, 2000 WL 116082, at *8. Indeed, "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Texaco*, 555 F.2d at 882

(citing cases). Intuit has not shown that its preparation of multiple designees would disrupt its normal business operations, especially as the Commission staff has been receptive to reasonably accommodating the logistical needs of such witnesses. Nor has Intuit shown that the cost of such preparation is too high "relative to the financial positions" of the company—"measured against the public interest of this investigation." *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980).[4]

III. CONCLUSION

For the foregoing reasons, Intuit's petition to quash is denied.

IT IS HEREBY ORDERED THAT Intuit Inc.'s Petition to Quash in Part May 18, 2020 Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Intuit shall comply in full with the Commission's Civil Investigative Demand no later than Tuesday, September 8, 2020, at 9:00 a.m. (Pacific Time), or at such other date, time, and location as the Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

4 Intuit's proposal that the Commission staff use the testimony of individual witnesses to obtain the information sought about its corporate interrogatory responses (*Petition*, at 16) is plainly inadequate: Only the testimony of Intuit's corporate designee(s) would bind Intuit itself. *See* 16 C.F.R. § 2.7(h).

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