UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of **DIAGEO PLC,** a public limited company, and **VIVENDI UNIVERSAL S.A.,** a French societe anonyme.	Docket No. C-4032

<u>COMPLAINT</u>

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Diageo plc and its subsidiaries ("Diageo")and Vivendi Universal S. A. and its subsidiaries ("Vivendi") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, 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. <u>Respondent Diageo</u>

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1A 9AG, England.

2. Among other things, Respondent Diageo produces, distributes, and sells distilled spirits products from facilities that it owns or operates worldwide.

3. In the United States, Diageo operates its distilled spirits business through a wholly-owned subsidiary corporation, Guinness UDV North America, Inc., whose principal business offices are located at Six Landmark Square, Stamford, Connecticut 06901.

4. Respondent Diageo had total revenues, from the sale of all products, of about $19 billion in 2000. Respondent Diageo's United States revenues from the sale of all products were about $8.5 billion in 2000.

5. Respondent Diageo is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Diageo markets or sells solely or jointly in the United States include Malibu Rum, Gordon's Gin, Johnnie Walker Black Scotch whisky, Hennessy Cognac, and Oban, Lagavulin, Dalwhinnie, Cardhu, Talisker, Cragganmore, Knocando, Glenkinchie, and Glen Ord single malt Scotch whiskies.

6. Respondent Diageo is, and at all times relevant herein has 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 Federal Trade Commission Act, 15 U.S.C. § 44.

II. <u>Respondent Vivendi</u>

7. Respondent Vivendi is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France.

8. Among other things, Respondent Vivendi produces, distributes, and sells distilled spirits products from facilities that it and its subsidiaries own or operate worldwide as part of their Seagram Spirits and Wine Group ("Seagram").

9. In the United States, Respondent Vivendi operates its distilled spirits business principally through Joseph E. Seagram & Sons, Inc., a wholly-owned subsidiary corporation that has its principal business offices located at 375 Park Avenue, New York, New York 10152-0192.

10. Respondent Vivendi had total sales, for all products, of about $39.7 billion in 2000. Respondent Vivendi's

United States sales of all products totaled about $6.7 billion in 2000.

11. Respondent Vivendi is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Vivendi markets or sells in the United States include Captain Morgan Original Spiced Rum, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet single malt Scotch whisky, and Martell Cognac.

12. Respondent Vivendi is, and at all times relevant herein has 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 Federal Trade Commission Act, 15 U.S.C. § 44.

III. <u>Third Party Pernod Ricard</u>

13. Third party Pernod Ricard S. A. and its subsidiaries ("Pernod Ricard") is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussmann, 75379 Paris, France.

14. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Austin, Nichols & Co., Inc., with offices located at 156 East 46th Street, New York, New York 10017. Among other things, Pernod Ricard markets and sells distilled spirits in the United States.

15. Pernod Ricard had total revenues, from the sale of all products, of about $4 billion in 2000. Pernod Ricard's United States sales of all products totaled about $250 million in 2000.

IV. <u>The Proposed Acquisition and Transaction</u>

16. On or about December 4, 2000, Respondent Diageo and Third Party Pernod Ricard entered into a Framework Agreement jointly to bid for the acquisition of all of Seagram's spirits and wine business. Diageo and Pernod Ricard agreed that if their bid was accepted by Respondent Vivendi, Diageo and Pernod Ricard would split between them the various Seagram companies and assets comprising the Seagram's spirits and wine business.

17. On or about December 19, 2000, Respondents Diageo and Vivendi, and third party Pernod Ricard, executed their Stock and Asset Purchase Agreement. Under this Agreement, Diageo and Pernod Ricard jointly undertook to acquire Seagram from Vivendi for a total of $8.15 billion. Pursuant to the Framework Agreement previously entered into between Diageo and Pernod Ricard, Respondent Diageo would contribute $5 billion and Pernod Ricard would contribute the remaining $3.15 billion for the acquisition of Seagram.

18. Under the terms of the Stock and Asset Purchase Agreement and the Framework Agreement:

(a) The Seagram businesses acquired by Diageo through purchases of corporations or assets would hold, among other brands and assets, all Seagram rum assets, including Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Myers's Rum;

(b) The Seagram businesses acquired by Pernod Ricard through purchases of corporations or assets would hold, among other brands and some related assets, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet Scotch whisky, and Martell Cognac;

(c) Diageo would operate the "back office" operation of Joseph E. Seagram & Sons, Inc., and, for up to one year, provide administrative services to Pernod Ricard for the Seagram brands that Pernod Ricard would be acquiring, including (1) order taking; (2) maintaining accounts receivable files; (3) inventory management, logistics planning, and customer shipping; and (4) the provision of information; and

(d) Diageo would acquire or have access to confidential commercially sensitive marketing and production material regarding all of the Seagram brands that Pernod Ricard would be acquiring.

19. On or about October 23, 2001, the Federal Trade Commission authorized its staff to file a complaint for temporary restraining order and preliminary injunction in United States District Court for an order blocking the proposed acquisition pending a determination by the Commission, after administrative proceedings, whether the proposed acquisition is anticompetitive.

V. Trade and Commerce

A. Relevant Product Markets

20. The relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are: (a) premium rum, (b) popular gin, (c) deluxe Scotch whisky, (c) single malt Scotch whisky, and (e) Cognac. In addition to these relevant markets, broader or narrower relevant markets may also exist.

a. Premium Rum

21. Rum is a distilled spirit made from cane sugar or its byproducts. Premium rum is rum that is generally advertised, promoted, and available throughout the United States, and sold at retail at prices higher than most other rums. The most popular premium rum products sold in the United States include Bacardi Light Rum, Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Malibu Rum. Total United States premium rum sales in 2000 were about 12 million 9-liter equivalent cases, which represents about $1 billion in retail sales.

b. Popular Gin

22. Gin is a distilled spirit made from grain and botanicals, primarily juniper. Popular gin is gin that is principally made and bottled in North America, is generally advertised, promoted, and available throughout the United States, and sold at retail at prices that are lower than the premium gins, which are imported from the United Kingdom, but higher than the gins that are not widely advertised and promoted. The most popular gins sold in the United States include Seagram's Gin and Gordon's Gin. Total United States popular gin sales in 2000 were about 5.2 million 9-liter equivalent case, which represents about $650 million in retail sales.

c. Deluxe Scotch Whisky

23. Scotch whisky is a distilled spirit made in Scotland from malt, or malt and barley, and aged a minimum of three years. Deluxe Scotch whisky is a blend of malt and grain Scotch whiskies from many distilleries, typically aged at least 12 years, and bottled in Scotland. Deluxe Scotch whisky is generally advertised, promoted, and available throughout the United States, and sold at retail at

prices higher than premium Scotch whisky products, but lower than single malt Scotch whiskies. The most popular deluxe Scotch whisky products sold in the United States are Chivas Regal Scotch whisky and Johnnie Walker Black Scotch whisky. Total sales of deluxe Scotch in the United States in 2000 were about 1.1 million 9-liter equivalent cases, which represents about $450 million in retail sales.

d. Single Malt Scotch Whisky

24. Single malt Scotch whisky is a Scotch that is produced from the malt of a single distillery, and is normally bottled in Scotland. The most popular single malt Scotch whiskies sold in the United States include The Glenlivet, Glenfiddich, Oban, Lagavulin, Dalwhinnie, Cardhu, and Talisker. Total sales of single malt Scotch whiskies in the United States in 2000 were about 700,000 9-liter equivalent cases, which represents about $250 million in retail sales.

e. Cognac

25. Cognac is a brandy, which is distilled wine, that is produced and bottled in southwestern France. The most popular Cognacs sold in the United States are Courvoisier, Hennessy, Martell, and Remy Martin. Total sales of Cognac in the United States in 2000 were about 2.8 million 9-liter equivalent cases, which represents about $1 billion in retail sales.

B. Relevant Geographic Markets

26. The relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition in each relevant market are (a) the United States and (b) individual states and territories of the United States.

C. Conditions of Entry

27. Entry into each of the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects from occurring.

VI. <u>Market Structure</u>

28. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios.

a. Premium Rum

29. In the national premium rum market, Respondent Diageo and or its subsidiaries have about an 8% share and Respondent Vivendi and or its subsidiaries have about a 33% share. The only other significant seller of premium rum is Bacardi USA, which has about a 54% share. The proposed acquisition would increase the HHI by about 550 points, result in market concentration of about 4,600 points, and create a duopoly.

30. Concentration in many premium rum state and territory markets does not vary significantly from the high concentration in the national premium rum market.

b. Popular Gin

31. In the national popular gin market, Respondent Diageo and or its subsidiaries have about a 34% share and Respondent Vivendi and or its subsidiaries have about a 66% share. If Diageo were to acquire or control the marketing of Seagram's Gin, the HHI would increase by about 4,500 points, result in market concentration of about 10,000 points, and create a monopoly.

32. Concentration in many popular gin state and territory markets does not vary significantly from the high concentration in the national popular gin market.

c. Deluxe Scotch Whisky

33. In the national deluxe Scotch whisky market, Respondent Diageo and or its subsidiaries have about a 51% share and Respondent Vivendi and or its subsidiaries have about a 49% share. If Diageo were to acquire or control the marketing of Chivas Regal Scotch whisky, the HHI would increase by about 5,000 points, result in market concentration of about 10,000 points, and create a monopoly.

34. Concentration in many deluxe Scotch whisky state and territory markets does not vary significantly from the high concentration in the national deluxe Scotch whisky market.

d. Single Malt Scotch Whisky

35. In the national single malt Scotch market whisky, Respondent Diageo and or its subsidiaries have about a 6% share and Respondent Vivendi and or its subsidiaries have about a 26% share. If Diageo were to acquire or control the marketing of The Glenlivet Scotch whisky, the HHI would increase by about 300 points and result in market concentration of about 2,000 points.

36. Concentration in many single malt Scotch whisky state and territory markets does not vary significantly from the high concentration in the national single malt Scotch whisky market.

e. Cognac

37. In the Cognac market, Respondent Diageo and or its subsidiaries have about a 54% share and Respondent Vivendi and or its subsidiaries have about a 9% share. If Diageo were to acquire or control the marketing of Martell Cognac, the HHI would increase by about 900 points and result in market concentration of about 4,600 points.

38. Concentration in many Cognac state and territory markets does not vary significantly from the high concentration in the national Cognac market.

VII. Effects of the Acquisition

39. The proposed acquisition and transaction may substantially lessen competition in each of the relevant markets in the following ways, among others:

(a) by eliminating direct competition between Respondent Diageo and Respondent Vivendi;

(b) by increasing the likelihood that Respondent Diageo will unilaterally exercise market power; and

(c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which may result in higher prices or reduced consumer choice.

VIII. Violations Charged

40. The Stock and Asset Purchase Agreement dated as of December 19, 2000, as amended, entered into between Respondent Diageo (jointly with Third Party Pernod Ricard) and Respondent Vivendi for the sale of Seagram constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

41. If the proposed acquisition were consummated, Respondent Diageo would be in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this nineteenth day of December, 2001, issues its Complaint against Respondents Diageo and Vivendi.

By the Commission.

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Donald S. Clark
Secretary

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