

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

_____)
In the Matter of)

JOHNSON & JOHNSON,)
a corporation.)
_____)

File No. 051-0050
PUBLIC RECORD VERSION

PETITION TO REOPEN AND SET ASIDE DECISION AND ORDER

Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.51, Johnson & Johnson (“J&J”), the Respondent in the above-captioned matter, hereby petitions the Federal Trade Commission (“Commission”) to reopen and set aside its Decision and Order dated December 28, 2005 (“Order”). J&J further respectfully requests expedited treatment of this petition and a waiver of the public comment period pursuant to 16 C.F.R. §2.51(c).

The subject of the Order was J&J’s proposed acquisition of Guidant Corporation (the “Acquisition”). However, there has been a material change in fact and circumstances that renders the provisions of the Order unnecessary: all acquisition agreements between J&J and Guidant Corporation (“Guidant”) have been terminated. In fact, Guidant was acquired by Boston Scientific Corporation (“Boston Scientific”) on April 21, 2006

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Accordingly, the Order’s remedial measures no longer are required to serve the public interest or preserve competition in the relevant markets. J&J therefore respectfully requests that the Order be reopened and set aside. Further, given the indisputable and irrevocable factual nature of the

changed circumstances and the significant expense to J&J in continued compliance with the provisions of the Order, J&J respectfully requests expedited treatment in the Commission's consideration of this Petition, as well as a waiver of the thirty (30) day public comment period pursuant to 16 C.F.R. § 2.51(c).

FACTUAL BACKGROUND

On December 14, 2004, J&J announced that it had entered into an agreement to acquire 100% of the voting securities of Guidant (the "Acquisition Agreement").¹ On November 2, 2005, the Commission accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") and a Proposed Decision & Order ("Proposed Order") that allowed J&J's proposed acquisition of Guidant to proceed subject to certain divestitures and other relief in order to settle charges that the proposed acquisition would reduce competition for drug eluting stents, endoscopic vessel harvesting ("EVH") devices, and proximal anastomotic assist devices. Among J&J obligations under the Proposed Order were the licensing of Drug Eluting Stent Patents to Abbott or an alternative Commission-approved buyer, the divestiture of the EVH Business to Datascope or an alternative Commission-approved buyer, and the termination of the Anastomotic Assist Distribution Agreement with Novare. The Commission simultaneously approved the appointment of KPMG, LLP ("KPMG") to serve as the Interim Monitor pursuant to Paragraph V of the Proposed Order and also approved the Interim Monitor Agreement by and between J&J and KPMG dated October 30, 2005. On December 28, 2005, the Commission issued its final Order.

¹ The Agreement and Plan of Merger dated as of December 15, 2004 by and among J&J and Guidant Corporation was superseded by the Amended and Restated Agreement and Plan of Merger dated as of November 14, 2005 among J&J and Guidant, including all amended or successor agreements thereof. Collectively, these agreements are referred to as the "Acquisition Agreement."

Shortly after the Commission accepted the Proposed Order for public comment, J&J began the process of divesting the EVH Business to Datascope as provided in the Purchase Agreement by and between Ethicon, Inc. and Datascope Corp. dated as of September 27, 2005 (the "Datascope Agreement"). On December 19, 2005, J&J and Datascope mutually agreed to enter into an Amended Purchase Agreement that provided for an early closing of the sale of the EVH Business, irrespective of the closing date of J&J's proposed acquisition of Guidant (the "Amended Datascope Agreement"). On January 3, 2006, J&J completed its divestiture of the EVH Business to Datascope.

Immediately upon its appointment, KPMG became actively involved in monitoring the viability, marketability and competitiveness of the EVH Business, as well as communications between J&J and Datascope and J&J's reporting and conduct obligations under the Agreement Containing Consent Order, Proposed Order, Datascope Agreement, and Interim Monitor Agreement (collectively the "Settlement"). The Datascope Agreement and Amended Datascope Agreement contained Transition Services and Supply Agreements between J&J and Datascope related to the EVH Business. Following the consummation of the EVH divestiture, KPMG has remained active in monitoring Datascope's integration activities, transition activities between J&J and Datascope, and J&J's continuing obligations under the Settlement. In addition to its monitoring activities, KPMG has prepared several reports that it has submitted to the Commission regarding the divestiture and J&J's compliance with the Order.

Guidant terminated the Acquisition Agreement with J&J on January 25, 2006. On that same day, Guidant entered into an Agreement and Plan of Merger with Boston Scientific. Guidant and Boston Scientific announced on March 31, 2006 that the shareholders of each company had voted in favor of the transaction. Shortly thereafter, on April 5, 2006, Boston

Scientific announced that it had entered into an Agreement Containing Consent Orders with the Commission Staff. On April 20, 2006, the Commission accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) and a Proposed Decision & Order (“Proposed Order”) that allowed Boston Scientific’s acquisition to proceed subject to certain conditions. Boston Scientific announced the consummation of its acquisition of Guidant on April 21, 2006.

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ARGUMENT

I. The Commission Should Reopen and Set Aside the Order

A. Legal Standard for Reopening and Setting Aside an Order

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51(b) of the Commission’s Rules of Practice, 16 C.F.R. § 2.51, provide that, upon the request of a party, the Commission shall reopen an order and consider whether it should be modified if the party establishes “a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside, in whole or in part, or that the public interest so requires.” 16 C.F.R. § 2.51(b).

The Commission previously has stated that “[a] satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.” *In re Eli Lilly and Company*, (Docket No. C-3594), Order Reopening and Setting Aside Order at 2 (May 13, 1999). J&J respectfully asserts that this standard has been met in these circumstances.

B. The Change in Circumstances Warrants Reopening and Setting Aside the Order

The stated purpose of the remedial actions in the Commission's Order was to "remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint." *See* Paragraphs II.G, III.K, and IV.D. of the Order. The Complaint, in turn, hinged on the fact that the Commission believed that J&J's agreement to acquire Guidant was in violation of the Clayton and Federal Trade Commission Acts. *See* Complaint of the Federal Trade Commission. The Acquisition in question, however, never came to fruition and the factual underpinnings of the Commission's Complaint and subsequent Decision & Order undeniably have been eliminated. Without the Acquisition, the antitrust violations alleged in the Commission's Complaint have not taken place. And without an underlying statutory violation, the existence of a remedial Order, which (as discussed below) imposes significant costs on J&J, cannot be in the public interest.

Further, there is no need for an Interim Monitor to oversee the divestiture of the EVH Business because, without the acquisition of Guidant, J&J has no competing EVH product line. Therefore, J&J has no incentive to undercut the viability of the EVH Business or not to comply with the provisions of the Amended Datascope Agreement. J&J has and will continue to comply with its contractual obligations under the Amended Datascope Agreement regardless of the existence of the Commission's Order.

Therefore, J&J respectfully asserts that the continued effect of the Order is not needed to preserve competition in the relevant markets and no longer is in the public interest and, accordingly, requests that the Order be reopened and set aside.

C. J&J Requests Expedited Treatment in the Commission's Consideration of this Petition as well as Waiver of the 30-day Public Comment Period

The Commission's Rules of Practice allow the Commission to waive the standard thirty (30) day public comment period when the Commission makes a determination that earlier disposition is necessary. J&J respectfully asserts that it is necessary in this matter and requests expedited treatment in the Commission's consideration of this Petition as well as waiver of the thirty (30) day public comment period.

Since the Commission accepted the Order for public comment on November 2, 2005, J&J has filed four (4) compliance reports with the Commission and incurred considerable expense.

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While reporting, monitoring and other compliance expenses are acceptable in instances where acquisitions are pending or consummated, they are unnecessary when the acquisition at issue will not occur. Further, as discussed above in Part I.B., the protection of the Interim Monitor is no longer necessary because J&J has no competing EVH product line, and therefore has no incentive to undercut the viability of the divested EVH Business.

The factual circumstances in this case leave little, if nothing to comment on; the fact that Guidant was acquired by Boston Scientific and not by J&J is indisputable.

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Accordingly, J&J respectfully requests

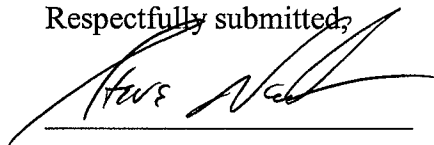
treatment in the Commission's consideration of this Petition as well as waiver of the thirty (30) day public comment period.

CONCLUSION

For the foregoing reasons, we respectfully request that the Commission grant J&J's Petition to Reopen and Set Aside the Order. We also respectfully request expedited treatment of this Petition as well as waiver of the thirty (30) day public comment period.

Dated: April 24, 2006

Respectfully submitted,



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Counsel for Johnson & Johnson

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

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JOHNSON & JOHNSON,)	File No. 051-0050
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**AFFIDAVIT IN SUPPORT OF PETITION OF JOHNSON & JOHNSON
TO REOPEN AND SET ASIDE THE DECISION AND ORDER**

Eric Harris, pursuant to 28 U.S.C. § 1746, declares:

1. I am Assistant General Counsel of Johnson & Johnson, a corporation organized under the laws of the State of New Jersey (“J&J”).

2. I have read and am familiar with the Decision and Order (“Order”) dated December 28, 2005, issued by the Federal Trade Commission (“Commission”) in the above-captioned matter.

3. I am familiar with the efforts of J&J to comply with the Order. I have coordinated and assisted in the preparation of the compliance filings J&J has submitted to the Commission pursuant to the Order.

4. The information in this affidavit is based on my personal knowledge and on information conveyed to me by management employees of J&J.

5. I affirm that to the best of my knowledge and belief, the facts and statements contained in J&J’s Petition to Reopen and Set Aside the Order are true and correct.

6. On December 14, 2004, J&J announced that it had entered into a definitive agreement to acquire certain voting securities of Guidant Corporation (“Guidant”).

7. On November 2, 2005, the Commission accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) that allowed J&J’s proposed acquisition of Guidant to proceed, provided J&J agreed to comply with the terms of the proposed Consent Agreement.

8. On December 28, 2005, the Commission approved the final Order concerning the proposed acquisition of Guidant by J&J that required J&J and Guidant to perform certain undertakings relating to drug eluting stents, endoscopic vessel harvesting devices, and proximal anastomotic assist devices.

9. On November 2, 2005, J&J began the process of divesting the EVH Business to Datascope pursuant to a Purchase Agreement by and between Ethicon Inc. and Datascope dated as of September 27, 2005.

10. The Commission appointed KPMG LLP as the Interim Monitor to oversee the divestiture of the EVH Business to Datascope. On October 30, 2005, J&J and KPMG LLP entered into an Interim Monitor Agreement.

11. On January 3, 2006, J&J completed the divestiture of the EVH Business to Datascope, pursuant to an Amended Purchase Agreement dated as of December 19, 2005. The sale of the EVH Business was completed on the mutual agreement of J&J and Datascope, even though J&J had not closed on its acquisition with Guidant.

12. Because J&J did not acquire Guidant but did complete the sale of its EVH Business to Datascope, J&J currently has no competing EVH product line.

13. Since November 2, 2005, J&J has expended considerable resources to comply, and remain in compliance, with the terms of the Order. J&J has filed four (4) compliance reports with the Commission, most recently on March 30, 2006. To date, J&J has incurred almost \$400,000 in expenses associated with the Interim Monitor required under the Order. J&J continues to incur expenses associated with the Interim Monitor. Based on the cost of previous Interim Monitor reports, J&J expects that its next report, due April 30, 2006, will cost in excess of \$100,000.

14. On January 25, 2006, Guidant terminated the Amended Acquisition Agreement with J&J.

15. On January 25, 2006, Guidant entered into an Agreement and Plan of Merger with Boston Scientific Corporation ("Boston Scientific").

16. On March 31, 2006, Guidant and Boston Scientific announced that the shareholders of each company had voted in favor of their proposed transaction.

17. On April 5, 2006, Boston Scientific announced that it had signed an Agreement Containing Consent Order with Commission Staff relating to its proposed acquisition of Guidant.

18. On April 20, 2006, the Commission accepted, subject to final approval, an Agreement Containing Consent Orders and a Proposed Decision & Order that allowed Boston Scientific's acquisition to proceed subject to certain conditions.

19. On April 21, 2006, Boston Scientific announced that it had consummated its transaction with Guidant.

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REDACTED

21. J&J has no agreement in place to acquire any assets or voting securities of Guidant and has no present intention of acquiring any assets or voting securities of Guidant.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 27, 2006.



Eric Hartts, Esq.
Assistant General Counsel
JOHNSON & JOHNSON