

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

**COMMISSIONERS:**                    **Joseph J. Simons, Chairman**  
    **Noah Joshua Phillips**  
    **Rohit Chopra**  
    **Rebecca Kelly Slaughter**  
    **Christine S. Wilson**

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<b>In the Matter of</b>	)	
	)	
	)	
<b>E. &amp; J. Gallo Winery,</b>	)	
<b>a corporation,</b>	)	
	)	
<b>Dry Creek Corporation,</b>	)	<b>ORDER TO MAINTAIN ASSETS</b>
<b>a corporation, and</b>	)	<b>Docket No. C-4730</b>
	)	
<b>Constellation Brands, Inc.,</b>	)	
<b>a corporation.</b>	)	

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**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent E. & J. Gallo Winery, a wholly-owned subsidiary of Respondent Dry Creek Corporation of certain assets of Respondent Constellation Brands, Inc. (“Constellation”), 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.

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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 E. & J. Gallo Winery is a corporation organized, existing, and doing business under, and by virtue of the laws of the state of California with its executive offices and principal place of business located at 600 Yosemite Boulevard, Modesto, California 95354.
2. Respondent Dry Creek Corporation 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 600 Yosemite Boulevard, Modesto, California 95354.
3. Respondent Constellation Brands, 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 207 High Point Drive, Building 100, Victor, New York 14564.
4. 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. “Gallo” means Dry Creek Corporation and its wholly-owned subsidiary E. & J. Gallo Winery, their directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Dry Creek Corporation and E. & J. Gallo Winery, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.
- B. “Constellation” means Constellation Brands, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Constellation Brands, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.
- C. “Precept” means Precept Brands LLC, a limited liability company organized, existing, and doing business under, and by virtue of the laws of, the State of Washington, with its

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executive offices and principal place of business located at 1910 Fairview Avenue East, Suite 400, Seattle, Washington, 98102.

- D. “Sazerac” means Sazerac Company Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of, the State of Louisiana, with its executive offices and principal place of business located at 101 Magazine Street, Fifth Floor, New Orleans, Louisiana 70130, and Sazerac Investments, LLC, a corporation organized, existing and doing business under, and by virtue of the laws of, the State of Delaware, with its offices and principle place of business located at 101 Magazine Street, Fifth Floor, New Orleans, Louisiana 70130.
- E. “Vie-Del” means Vie-Del Company, a corporation organized, existing, and doing business under, and by virtue of the laws of, the State of Nevada, with its executive offices and principal place of business located at 11903 S. Chestnut Ave, Fresno, California 93725.
- F. “Decision and Order” means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.
- G. “Orders” means this Order to Maintain Assets and the Decision and Order.
- H. “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 Respondents fully transfer a Divestiture Business and related Divestiture Assets to an Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Business and related Divestiture 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 Divestiture Business, to minimize the risk of loss of competitive potential of the Divestiture Business, to operate the Divestiture Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of the Divestiture Assets, except for ordinary wear and tear.
- B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets, or terminate any of the operations of the Divestiture 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 Divestiture Business.
- D. Provide the Divestiture 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

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expenditure plans, research and development plans, and commercial activities for the Divestiture 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 Divestiture Business.
- F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Divestiture 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 Divestiture Business to another of Respondents' businesses.
- G. Maintain and preserve Business Information related to the Divestiture Business.
- H. Provide the resources necessary for the Divestiture Business to respond to competition, prevent diminution in sales, and maintain its competitive strength.
- I. Continue providing customary levels of support services to the Divestiture Business.
- J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of the Divestiture Business, and operate the Divestiture Business 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 the Divestiture Business,

*Provided, however,* Respondents may take actions that an Acquirer has requested or agreed to in writing to facilitate the Acquirer's acquisition of the Divestiture Assets if the relevant actions are consistent with the purposes of the Orders and the Monitor (in consultation with Commission staff) approves the action in advance.

### **III. Transition Assistance**

**IT IS FURTHER ORDERED** that:

- A. Until Respondents have transferred Business Information included in the Divestiture Assets to the Acquirers, Respondents shall ensure that this Business Information is maintained and updated in the ordinary course of business and shall provide the relevant Acquirer with access to this Business Information (wherever located and however stored) and to employees who possess this Business Information.
- B. At the option of the Acquirer, Respondents shall provide Transitional Services sufficient to efficiently transfer the Divestiture Business and Divestiture Assets to the Acquirer and allow the Acquirer to operate the Divestiture Business and Divestiture Assets in a manner

that is in all material respects equivalent to the manner in which Respondents operated them prior to the Acquisition:

1. As set forth in a Divestiture Agreement, or otherwise reasonably requested by the Acquirer (whether requested 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.
- C. At the option of the Acquirer of the Dessert Wine Assets, Respondent Gallo shall, on terms and conditions and at the price set forth in the relevant Divestiture Agreement, produce and supply Dessert Wine Products, or components thereof, for sale by the Acquirer. Respondent Gallo shall produce and supply Dessert Wine Products, or components thereof, in quantities sufficient to meet the needs of the Acquirer and in a manner that enables the Acquirer to provide customers with Dessert Wine Products of the same quality and on the same schedule as did Respondent Gallo. Unless the Acquirer requests an earlier termination in writing, Respondent Gallo shall not cease supplying products under this Paragraph until the Acquirer begins Commercial Production of the Dessert Wine Products.
- D. At the option of the Acquirer of the Concentrate Assets, Respondent CBI shall, on terms and conditions and at the price set forth in the relevant Divestiture Agreement, produce and supply Concentrate Products, or components thereof, for sale by the Acquirer. Respondent CBI shall produce and supply Concentrate Products, or components thereof, in quantities sufficient to meet the needs of the Acquirer and in a manner that enables the Acquirer to provide customers with Concentrate Products of the same quality and on the same schedule as did Respondent CBI. Unless the Acquirer requests an earlier termination in writing, Respondent CBI shall not cease supplying products under this Paragraph until:
1. The Acquirer begins Commercial Production of the Concentrate Products, and
  2. For a 6-month period after the Acquirer begins Commercial Production, the Acquirer independently produces 100% of the products it sells to customers.
- E. Until 90 days after Respondent CBI ceases to supply products under Paragraph III.D. above:
1. Respondent CBI shall take no action to, directly or indirectly, induce any person to discontinue or reduce grape concentrate purchases from the Acquirer of the Concentrate Business and shall, at the request of the Acquirer, provide reasonable assistance to the Acquirer to obtain or retain customers for Concentrate Products, and
  2. Respondent Gallo shall not, directly or indirectly, induce any person to discontinue or reduce its grape concentrate purchases from the Acquirer of the Concentrate Business,

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*Provided, however,* Respondent Gallo may (i) advertise in newspapers, trade publications, trade shows, or other media in a manner not targeted specifically at customers of the Acquirer; (ii) sell products to a customer that initiates communications with Respondent Gallo to purchase grape concentrate, so long as such customer was not solicited by Respondent Gallo in violation of this Paragraph; and (iii) sell products, including through brokers, as Respondent Gallo has done in its ordinary course.

- F. Respondents shall allow each Acquirer to terminate, in whole or part, any agreement to provide Transitional Services at any time upon commercially reasonable notice and without cost or penalty.
- G. Respondents shall not cease providing Transitional Services or supplying products to an Acquirer as required by this Order due to breach by an Acquirer of a Divestiture Agreement. Further, Respondents shall not limit any damages (including indirect, special, and consequential damages) that an Acquirer would be entitled to receive in the event of a Respondent's breach of any agreement relating to Transitional Services or product supply required by this Order.

#### **IV. Employees**

IT IS FURTHER ORDERED that:

- A. Until termination of the Employee Hiring Period for an Acquirer, Respondents shall:
  - 1. Cooperate with and assist the Acquirer to evaluate independently and offer employment to any Divestiture Business Employee who worked in the relevant Divestiture Business;
  - 2. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all relevant Divestiture Business Employees, and provide Employee Information for each;
  - 3. 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 relevant Divestiture Business Employee, and to make an offer of employment to any relevant Divestiture Business Employee;
  - 4. Remove any impediments within the control of Respondents that may deter relevant Divestiture 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 a relevant Divestiture 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;

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5. Continue to provide the relevant Divestiture Business Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;
6. Provide reasonable financial incentives for the relevant Divestiture Business Employees to continue in their positions, and as may be necessary, to facilitate the employment of relevant Divestiture Business Employees by the Acquirer; and
7. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any relevant Divestiture Business Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any relevant Divestiture Business Employee by an Acquirer.
8. Not directly or indirectly, solicit or otherwise attempt to induce a Divestiture Business Employee to reject a written offer of employment from an Acquirer, or terminate existing employment with an Acquirer,

*Provided, however,* Respondents may:

- (i) Hire an employee whose employment has been terminated by the Acquirer;
- (ii) 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 Divestiture Business Employees; or
- (iii) Hire an employee who has applied for employment with a Respondent, as long as such application was not solicited or induced in violation of this Paragraph.

- B. Within 6 months after the Divestiture Date, if the Commission determines that any additional employee of a Respondent who worked for or supported the Divestiture Business should be included as a Divestiture Business Employee, the Commission shall so notify the Respondent and as of the date of such notification, the identified employee shall be considered a Divestiture Business Employee under this Order.

## **V. 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 solely related to one or more Divestiture Businesses that is received or maintained by Respondents;

*Provided, however,* that a Respondent may disclose or use such Confidential Information in the course of:

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- (i) Performing its obligations or as permitted under the Decision and Order, this Order to Maintain Assets or any Divestiture Agreement; or
  - (ii) Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Assets or any Divestiture Business, or as required by law, rule or regulation.
- B. Respondent shall only disclose Confidential Information solely related to one or more Divestiture Businesses to an employee or other person if disclosure is permitted in Paragraph V.A and the employee or other person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.
- C. Respondents shall enforce the terms of this Paragraph V and take necessary actions to ensure that their employees and other persons comply with its terms, including implementing access and data controls, training employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

## **VI. Additional Obligations**

**IT IS FURTHER ORDERED** that:

- A. Until 4 years after the entry of this Order, Respondent CBI shall not terminate the operations of the Sparkling Wine Business and shall take all actions necessary to maintain the full economic viability, marketability and competitiveness of the Sparkling Wine Business.
- B. Respondents shall not, except as required to comply with the Order or the Divestiture Agreement with the Acquirer of the Concentrate Business:
- 1. Use any Divestiture Assets or Excluded Assets related to the Concentrate Business for the production of grape concentrate, or
  - 2. Produce grape concentrate at the Mission Bell Facility.
- C. Respondent CBI shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, sell, transfer, convey or lease to Respondent Gallo the Mission Bell Facility, or any Mission Bell Assets used, or used within 6 months of the Acquisition Date, at the Mission Bell Facility,

*Provided, however, this Paragraph VI.C shall not apply to the assets identified in the Non-Public Appendix VII attached to the Decision and Order.*

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- D. Respondent Gallo shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, acquire or lease the Mission Bell Facility, or any Mission Bell Assets used, or used within 6 months of the Acquisition Date, at the Mission Bell Facility,

*Provided, however,* this Paragraph VI.D shall not apply to the assets identified in the Non-Public Appendix VII attached to the Decision and Order.

- E. No later than 2 days after the Divestiture Date for the Concentrate Business, Respondent Gallo shall create and maintain a website with the URL MegaNatural.com. Except as otherwise agreed to in writing by Respondent Gallo and Vie-Del, the website shall contain only one webpage that contains the following:
1. No logos, trade dress or other imagery used by Respondent Gallo or by Vie-Del;
  2. The title MegaNatural; and;
  3. Two buttons of identical size, format and prominence and related statements of identical font, font size and placement that comply with the following:
    - a. A button captioned “Color Concentrates” that links to [www.vie-del.com](http://www.vie-del.com) and is located directly above the statement, “click here if you are interested in MegaNatural color concentrates products, including Mega Red or Mega Purple,” and
    - b. A button captioned “Polyphenolics” that links to [www.polyphenolics.com](http://www.polyphenolics.com) and is located directly above the statement, “click here if you are interested in MegaNatural Polyphenolics products.”
- F. Gallo shall not use or retain information regarding any third party who selects the Color Concentrates button on the MegaNatural.com website.
- G. Starting on the Divestiture Date for the Concentrate Business until the earlier of 5 years after issuance of the Decision and Order or 2 years after Respondent CBI ceases to supply products under Paragraph VI.D above, Respondent Gallo shall:
1. Not directly link any webpage on the website polyphenolics.com, or any other website Respondent Gallo creates or maintains for the primary purpose of selling polyphenolics, to a website or webpage used or maintained by Gallo that markets products that compete with Concentrate Products;
  2. Not use the MEGANATURALBP.com or MEGANATURAL-BP.com domain names; and
  3. Not market products that compete with Concentrate Products on any website that includes MegaNatural in its URL.
- H. Respondent Gallo shall not interfere with Vie-Del’s ability to use “MegaNatural,” or any other derivation or variant thereof, in connection with the marketing or sale of Concentrate Products or other grape concentrates by entering into exclusive arrangements

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regarding the term MegaNatural in connection to advertising words, sponsored links, hyperlinks, search priorities, or any other domain name.

## **VII. Monitor**

**IT IS FURTHER ORDERED** that:

- A. The Commission appoints William Berlin 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 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 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 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 Respondents; 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. 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, 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. 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 with 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 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 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, 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.

### **VIII. 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 with respect to some or all of the Divestiture Assets, the Commission may appoint a Divestiture Trustee to divest the relevant Divestiture 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 divest relevant Divestiture Assets and takes such other action as may be required to 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 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 one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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; The Divestiture Trustee shall have 12 months from the date the Commission approves the trustee agreement described herein to accomplish the divestitures, 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 divestitures 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 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 divestitures shall be made in the manner and to Acquirers as required by the Decision and Order, provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for Divestiture Assets related to a particular Divestiture Business, and if the Commission determines to approve more than one such acquiring entity for the divestiture, 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 VIII.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 Divestiture 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 each 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, among other things, 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.
- 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

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manner as provided in this Paragraph VIII, and who will have the same authority and responsibilities as the original Divestiture Trustee.

- 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.

### **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](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto: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 each Respondent shall notify the Commission at least 30 days prior to:

- A. Its proposed dissolution (i.e., the dissolution of E. & J. Gallo Winery, Dry Creek Corporation, or Constellation Brands, Inc.);
- B. Its proposed acquisition, merger or consolidation (i.e., the acquisition, merger or consolidation of E. & J. Gallo Winery, Dry Creek Corporation, or Constellation Brands, Inc.); or
- C. Any other changes in the Respondent, 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 the relevant Respondent, made to its principal place of business as identified in this Order to Maintain Assets, registered office of its United States subsidiary, or its headquarters office, the notified Respondent 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 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 the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

## **XII. Purpose**

**IT IS FURTHER ORDERED** that the purpose this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Brandy Business, the Concentrate Business and the Dessert Wine Business through their full transfer and delivery to Acquirers; to minimize any risk of loss of competitive potential for the Brandy Business, the Concentrate Business, and the Dessert Wine Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the divestiture Assets except for ordinary wear and tear.

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**XIII. Term**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate three days after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Decision and Order pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

April J. Tabor  
Acting Secretary

SEAL:

ISSUED: December 23, 2020