

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**In the Matter of****AGILENT TECHNOLOGIES, INC.,
a corporation.****Docket No. C-4292****APPLICATION FOR APPROVAL OF PROPOSED CROSS-LICENSE**

Pursuant to Section 2.41(f) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 2.41(f), and Paragraph IX.A of the Commission's Decision and Order in the above-captioned matter, Agilent Technologies, Inc. ("Agilent") hereby requests that the Commission approve a proposed cross-license of certain intellectual property between Agilent and Analytik Jena AG ("Analytik").

I. INTRODUCTION

In 2010, Agilent acquired Varian, Inc. ("Varian"). Pursuant to that transaction, Agilent acquired Varian's life sciences, environmental, and energy materials businesses, which included, among other things, various atomic and molecular spectroscopy products. In connection with that acquisition, on June 25, 2010, the Commission approved and issued a Decision and Order ("Order") that, among other things, required Agilent to (i) divest Varian's ICP-MS Business to Bruker Corporation ("Bruker"), and (ii) grant to Bruker "a fully paid-up, irrevocable, royalty-free license to the ICP-MS Shared Intellectual Property in the ICP-MS field of use." (Order,

¶¶ IV.A-B.)¹ The ICP-MS Shared Intellectual Property in the ICP-MS field of use consisted of roughly 75 patent families. One of the patents that was licensed to Bruker was United States Patent No. 7,852,471 (hereinafter, the “’471 Patent”), but that patent license was limited to the ICP-MS field of use. Agilent retained ownership of the ’471 Patent and the right to practice it as to ICP-OES and any other uses. Paragraph IX.A of the Order prohibited Agilent, “without the prior approval of the Commission,” from acquiring directly or indirectly any asset divested pursuant to the Order.

In 2014, Bruker entered into a commercial transaction by which it transferred to Analytik both its preexisting ICP-MS business and the ICP-MS intellectual property it had previously acquired from Agilent. Since that time, Analytik has manufactured and marketed both ICP-MS and ICP-OES products. Agilent also continues to manufacture and market both ICP-MS and ICP-OES products.

In 2016, Analytik approached Agilent expressing interest in obtaining a worldwide, non-exclusive license permitting it to practice the ’471 Patent in the ICP-OES field of use. In preliminary commercial discussions, Agilent expressed interest in the possibility of also obtaining a license from Analytik that would permit Agilent to practice the ’471 Patent in the ICP-MS field of use. Agilent and Analytik therefore have discussed entering into a proposed cross-license whereby Analytik would acquire non-exclusive and non-transferable rights to practice the ’471 Patent (and foreign equivalents) in the ICP-OES field, and Agilent would acquire non-exclusive and non-transferable rights to practice the patent in the ICP-MS field. No money would be exchanged.

¹ Unless otherwise indicated, capitalized terms have the same meaning as defined terms in the Order.

Through this cross-license, Agilent would be re-acquiring a component of the ICP-MS intellectual property that the Commission's Order required to be divested to Bruker—namely, the right to practice the '471 Patent for ICP-MS uses. Pursuant to Paragraph IX.A of the Order, Agilent hereby seeks approval from the Commission to consummate the cross-license. This application provides an overview of background facts relevant to the proposed cross-license, describes the principal terms of the proposed cross-license, and explains why in Agilent's view the Commission should approve of this transaction. As explained below, the proposed cross-license would in no way frustrate the purposes of the Order but would promote continued investment and competition in this area of spectrometry technology.

II. FACTUAL BACKGROUND

Atomic spectroscopy includes technologies that are primarily associated with the determination of the elemental composition of a sample. Two such technologies include inductively-coupled plasma combined with mass spectrometry (ICP-MS), and inductively-coupled plasma combined with optical emission spectrometry (ICP-OES). In each case, the process involves forming a plasma, usually from argon, into which the sample is aspirated. The heat of the plasma atomizes, excites, and ionizes the analytes. This produces both photons (for OES) and ions (for MS), which the spectrometer measures to determine the composition of the sample.

The ICP is formed by coupling radio frequency (RF) energy in a coil to the plasma gas (e.g., argon). This energy is produced by an RF generator, typically producing 1-1.5kW of power at 27 or 40MHz from a direct current input of several kV. The design of the RF generator is important to the analytical performance, reliability, and efficiency of the spectrometer. ■

[REDACTED].²

There are broadly two types of RF generators used for ICP-OES and ICP-MS spectrometers. In traditional spectrometer designs, vacuum tubes are used to convert a high DC voltage into RF, as part of an oscillator circuit fed by a high-voltage power supply. More contemporary spectrometer designs use transistors to power solid-state RF (SSRF) generators.

SSRF systems have several advantages over vacuum tube systems. To begin with, vacuum tubes have finite lives and in many instances need to be replaced on an annual basis. A tube costs about \$1,000 and can take several hours to replace. SSRF systems, on the other hand, generally require no routine maintenance. SSRF systems also can be made significantly smaller than systems using vacuum tubes, enabling development of more compact spectrometers. In SSRF systems, the RF oscillator can be fed from a lower voltage, which is safer to deal with when manufacturing and servicing these products. The cost of goods associated with SSRF systems is also significantly lower than vacuum tube systems. For example, [REDACTED]

[REDACTED]

The '471 Patent covers a "Hosemans Power Generator for Spectrometry," which is a specialized type of SSRF system. The Hosemans Generator may be used in ICP-MS or ICP-OES spectrometers. Agilent has developed and uses a Hosemans Generator in its ICP-OES products. Analytik has developed and uses a Hosemans Generator in its ICP-MS products. Both companies developed their Hosemans Generators independently, and their proprietary

² Agilent has redacted certain confidential and proprietary business information from this application. In compliance with 16 C.F.R. § 4.9(c) and Section 6(f) of the Federal Trade Commission Act, Agilent will deliver to the Commission's Office of the General Counsel a separate submission that will provide additional detail in support of Agilent's request to protect this information from public disclosure.

specifications presumably differ from one another. However, because of the intellectual property use limitations imposed by the Commission's Order, Agilent since 2010 has been unable to use its proprietary Hosemans Generator design for its ICP-MS products. Agilent therefore uses a different [REDACTED] SSRF design for those products. And, similarly, Analytik does not have the right to use its proprietary Hosemans Generator design in its ICP-OES products, so Analytik instead uses a vacuum tube, free-running RF system in these products.³ For both companies, utilizing two different power generation systems is costly and inefficient. Both Agilent and Analytik would therefore benefit from the proposed cross-license primarily in that it would enable each company to make wider and more flexible internal use of their own existing, proprietary Hosemans Generator designs.

III. DESCRIPTION OF THE PROPOSED CROSS-LICENSE

The terms of the proposed cross-license are straightforward. Agilent and Analytik propose a cross-license whereby Analytik would acquire non-exclusive, non-transferable, and non-sublicensable (with the exception of sublicenses to Analytik affiliates) rights to practice the '471 Patent (and foreign equivalents) in the ICP-OES field, and Agilent would acquire non-exclusive, non-transferable, and non-sublicensable (with the exception of sublicenses to Agilent affiliates) rights to practice the patent in the ICP-MS field. No money would be exchanged. No royalties would be paid. Analytik would retain its license to all other ICP-MS Shared Intellectual Property in the ICP-MS field of use. No cooperation between Agilent and Analytik would be required pursuant to the cross-license agreement.⁴

³ See Analytik Jena website ("Features PlasmaQuant® PQ 9000-Serie"), available at <https://www.analytik-jena.de/en/analytical-instrumentation/products/optical-emission-spectrometry/features-plasmaquantr-pq-9000-series.html#c45943>.

⁴ If the Commission approves this application, the parties will negotiate and finalize the terms of the cross-license, but neither party will have an obligation to enter into a final license agreement, and the parties may discontinue the negotiations at any time.

IV. JUSTIFICATIONS FOR COMMISSION APPROVAL

The proposed cross-license clearly will not frustrate the purposes of the Commission's Order, in particular the purposes of Paragraph IV of the Order (governing the ICP-MS divestiture). These purposes were clearly stated in Paragraph IV.H:

The purposes of this Paragraph IV of the Order are: (1) to ensure the continuation of the Varian ICP-MS Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the ICP-MS Acquirer [originally Bruker, now Analytik Jena] has the intention and ability to produce the Varian ICP-MS Products at facilities independent of Respondent Agilent, and (3) and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

None of these purposes would be frustrated by the proposed cross-license.

First, the cross-license would strengthen Analytik's overall business position by allowing Analytik to expand its use of this versatile SSRF power source, which Analytik could then use for both its ICP-OES and ICP-MS products, which in turn would improve the efficiency of Analytik's operations and serve to upgrade its ICP-OES offerings (which today continue to rely upon vacuum tubes) to contemporary power source standards.

Second, for the past seven years Bruker and, more recently, Analytik have fully demonstrated that they are capable of independently producing and marketing ICP-MS products. The proposed cross-license would certainly do nothing to diminish, and is likely to improve, the strength of Analytik's independent business position.

Third, the cross-license would not lessen competition in any way in the ICP-MS field; rather, it would provide at least modest cost savings to both Agilent and Analytik and could increase competition by enabling both Agilent and Analytik to manufacture and sell ICP-MS and ICP-OES products more efficiently.

Through the proposed cross-license, Agilent and Analytik would achieve cost savings and manufacturing efficiencies by being freed up to internally employ their respective proprietary Hosemans Generator designs across their full ICP-MS and ICP-OES product lines.

[REDACTED]

[REDACTED] Analytik would also recognize unspecified cost of goods and R&D savings. That said, [REDACTED]

[REDACTED]

[REDACTED] so the cost savings that could be achieved from the proposed cross-license should not affect the competitive dynamics of the industry in any material way.

Another consideration is that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Analytik initially approached Agilent about acquiring the '471 Patent rights so that Analytik could develop more competitive ICP-OES products. This deal will facilitate Analytik's expansion in the ICP-OES space. Customers demand and expect cutting-edge technology to be used in spectrometer products, so Analytik's competitive position can only be

improved by the proposed cross-license. This deal will also strengthen Analytik's overall competitive position vis-à-vis other spectrometer manufacturers.

V. CONCLUSION

The proposed cross-license would benefit both Agilent and Analytik through lower costs and manufacturing efficiencies, and would benefit spectrometer consumers through the availability of enhanced product options at lower costs. Competition for ICP-MS and ICP-OES products will be enhanced as a result. For all these reasons, Agilent respectfully requests that the Commission approve the proposed cross-license, and that it do so as soon as practicable.

Analytik supports this petition. Should the Commission require additional information, both Agilent and Analytik are available to assist the Commission's review.

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Respectfully submitted,

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