

Complaint

IN THE MATTER OF

JOHNSON & JOHNSONCONSENT 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-4363; File No. 111 0160*
Complaint, June 11, 2012 – Decision, August 7, 2012

This consent order addresses the \$21.3 billion acquisition by Johnson & Johnson of certain assets of Synthes, Inc. 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 combining the two largest competitors in the U.S. market for volar distal radius plating systems. The consent order requires Johnson & Johnson to divest all assets (including intellectual property) related to its “DVR” volar distal radius plating system business to Biomet, Inc.

Participants

For the *Commission*: Brian A. O’Dea, Eric D. Rohlck, and Mark D. Seidman.

For the *Respondent*: Steven K. Bernstein, Vadim Brusser, Brianne Kucerik, Ann Malester, and Steven A. Newborn, Weil, Gotshal & Manges LLP

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Johnson & Johnson (“J&J”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Synthes, Inc. (“Synthes”), 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 Federal Trade Commission Act (“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:

Complaint

I. DEFINITIONS

1. “Commission” means the Federal Trade Commission.

2. “J&J” or “Respondent J&J” means Johnson & Johnson, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Johnson & Johnson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

3. “Synthes” means Synthes, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Synthes, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “Volar distal radius plating system” means a plating system used to treat fractures of the distal portion of the radius bone that is implanted from the bottom of the wrist.

5. “DVR” means the DVR Anatomic Volar Plating System, the volar distal radius plating system owned by Respondent J&J.

6. “FDA” means the United States Food and Drug Administration.

II. RESPONDENT

7. Respondent J&J is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, with its office and principal place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933. J&J, among other things, is engaged in the research, development, marketing and sale of trauma products, including the DVR.

8. 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 is a corporation whose business is in or affects commerce, as “commerce” is

Complaint

defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. PROPOSED ACQUISITION

9. On April 26, 2011, J&J and Synthes entered into an agreement and plan of merger (the “Purchase Agreement”) whereby J&J agreed to acquire Synthes in a transaction valued at approximately \$21.3 billion (the “Acquisition”).

IV. RELEVANT MARKET

10. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, and sale of volar distal radius plating systems.

11. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce. To compete effectively in the United States volar distal radius plating market, a firm must have FDA approval for its device, establish a local sales and service organization, and its product must not infringe any other firm’s intellectual property.

V. STRUCTURE OF THE MARKET

12. Combined, J&J and Synthes would control over 70 percent of the U.S. market for volar distal radius plating systems. Synthes is the leading supplier of volar distal radius plating systems, accounting for approximately 42 percent of the market by 2010 revenue. J&J’s volar distal radius plating system accounted for approximately 29 percent of the market by 2010 revenue. Although other companies sell volar distal radius plating systems in the United States, most achieve only minimal sales. The U.S. market for volar distal radius plating systems is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). If left unremedied, the acquisition would produce a post-merger HHI of over 5,000 and would represent an increase in the HHI of more than 2,500.

Complaint

VI. CONDITIONS OF ENTRY AND EXPANSION

13. A supplier attempting to enter the market for volar distal radius plating systems would have to invent around the patents held by J&J and Synthes, develop a reputation for quality products and support among surgeons, and establish a strong distribution network. Both the J&J and Synthes volar distal radius plating systems are protected by patents. The patents held by the two companies have largely prevented competitors from developing products that surgeons consider to be as effective as those of J&J and Synthes. Manufacturer product reputation and distribution presence also play a strong role in surgeon preferences. Many fringe competitors are limited by their lack of a strong distribution presence, and it would take a significant amount of time for one or more current fringe competitors to develop a reputation for quality, service, and consistency that rivals that of J&J and Synthes with respect to volar distal radius plating. Therefore, entry into the relevant line of commerce described in Paragraph 10 or expansion by fringe competitors would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, would be substantially to lessen competition and to tend to create a monopoly in the 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, in the following ways, among others:

- a. eliminating actual, direct, and substantial competition between J&J and Synthes in the market for the research, development, marketing, and sale of volar distal radius plating systems;
- b. increasing J&J's ability to raise prices unilaterally in the relevant market; and
- c. reducing research and development in the relevant market.

Order to Maintain Assets

VIII. VIOLATIONS CHARGED

15. The Purchase Agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

16. The Acquisition described in Paragraph 9, 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 eleventh day of June, 2012, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Synthes, Inc. (“Synthes”) by Johnson & Johnson (“Respondent J&J”), and Respondent J&J having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent J&J 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; and

Respondent J&J, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent J&J of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not

Order to Maintain Assets

constitute an admission by Respondent J&J that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent J&J has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement 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 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 the following Order to Maintain Assets ("Asset Maintenance Order"):

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters address located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933;
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent J&J, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that all capitalized terms used in this Asset Maintenance Order, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Consent Agreement, the following definitions shall apply:

Order to Maintain Assets

- A. “Decision and Order” means:
1. the 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. the Final Decision and Order issued and served by the Commission.
- B. “Orders” means the Decision and Order and this Asset Maintenance Order.

II. (Asset Maintenance)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement or as expressly allowed pursuant to this Asset Maintenance Order, Respondent J&J shall not, and shall instruct its Distributors not to, interfere, directly or indirectly, with the DVR Business of the Acquirer.

Provided however, that unless otherwise prohibited by the Order, nothing in this Paragraph II.A. shall prevent (a) Respondent J&J or its Distributors (i) from competing for contracts or for the business of suppliers, distributors, resellers, or customers; or (ii) from engaging in competition for the research, development, manufacture, marketing and sales of Wrist Plating Systems; and (b) Respondent J&J from using its Distributors for selling products other than DVR.

- B. During the time period before the Effective Date, Respondent J&J shall, except as otherwise provided in this Asset Maintenance Order:
1. take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business to minimize

Order to Maintain Assets

any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear. Respondent J&J shall not sell, transfer, encumber or otherwise impair the DVR Business (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability or competitiveness of the DVR Business including, but not limited to, hiring or offering to hire any Designated Employees;

2. retain all of Respondent J&J's rights, title, and interest in the DVR Business, except for the disposition of inventory in the regular and ordinary course of business, consistent with past practices;
3. maintain the operations of the DVR Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the DVR Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the DVR Business; Respondent J&J's responsibilities shall include, but are not limited to, the following:
 - a. Respondent J&J shall provide the DVR 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 the DVR Business;
 - b. Respondent J&J shall continue, at least at their scheduled pace, any additional expenditures for

Order to Maintain Assets

the DVR Business authorized prior to the date the Consent Agreement was signed by Respondent J&J including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;

- c. Respondent J&J shall provide such resources as may be necessary to respond to competition against the DVR Business and/or to prevent any diminution in sales of the DVR Business after the Acquisition Date and prior to the Effective Date;
- d. Respondent J&J shall provide such resources as may be necessary to maintain the competitive strength and positioning of the DVR Business in a business-as-usual manner and/or in accordance with the applicable DVR Business plan;
- e. Respondent J&J shall make available for use by the DVR Business funds in a business-as-usual manner and/or in accordance with the applicable DVR Business plan sufficient to perform all routine maintenance or replacement, and all other maintenance or replacement of assets as may be necessary to maintain the DVR Business;
- f. Respondent J&J shall provide the DVR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business; and
- g. Respondent J&J shall provide such support services to the DVR Business as were being provided to such business by Respondent J&J as of the date the Consent Agreement was signed by Respondent J&J.

Order to Maintain Assets

4. maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date including, but not limited to, instructing Respondent J&J's Distributors to maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date.
 5. develop, sell, and manufacture the DVR consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the DVR Business pending divestiture.
- C. The purpose of this Paragraph II is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

III. (Divestiture and Post-Divestiture Requirements)**IT IS FURTHER ORDERED** that:

- A. Prior to the Effective Date, Respondent J&J shall secure all consents, assignments, and waivers from all Third Parties, other than the FDA, that are Related To the DVR Business including securing a lease for the Miami Facility and the Girardet Facility, if such facilities are being leased to the Acquirer, and securing consents from all customers of the DVR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A. of the Decision and Order.

Provided, however, Respondent J&J may satisfy this requirement with respect to any one or more leases or agreements by certifying that the Acquirer has

Order to Maintain Assets

executed such relevant agreements directly with each of the relevant Third Parties.

Provided, further, however, Respondent J&J shall not be required to obtain consents necessary to assign contracts from customers that, in the aggregate, represented less than five percent (5%) of Respondent J&J's United States DVR sales for calendar year 2011.

- B. Within ninety (90) days of the Effective Date, Respondent J&J shall transfer a Cloned Form of the TeamCenter, Agile, and EtQ software programs, together with all data belonging to the Acquirer, and resident on such programs, current as of such transfer date, in a manner that provides the Acquirer independent access to and control over such Cloned Form software programs.
- C. As of the Effective Date, Respondent J&J shall grant to the Acquirer direct access to data belonging to the Acquirer and resident on the TeamCenter, Agile, and EtQ software programs, pursuant to the Remedial Agreement and subject to non-disclosure agreements, until such time as the Acquirer notifies Respondent J&J and the Monitor that the Acquirer has validated the Cloned Form of the software programs with data belonging to the Acquirer, current as of the last transaction executed on Respondent J&J's versions of the TeamCenter, Agile, and EtQ software programs. Respondent J&J shall assist the Acquirer, as is reasonably necessary, to complete the validation process expeditiously.

IV. (Facilitate Hiring)

IT IS FURTHER ORDERED that:

- A. Beginning no later than the time Respondent J&J signs the Consent Agreement in this matter until ninety (90) days after the Effective Date:

Order to Maintain Assets

1. Respondent J&J shall provide, and Respondent J&J shall instruct Respondent J&J's Distributors to provide, the applicable Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent J&J and Respondent J&J's Distributors, as applicable, until the Designated Employee has been hired, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to transition the DVR Business to the Acquirer;
2. Respondent J&J shall not, and shall instruct its Distributors not to, interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer or the Acquirer's Distributors as described in this Order, and shall remove any impediments within the control of Respondent J&J, and instruct Respondent J&J's Distributors to remove such impediments, that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer or the Acquirer's Distributors including, but not limited to, any noncompete provisions of employment or other contracts with Respondent J&J or Respondent J&J Distributor that would affect the ability or incentive of those individuals to be employed by the Acquirer or the Acquirer's Distributors. In addition, Respondent J&J shall not make any counteroffer to a Designated Employee, and shall instruct Respondent J&J's Distributor that employs such Designated Employee not to make any counteroffer to a Designated Employee, who receives a written offer of employment from the Acquirer or the Acquirer's Distributors, unless and until the Designated Employee has declined, in

Order to Maintain Assets

writing, the Acquirer's or Acquirer's Distributor's offer.

3. Respondent J&J shall, or where applicable, Respondent J&J shall instruct its Distributors, in a manner consistent with local labor laws:
 - a. to facilitate employment interviews between each Designated Employee and the Acquirer or the Acquirer's Distributors, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer or the Acquirer's Distributors and shall not discourage such employee from participating in such interviews;
 - b. to not interfere in employment negotiations between each Designated Employee and the Acquirer or the Acquirer's Distributors;
 - c. with respect to each Designated Employee who receives an offer of employment from the Acquirer or the Acquirer's Distributors:
 - i. not to prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer or the Acquirer's Distributors, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer or the Acquirer's Distributors including, but not limited to, the Acquirer or the Acquirer's Distributor offering to hire the Designated Employee;
 - ii. to cooperate with the Acquirer or the Acquirer's Distributors in effecting transfer of the Designated Employee to the employ of the Acquirer or the Acquirer's

Order to Maintain Assets

Distributors, if the Designated Employee accepts an offer of employment from the Acquirer or the Acquirer's Distributors;

- iii. to eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer or the Acquirer's Distributors any information Relating To the manufacture and sale of the DVR; and
- iv. unless alternative arrangements are agreed upon with the Acquirer or the Acquirer's Distributors, to retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer or the Acquirer's Distributors including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits.

Provided, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph IV.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer or the Acquirer's Distributor to such employee.

Provided further, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph IV.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from enforcing, or requiring as a condition of accepting employment with the Acquirer or the Acquirer's Distributors, an eighteen (18) month non-compete Related To products not divested pursuant to the Remedial Agreement.

Order to Maintain Assets

- B. Respondent J&J shall not, and Respondent J&J shall instruct its Distributors not to, for a period of two (2) years following the Effective Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Designated Employee, who is employed by the Acquirer or the Acquirer's Distributors, to terminate his or her employment relationship with the Acquirer or the Acquirer's Distributors.

Provided, however, Respondent J&J, Respondent J&J's Distributors, or recruiters retained by Respondent J&J or Respondent J&J's Distributors, may place general advertisements for or conduct general searches for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's or the Acquirer's Distributors' employees;

Provided further, however, Respondent J&J may hire Designated Employees who apply for employment with Respondent J&J as long as such employees were not solicited by Respondent J&J in violation of this Paragraph.

V. (Confidentiality)

IT IS FURTHER ORDERED that:

- A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to the Orders:
1. Respondent J&J shall not use, provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any Person. Among other things, Respondent J&J shall not use such Confidential Business Information:
 - a. to assist or inform Respondent J&J employees who Develop, manufacture, solicit for sale, sell, or service Respondent J&J products that compete with the products divested, sold, or

Order to Maintain Assets

distributed pursuant to the Decision and Order including, but not limited to, the employees of the Wrist Plating System Business owned and operated by Synthes;

- b. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
 - c. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to the Decision and Order; or
 - d. to interfere in any other way with the Acquirer pursuant to the Orders or with the DVR Business divested pursuant to the Decision and Order.
2. Respondent J&J shall not disclose or convey Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically authorized by the Acquirer to receive such information;
 3. Respondent J&J shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Synthes Wrist Plating System Business; and
 4. Respondent J&J shall institute procedures and requirements to ensure that:
 - a. Respondent J&J employees with access to Confidential Business Information do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and
 - b. Respondent J&J employees associated with the Synthes Wrist Plating System do not solicit, access or use any Confidential Business

Order to Maintain Assets

Information that they are prohibited under the Orders from receiving for any reason or purpose.

- B. The requirements of this Paragraph V do not apply to Confidential Business Information that Respondent J&J demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent J&J;
 2. is necessary to be included in mandatory regulatory filings; *Provided, however,* that Respondent J&J shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 3. was available, or becomes available, to Respondent J&J on a non-confidential basis, but only if, to the knowledge of Respondent J&J, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 4. is information the disclosure of which is consented to by the Acquirer;
 5. is necessary to be exchanged in the course of consummating the Acquisition or the transactions under the Remedial Agreement;
 6. is disclosed in complying with the Orders;
 7. is information the disclosure of which is necessary to allow Respondent J&J to comply with the requirements and obligations of the laws of the United States and other countries;
 8. is disclosed in defending legal claims, investigations or enforcement actions threatened or

Order to Maintain Assets

brought against Respondent J&J or the DVR Business; or

9. is disclosed in obtaining legal advice.
- C. The purpose of this Paragraph V is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

VI. (Monitor)**IT IS FURTHER ORDERED** that:

- A. Charles River Associates shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent J&J and attached as Exhibit A (“Monitor Agreement”) and Confidential Exhibit A-1 (“Monitor Compensation”). The Monitor is appointed to assure that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent J&J transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Decision and Order and this Asset Maintenance Order, and consistent with the purposes of this Order.
- C. No later than one (1) day after the Acquisition Date, Respondent J&J shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to

Order to Maintain Assets

perform his duties and responsibilities, pursuant to and consistent with, the purposes of this Order.

- D. Respondent J&J 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 J&J's compliance with the terms 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 Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent J&J and the Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent J&J's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent J&J's compliance with its obligations under the Order. Respondent J&J 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 J&J's compliance with the Order.

Order to Maintain Assets

4. The Monitor shall serve, without bond or other security, at the expense of Respondent J&J on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent J&J, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent J&J 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, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent J&J of its obligations under the Orders.
7. Respondent J&J 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*, such agreement shall not restrict the Monitor from providing any information to the Commission.

Order to Maintain Assets

- E. 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 relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. 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 J&J, which consent shall not be unreasonably withheld. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Monitor, Respondent J&J shall be deemed to have consented to the selection of the proposed Monitor.
 - 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent J&J shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent J&J's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Order.
- G. 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.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

Order to Maintain Assets

VII. (Compliance Reports)

IT IS FURTHER ORDERED that within thirty (30) days after the date this Asset Maintenance Order becomes final, and every sixty (60) days thereafter until the Asset Maintenance Order terminates, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the Orders; *Provided, however*, that, after the Decision and Order becomes final, the reports due under this Asset Maintenance Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent J&J pursuant to the Decision and Order.

VIII. (Change in Respondent J&J)

IT IS FURTHER ORDERED that Respondent J&J shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of such Respondent;
- B. acquisition, merger or consolidation of Respondent; or
- C. any other change in the Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

IX. (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 (5) days notice to Respondent J&J, Respondent J&J shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent J&J 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

Order to Maintain Assets

documents in the possession or under the control of Respondent J&J Relating To compliance with this Order, which copying services shall be provided by Respondent J&J at its expense; and

- B. to interview officers, directors, or employees of Respondent J&J, who may have counsel present, regarding such matters.

X. (Termination)

IT IS FURTHER ORDERED that this Asset Maintenance Order shall terminate on the earlier of:

- A. Three (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 later of:
 - 1. the day after the divestitures pursuant to Paragraph II of the Decision and Order are accomplished, or
 - 2. three (3) days after the related Decision and Order becomes final.

By the Commission.

Order to Maintain Assets

APPENDIX A**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 24th day of May, 2012, by and between Johnson & Johnson ("Respondent") and Charles River Associates ("Monitor"), (collectively the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in In the Matter of Johnson & Johnson, 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 its DVR Business, 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 issue 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: (a) monitoring Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders; and (b) supervising the performance of any transition services required by the Orders.

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, to include those employees designated to be transferred to an Acquirer, 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,

Order to Maintain Assets

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) days after the date on which Respondent files such report with the Commission.

1.4 Monitor's Obligations. Monitor shall:

(a) carry out the Monitor's duties and responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondent's compliance with the Orders;

(b) maintain the confidentiality of all confidential information, including Confidential Business Information as defined in the Orders, and any other information provided to the Monitor by the Respondent, the Acquirer of the DVR Business, any supplier or customer of Respondent or the DVR Business, 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 under this Agreement; or (ii) persons employed at the Commission;

(c) 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;

(d) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information related to this Agreement has been disclosed;

(e) for a period of five (5) 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, including Confidential Business Information, relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that relate to the performance of the Monitor's responsibilities under this Agreement. CRA may retain archival copies of any such materials for litigation defense purposes, provided that CRA continue to abide by all obligations under the confidentiality provisions herein.

Order to Maintain Assets

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.

2.2 Monitor Compensation. Respondent will pay Monitor in accordance with the fee schedule 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 Commission-approved Acquirer of the DVR Business, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent will 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 be liable to indemnify and hold harmless Monitor 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by Monitor.

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.

Order to Maintain Assets

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) when Respondent's last obligation under the Orders that pertains to Monitor's service has been fully performed; 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 New York, 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 is 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,

Order to Maintain Assets

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

CHARLES RIVER ASSOCIATES


NAME: Gary Roberts
TITLE: Vice President

RESPONDENT

JOHNSON & JOHNSON

NAME: _____
TITLE: _____

Order to Maintain Assets

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**CHARLES RIVER ASSOCIATES**

NAME: _____
TITLE: _____

RESPONDENT**JOHNSON & JOHNSON**

Sue Hanna

NAME: _____
TITLE: *Assistant General Counsel*

Decision and Order

NON-PUBLIC APPENDIX A-1

MONITOR COMPENSATION

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Synthes, Inc. (“Synthes”) by Johnson & Johnson (“Respondent J&J”), and Respondent J&J having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent J&J 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; and

Respondent J&J, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent J&J of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent J&J that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent J&J has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its

Decision and Order

Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”).

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters address located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent J&J, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “J&J” means Johnson & Johnson, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Johnson & Johnson (including DePuy Orthopaedics, Inc., and Synthes, Inc. after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Synthes” means Synthes, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 1302 Wrights Lane East, West Chester, PA 19380.

Decision and Order

- C. “Commission” means the Federal Trade Commission.
- D. “Biomet” means Biomet, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its headquarters address located at 56 East Bell Drive, Warsaw, IN 46581-0587.
- E. “Acquisition” means Respondent J&J’s acquisition of Synthes.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.
- G. “Acquirer” means:
1. an entity that is specifically identified in this Order to acquire particular assets that Respondent J&J is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 2. an entity that receives the prior approval of the Commission to acquire particular assets that Respondent J&J is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- H. “Cloned Form” means a program (*e.g.*, an operating system or an application program) that has functions and behavior identical to another program but that does not contain source code from that program. The Cloned Form of the software will include a fully paid-up licenses or sub-licenses to the appropriate licenses that come with the software.
- I. “Confidential Business Information” means competitively sensitive, proprietary, and all other information, solely Relating To the DVR Business,

Decision and Order

that is not in the public domain, and includes, but is not limited to, information Relating To the research, Development, manufacturing, marketing, or sale of the DVR, including the terms of the Remedial Agreement, all customer lists, price lists, contracts, cost information, technologies, processes, or other trade secrets Related To the DVR and the DVR Business. *Provided, however,* that “Confidential Business Information” shall not include (1) information that subsequently falls within the public domain through no violation of this Order or of any confidentiality agreement with respect to such information by Respondent J&J or (2) information that Synthes can demonstrate it lawfully obtained without the assistance of Respondent J&J prior to the Acquisition Date.

- J. “Designated Employee” means a Person or Person filling the job description (if the Person listed is no longer employed at that particular job) listed on Non-Public Appendix B to this Order.
- K. “Development” means all preclinical and clinical device development activities, including test method development and stability testing, 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 DVR (including any governmental price or reimbursement approvals), and regulatory affairs activities Related To the foregoing. “Develop” means to engage in Development.
- L. “Distributor” means:
 - 1. any current independent distributor of DVR in the United States, or

Decision and Order

2. an independent distributor that may become or becomes a distributor of DVR in the United States by virtue of interviewing and hiring a Designated Employee.
- M. “DVR” means the DVR[®] Anatomic Volar Plating System owned by Respondent J&J prior to the Effective Date including, but not limited to, the plates, screws, pegs, case, and the instruments, tools, or products used in connection with the implantation of the plates, screws, and pegs.
- N. “DVR Business” means all of Respondent J&J’s assets, tangible and intangible, businesses and goodwill, Related To the research, Development, manufacture, distribution, marketing or sale of DVR in the United States including, without limitation, the following:
1. all DVR Intellectual Property;
 2. all DVR manufacturing technology;
 3. all rights to the name Hand Innovations, and all trademarks, trade names, and logos Related To Hand Innovations;
 4. all instruments, tools, or products used in connection with the implantation of or otherwise Related To the DVR;
 5. all DVR scientific and regulatory material;
 6. all DVR manufacturing equipment, to the extent owned by Respondent J&J;
 7. to the extent Related To the DVR, all of Respondent J&J’s rights, titles and interests in, and to, the contracts entered into in the ordinary course of business with customers, suppliers, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees, in

Decision and Order

each case that are Third Parties, including, without limitation, all of Respondent J&J's contracts with any Third Party to the extent Related To the supply of components used in the manufacture of the DVR; *Provided, however,* that Respondent J&J's contracts with its Distributors are excluded.

8. all inventory, including raw materials, packaging materials, work-in-process and finished goods, in each case to the extent consisting of, or intended for use in the manufacture of, the DVR;
9. all commitments and orders for the purchase of goods that have not been shipped, to the extent such goods are, or are intended for use in the manufacture of, the DVR;
10. all rights under warranties and guarantees, express or implied, with respect to the DVR;
11. all items of prepaid expenses, to the extent Related To the DVR; and
12. all books, records and files Related To the foregoing, or to the DVR.

Provided, however, that "DVR Business" does not include any portion of any of the foregoing assets, businesses and goodwill that does not Relate To the DVR;

Provided further, however, that "DVR Business" does not include assets or groups of assets specifically excluded, and listed at Schedule 2.02(b) of the J&J/Biomet Divestiture Agreement;

Provided further, however, that except as provided to the Acquirer for transition purposes, or as part of the Remedial Agreement, or otherwise provided for in this Order, "DVR Business" shall not include any of the following: (a) (i) the name "Johnson & Johnson" or "J&J," or the names of any other divisions,

Decision and Order

businesses, corporations or companies owned by Respondent J&J, including “DePuy,” “DePuy Orthopaedics,” and “DePuy Trauma,” or (ii) any Trademarks or Trade Dress used on Respondent J&J’s products other than DVR; (b) any interest in real property; or (c) any personal property.

- O. “DVR Intellectual Property” means all of the following Related To DVR:
1. all Respondent J&J intellectual property used in the Development, manufacturing, storage, distribution and sale of DVR including, but not limited to:
 - a. DVR Manufacturing Copyrights;
 - b. Software;
 - c. computer programs;
 - d. Patents including, but not limited to, the right to obtain and file for Patents and DVR Sales Copyrights, and DVR Manufacturing Copyrights, and registrations thereof;
 - e. licenses including, but not limited to, licenses to third-party Software if transferable and sub-licenses to Software modified by Respondent J&J;
 - f. know-how (including, but not limited to, flow sheets, process and instrumentation), diagrams, risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications), drawings, utility models, designs, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions;

Decision and Order

- g. technical information (including, but not limited to, material and final product specifications);
 - h. protocols (including, but not limited to, operational manuals);
 - i. quality control information and methods, and other confidential or proprietary technical, business, Development and other information;
 - j. trade secrets; and
 - k. all rights to limit the use or disclosure thereof of Trade Dress, and the modifications or improvements to such intellectual property; and
 - 2. subject to any mutually agreed covenant not to sue between Respondent J&J and Acquirer, rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.
- P. “DVR Manufacturing Copyrights” means copyrights in all process development data and reports Relating To the research and development of the DVR, or of any materials used in the research, Development, manufacture, manufacturing records, manufacturing processes, and supplier lists of or for the DVR; all copyrights in data contained in laboratory notebooks Relating To the DVR; all copyrights in analytical and quality control data Relating To the DVR; and all correspondence with governmental agencies Relating To the foregoing.
- Q. “DVR Sales Copyrights” means rights to all original works of authorship of any kind directly Related To the sale of the DVR, and any registrations and applications for registrations thereof, including, but not limited to, all such rights with respect to:

Decision and Order

1. all promotional, marketing, sales, and advertising materials, educational and training materials for the sales force, and sales forecasting models;
 2. marketing or sale of the DVR including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all such rights with respect to customer information; and
 3. records, including customer lists, sales force call activity reports, vendor lists, and sales data.
- R. “Effective Date” means the date on which the divestitures, licensing, and assignments pursuant to Paragraph II or Paragraph VI of this Order, are consummated.
- S. “Girardet Facility” means that portion of the facility and offices located at Rue de Girardet 29, 2400 Le Locle, Switzerland, that is Related To the DVR Business consisting of, among other things, office, manufacturing, production, and packaging space for the DVR Business.
- T. “J&J/Biomet Divestiture Agreement” means the asset purchase agreement, together with all licenses, assignments, and other agreements entered into by Respondent J&J and Biomet for the sale of the DVR Business, and all other agreements, leases, transfers, and licenses required by this Order. The J&J/Biomet Divestiture Agreement is attached as Confidential Exhibit A to this Order.
- U. “Miami Facility” means that portion of the facility and offices located at 6303 Blue Lagoon Drive, Miami, FL, that is Related to the DVR Business consisting of,

Decision and Order

among other things, office, and research and development space for the DVR Business.

- V. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, 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.
- W. “Person” means any natural person, partnership, corporation, association, trust, joint venture, limited liability company, government, government agency, division, or department, or other business or legal entity.
- X. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- Y. “Remedial Agreement” means the following:
1. the J&J/Biomet Divestiture Agreement if such agreement has not been rejected by the Commission pursuant to Paragraph II of this Order; and
 2. any agreement between Respondent J&J and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, Related To the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by

Decision and Order

the Commission to accomplish the requirements of this Order.

- Z. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- AA. “Third Party(ies)” means any Person other than Respondent J&J, Synthes, or the Acquirer.
- BB. “Trade Dress” means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.
- CC. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights therein, and the goodwill symbolized thereby and associated therewith.
- DD. “United States” means United States of America.
- EE. “Wrist Plating System” means:
1. any plating system or implantable device used to achieve the reduction and/or fixation of any fracture of the distal portion of the radius bone; and
 2. any instruments, tools, or products used in connection with the implantation of or otherwise Related To such system or device.
- FF. “Wrist Plating System Business” means any and all assets, tangible and intangible, businesses and goodwill, Related To the research, Development, manufacture, distribution, marketing or sale of a Wrist Plating System.

Decision and Order

II. (Divestiture)**IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondent J&J shall divest the DVR Business absolutely and in good faith, to Biomet, pursuant to, and in accordance with, the J&J/Biomet Divestiture Agreement. The J&J/Biomet Divestiture Agreement (which shall include, among other things, the asset purchase agreement, a transition services agreement, the lease to or assignment of a lease to the Miami Facility and the Giradet Facility, and licenses between Respondent J&J and Biomet) shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Biomet, or to reduce any obligations of Respondent J&J under such agreements, and such agreements, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, that with respect to documents or other materials included in the DVR Business that contain information (a) that Relates To both the DVR and to other products or businesses of Respondent J&J, or (b) for which Respondent J&J has a legal obligation to retain the original copies, Respondent J&J shall be required to divest to the Acquirer only copies or, at its option, relevant excerpts of such documents and materials, but Respondent J&J shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondent J&J not be required to divest itself completely of records or information that relates to products or businesses other than the DVR;

Provided further, however, that with respect to any contract or agreement included in the DVR Business that relates both to the DVR and to any other product, Respondent J&J may, concurrently with assigning

Decision and Order

such contract or agreement to the extent it relates to the DVR, retain its rights under such contract or agreement for purposes of such other product(s).

Provided further, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent J&J that Biomet is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent J&J shall immediately notify Biomet of the notice received from the Commission and shall as soon as practicable effect the rescission of the J&J/Biomet Divestiture Agreement; and (2) Respondent J&J shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the DVR Business, enter into manufacturing and distribution agreements, assign or extend rights and obligations under customer contracts, and divest any other assets or enter into any other relief required to satisfy the purposes of this Order, absolutely and in good faith, at no minimum price, to or with an Acquirer, that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission;

Provided further, however, that if Respondent J&J has complied with the terms of Paragraphs II.A. and II.B. before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent J&J that the manner in which the divestiture and assignments were accomplished is not acceptable, the Commission may direct Respondent J&J, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture and assignments including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Effective Date, Respondent J&J shall secure all consents, assignments, and waivers from all Third Parties, other than the FDA, that are Related To the DVR Business including securing a lease for the

Decision and Order

Miami Facility and the Girardet Facility, if such facilities are being leased to the Acquirer, and securing consents from all customers of the DVR Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A.

Provided, however, Respondent J&J may satisfy this requirement with respect to any one or more leases or agreements by certifying that the Acquirer has executed such relevant agreements directly with each of the relevant Third Parties.

Provided, further, however, Respondent J&J shall not be required to obtain consents necessary to assign contracts from customers that, in the aggregate, represented less than five percent (5%) of Respondent J&J's United States DVR sales for calendar year 2011.

- C. Respondent J&J shall include, as part of a Remedial Agreement, any transition services agreement by which Respondent J&J contemplates providing services or assistance it will provide the Acquirer. Such transition services agreement shall include, but not be limited to:
1. the scope of services, term, and prices or costs for such services; and
 2. the option for the Acquirer to terminate a particular service in the United States:
 - a. at any time, with prior notice not greater than thirty (30) days, without penalty or payment for the remainder of the original service period; and
 - b. without automatically terminating, or incurring a penalty or additional cost for continuing, that particular service in another part of the world.
- D. Within ninety (90) days of the Effective Date, Respondent J&J shall transfer a Cloned Form of the

Decision and Order

TeamCenter, Agile, and EtQ software programs, together with all data belonging to the Acquirer, and resident on such programs, current as of such transfer date, in a manner that provides the Acquirer independent access to and control over such Cloned Form software programs.

- E. As of the Effective Date, Respondent J&J shall grant to the Acquirer direct access to data belonging to the Acquirer and resident on the TeamCenter, Agile, and EtQ software programs, pursuant to the Remedial Agreement and subject to non-disclosure agreements, until such time as the Acquirer notifies Respondent J&J and the Monitor that the Acquirer has validated the Cloned Form of the software programs with data belonging to the Acquirer, current as of the last transaction executed on Respondent J&J's versions of the TeamCenter, Agile, and EtQ software programs. Respondent J&J shall assist the Acquirer, as is reasonably necessary, to complete the validation process expeditiously.
- F. Any Remedial Agreement that has been approved by the Commission between Respondent J&J (or a Divestiture Trustee) and a Commission-approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent J&J to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- G. Respondent J&J unilaterally shall not terminate any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without:
1. prior approval of the Commission;
 2. the written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or
 3. in the case of a proposed unilateral termination by Respondent J&J due to an alleged breach of an

Decision and Order

agreement by the Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall be given only after the parties have:

- a. attempted to settle the dispute between themselves, and
 - b. either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.
- H. The purposes of this Paragraph II of the Order are: (1) to ensure that the Acquirer will have the intention and ability to produce and sell the DVR independently of Respondent J&J; and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III. (Asset Maintenance)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement or as expressly allowed pursuant to this Order, Respondent J&J shall not, and shall instruct its Distributors not to, interfere, directly or indirectly, with the DVR Business of the Acquirer.

Provided however, that unless otherwise prohibited by the Order, nothing in this Paragraph III.A. shall prevent (a) Respondent J&J or its Distributors (i) from competing for contracts or for the business of suppliers, distributors, resellers, or customers; or (ii) from engaging in competition for the research, development, manufacture, marketing and sales of Wrist Plating Systems; and (b) Respondent J&J from using its Distributors for selling products other than DVR.

Decision and Order

- B. During the time period before the Effective Date, Respondent J&J shall, except as otherwise provided in the Order:
1. take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear. Respondent J&J shall not sell, transfer, encumber or otherwise impair the DVR Business (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability or competitiveness of the DVR Business including, but not limited to, hiring or offering to hire any Designated Employees;
 2. retain all of Respondent J&J's rights, title, and interest in the DVR Business, except for the disposition of inventory in the regular and ordinary course of business, consistent with past practices;
 3. maintain the operations of the DVR Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the DVR Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the DVR Business; Respondent J&J's responsibilities shall include, but are not limited to, the following:
 - a. Respondent J&J shall provide the DVR Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such

Decision and Order

business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the DVR Business;

- b. Respondent J&J shall continue, at least at their scheduled pace, any additional expenditures for the DVR Business authorized prior to the date the Consent Agreement was signed by Respondent J&J including, but not limited to, all research, Development, manufacture, distribution, marketing and sales expenditures;
- c. Respondent J&J shall provide such resources as may be necessary to respond to competition against the DVR Business and/or to prevent any diminution in sales of the DVR Business after the Acquisition Date and prior to the Effective Date;
- d. Respondent J&J shall provide such resources as may be necessary to maintain the competitive strength and positioning of the DVR Business in a business-as-usual manner and/or in accordance with the applicable DVR Business plan;
- e. Respondent J&J shall make available for use by the DVR Business funds in a business-as-usual manner and/or in accordance with the applicable DVR Business plan sufficient to perform all routine maintenance or replacement, and all other maintenance or replacement of assets as may be necessary to maintain the DVR Business;
- f. Respondent J&J shall provide the DVR Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the DVR Business; and

Decision and Order

- g. Respondent J&J shall provide such support services to the DVR Business as were being provided to such business by Respondent J&J as of the date the Consent Agreement was signed by Respondent J&J.
 4. maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date including, but not limited to, instructing Respondent J&J's Distributors to maintain a work force substantially as large as, and with equivalent or better training and expertise to, what was associated with the DVR Business as of the Acquisition Date.
 5. develop, sell, and manufacture the DVR consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the DVR Business pending divestiture.
- C. The purpose of this Paragraph III is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

IV. (Confidentiality)**IT IS FURTHER ORDERED** that:

- A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to this Order:
 1. Respondent J&J shall not use, provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any

Decision and Order

Person. Among other things, Respondent J&J shall not use such Confidential Business Information:

- a. to assist or inform Respondent J&J employees who Develop, manufacture, solicit for sale, sell, or service Respondent J&J products that compete with the products divested, sold, or distributed pursuant to this Order including, but not limited to, the employees of the Wrist Plating System Business owned and operated by Synthes;
 - b. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
 - c. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to this Order; or
 - d. to interfere in any other way with the Acquirer pursuant to this Order or with the DVR Business divested pursuant to this Order.
2. Respondent J&J shall not disclose or convey Confidential Business Information, directly or indirectly, to any person except the Acquirer or other persons specifically authorized by the Acquirer to receive such information;
 3. Respondent J&J shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Synthes Wrist Plating System Business; and
 4. Respondent J&J shall institute procedures and requirements to ensure that:
 - a. Respondent J&J employees with access to Confidential Business Information do not provide, disclose or otherwise make available, directly or indirectly, any Confidential

Decision and Order

Business Information in contravention of this Order; and

- b. Respondent J&J employees associated with the Synthes Wrist Plating System do not solicit, access or use any Confidential Business Information that they are prohibited under this Order from receiving for any reason or purpose.
- B. The requirements of this Paragraph IV do not apply to Confidential Business Information that Respondent J&J demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent J&J;
 2. is necessary to be included in mandatory regulatory filings; *Provided, however,* that Respondent J&J shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 3. was available, or becomes available, to Respondent J&J on a non-confidential basis, but only if, to the knowledge of Respondent J&J, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 4. is information the disclosure of which is consented to by the Acquirer;
 5. is necessary to be exchanged in the course of consummating the Acquisition or the transactions under the Remedial Agreement;
 6. is disclosed in complying with this Order;

Decision and Order

7. is information the disclosure of which is necessary to allow Respondent J&J to comply with the requirements and obligations of the laws of the United States and other countries;
 8. is disclosed in defending legal claims, investigations or enforcement actions threatened or brought against Respondent J&J or the DVR Business; or
 9. is disclosed in obtaining legal advice.
- C. The purpose of this Paragraph IV is to maintain the full economic viability, marketability and competitiveness of the DVR Business until the Effective Date, to minimize any risk of loss of competitive potential for the DVR Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the DVR Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the DVR Business, except for ordinary wear and tear.

V. (Monitor)**IT IS FURTHER ORDERED** that:

- A. Charles River Associates shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent J&J and attached as Exhibit C (“Monitor Agreement”) and Confidential Exhibit C-1 (“Monitor Compensation”). The Monitor is appointed to assure that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent J&J transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities,

Decision and Order

pursuant to this Order and the Order to Maintain Assets, and consistent with the purposes of this Order.

- C. No later than one (1) day after the Acquisition Date, Respondent J&J shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to and consistent with, the purposes of this Order.
- D. Respondent J&J 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 J&J's compliance with the terms 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 Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent J&J expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent J&J and the Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent J&J's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent J&J's compliance with its obligations under the Order.

Decision and Order

Respondent J&J 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 J&J's compliance with the Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent J&J on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent J&J, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent J&J 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, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent J&J of its obligations under the Order.
7. Respondent J&J may require the Monitor and each of the Monitor's consultants, accountants,

Decision and Order

attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *Provided, however,* such agreement shall not restrict the Monitor from providing any information to the Commission.

- E. 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 relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. 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 J&J, which consent shall not be unreasonably withheld. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent J&J of the identity of any proposed Monitor, Respondent J&J shall be deemed to have consented to the selection of the proposed Monitor.
 - 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent J&J shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent J&J's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. 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 Order.

Decision and Order

- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

VI. (Divestiture Trustee)**IT IS FURTHER ORDERED** that:

- A. If Respondent J&J has not fully complied with the obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the DVR Business, and enter any other agreements, assignments, and licenses, 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 J&J shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraph II. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI 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 Respondent J&J to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent J&J, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent J&J has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent J&J of the

Decision and Order

identity of any proposed Divestiture Trustee, Respondent J&J shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent J&J 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 effectuate the divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent J&J 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 the DVR Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the DVR Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receive the prior approval of the Commission and in a manner that receives 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 believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *Provided, however,* the Commission may extend the divestiture period only two (2) times.

Decision and Order

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 divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent J&J shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent J&J shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent J&J shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission.
4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent J&J's 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 for assets and businesses to be divested pursuant to Paragraph II, 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 J&J from among those approved by the Commission;

Provided further, however, that Respondent J&J shall select such entity within five (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

Decision and Order

Respondent J&J, 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 J&J, 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 J&J, 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 J&J 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, malfeasance, 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.

Decision and Order

8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
 9. The Divestiture Trustee shall report in writing to Respondent J&J and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 10. Respondent J&J 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.
 11. 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 relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. 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 VI.
- F. 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 obligations under Paragraph II of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person

Decision and Order

appointed as the Monitor pursuant to Paragraph V of this Order, and the Order to Maintain Assets.

VII. (Employees)**IT IS FURTHER ORDERED** that:

- A. Beginning no later than the time Respondent J&J signs the Consent Agreement in this matter until ninety (90) days after the Effective Date:
1. Respondent J&J shall provide, and Respondent J&J shall instruct Respondent J&J's Distributors to provide, the applicable Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent J&J and Respondent J&J's Distributors, as applicable, until the Designated Employee has been hired, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to transition the DVR Business to the Acquirer;
 2. Respondent J&J shall not, and shall instruct its Distributors not to, interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer or the Acquirer's Distributors as described in this Order, and shall remove any impediments within the control of Respondent J&J, and instruct Respondent J&J's Distributors to remove such impediments, that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer or the Acquirer's Distributors including, but not limited to, any noncompete provisions of employment or other contracts with Respondent J&J or Respondent J&J Distributor that would

Decision and Order

affect the ability or incentive of those individuals to be employed by the Acquirer or the Acquirer's Distributors. In addition, Respondent J&J shall not make any counteroffer to a Designated Employee, and shall instruct Respondent J&J's Distributor that employs such Designated Employee not to make any counteroffer to a Designated Employee, who receives a written offer of employment from the Acquirer or the Acquirer's Distributors, unless and until the Designated Employee has declined, in writing, the Acquirer's or Acquirer's Distributor's offer.

3. Respondent J&J shall, or where applicable, Respondent J&J shall instruct its Distributors, in a manner consistent with local labor laws:
 - a. to facilitate employment interviews between each Designated Employee and the Acquirer or the Acquirer's Distributors, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer or the Acquirer's Distributors and shall not discourage such employee from participating in such interviews;
 - b. to not interfere in employment negotiations between each Designated Employee and the Acquirer or the Acquirer's Distributors;
 - c. with respect to each Designated Employee who receives an offer of employment from the Acquirer or the Acquirer's Distributors:
 - i. not to prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer or the Acquirer's Distributors, and shall not offer any incentive to the Designated Employee to

Decision and Order

decline employment with the Acquirer or the Acquirer's Distributors including, but not limited to, the Acquirer or the Acquirer's Distributor offering to hire the Designated Employee;

- ii. to cooperate with the Acquirer or the Acquirer's Distributors in effecting transfer of the Designated Employee to the employ of the Acquirer or the Acquirer's Distributors, if the Designated Employee accepts an offer of employment from the Acquirer or the Acquirer's Distributors;
- iii. to eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer or the Acquirer's Distributors any information Relating To the manufacture and sale of the DVR; and
- iv. unless alternative arrangements are agreed upon with the Acquirer or the Acquirer's Distributors, to retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer or the Acquirer's Distributors including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits.

Provided, however, that subject to the conditions of continued employment prescribed in this Order, this Paragraph VII.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer or the Acquirer's Distributor to such employee.

Provided, further, however, that subject to the conditions of continued employment prescribed in this

Decision and Order

Order, this Paragraph VII.A. shall not prohibit Respondent J&J or Respondent J&J's Distributors from enforcing, or requiring as a condition of accepting employment with the Acquirer or the Acquirer's Distributors, an eighteen (18) month non-compete Related To products not divested pursuant to the Remedial Agreement.

- B. Respondent J&J shall not, and Respondent J&J shall instruct its Distributors not to, for a period of two (2) years following the Effective Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Designated Employee, who is employed by the Acquirer or the Acquirer's Distributors, to terminate his or her employment relationship with the Acquirer or the Acquirer's Distributors.

Provided, however, Respondent J&J, Respondent J&J's Distributors, or recruiters retained by Respondent J&J or Respondent J&J's Distributors, may place general advertisements for or conduct general searches for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's or the Acquirer's Distributors' employees;

Provided further, however, Respondent J&J may hire Designated Employees who apply for employment with Respondent J&J as long as such employees were not solicited by Respondent J&J in violation of this Paragraph.

VIII. (Prior Notice)

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Respondent J&J shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII, directly or indirectly, acquire:

- A. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces,

Decision and Order

designs, manufactures, or sells Wrist Plating Systems in or into the United States; or

- B. any business, whether by asset purchase or otherwise, that engages in or engaged in, at any time after the Acquisition, or during the six (6) month period prior to the Acquisition, the design, manufacture, production, or sale of Wrist Plating Systems in or into the United States.

Said 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 (herein referred to as “the Notification”), 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 Respondent J&J and not of any other party to the transaction. Respondent J&J shall provide the Notification to the Commission at least thirty 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), Respondent J&J shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph 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.

Provided, further, however, that prior notification shall not be required by this Paragraph VIII for any acquisition (1) after which Respondent J&J would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VIII, or (2) where the Person or assets

Decision and Order

being acquired generated less than \$5 million in United States Wrist Plating System revenues in the most recent completed calendar year.

IX. (Compliance Reports)**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent J&J has fully complied with Paragraphs II.A., II.B., II.C., III.B., and VII.A. of this Order, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent J&J shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent J&J shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations Related To the divestiture of the relevant assets and the identity of all parties contacted. Respondent J&J shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent J&J shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent J&J shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to

Decision and Order

comply with the Order and copies of all written communications to and from all persons Relating To this Order. Additionally, Respondent J&J shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph VIII. Respondent J&J shall include a description of such acquisitions.

X. (Reorganization)

IT IS FURTHER ORDERED that Respondent J&J shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of such Respondent;
- B. acquisition, merger or consolidation of Respondent; or
- C. any other change in the Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XI. (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 (5) days notice to Respondent J&J, Respondent J&J shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent J&J 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 Respondent J&J Relating To compliance with this Order, which copying services shall be provided by Respondent J&J at its expense; and

Decision and Order

- B. to interview officers, directors, or employees of Respondent J&J, who may have counsel present, regarding such matters.

XII. (Termination)

IT IS FURTHER ORDERED that this Order shall terminate on August 7, 2022.

By the Commission.

CONFIDENTIAL EXHIBIT A**J&J/BIOMET DIVESTITURE AGREEMENT**

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

CONFIDENTIAL EXHIBIT B**DESIGNATED EMPLOYEES**

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

Decision and Order

EXHIBIT C**MONITOR AGREEMENT**

This Monitor Agreement (this "Agreement"), entered into this 24th day of May, 2012, by and between Johnson & Johnson ("Respondent") and Charles River Associates ("Monitor"), (collectively the "Parties"), provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in In the Matter of Johnson & Johnson, 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 its DVR Business, 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 issue 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: (a) monitoring Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders; and (b) supervising the performance of any transition services required by the Orders.

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, to include those employees designated to be transferred to an Acquirer, 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,

Decision and Order

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) days after the date on which Respondent files such report with the Commission.

1.4 Monitor's Obligations. Monitor shall:

(a) carry out the Monitor's duties and responsibilities, including submission of periodic reports, and such additional written reports as may be requested by the Commission staff, to the Commission staff regarding Respondent's compliance with the Orders;

(b) maintain the confidentiality of all confidential information, including Confidential Business Information as defined in the Orders, and any other information provided to the Monitor by the Respondent, the Acquirer of the DVR Business, any supplier or customer of Respondent or the DVR Business, 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 under this Agreement; or (ii) persons employed at the Commission;

(c) 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;

(d) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information related to this Agreement has been disclosed;

(e) for a period of five (5) 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, including Confidential Business Information, relating thereto; and

(f) upon the termination of the Monitor's duties under this Agreement, promptly destroy all written and electronic materials (both originals and copies) that relate to the performance of the Monitor's responsibilities under this Agreement. CRA may retain archival copies of any such materials for litigation defense purposes, provided that CRA continue to abide by all obligations under the confidentiality provisions herein.

Decision and Order

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.

2.2 Monitor Compensation. Respondent will pay Monitor in accordance with the fee schedule 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 Commission-approved Acquirer of the DVR Business, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent will 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 be liable to indemnify and hold harmless Monitor 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by Monitor.

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.

Decision and Order

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) when Respondent's last obligation under the Orders that pertains to Monitor's service has been fully performed; 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 New York, 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 is 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,

Decision and Order

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

CHARLES RIVER ASSOCIATES


NAME: Gary Roberts
TITLE: Vice President

RESPONDENT

JOHNSON & JOHNSON

NAME: _____
TITLE: _____

Decision and Order

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**CHARLES RIVER ASSOCIATES**

NAME: _____
TITLE: _____

RESPONDENT**JOHNSON & JOHNSON**

Sue Hanna

NAME: _____
TITLE: *Assistant General Counsel*

Analysis to Aid Public Comment

CONFIDENTIAL EXHIBIT C-1

**COMPENSATION PROVISION OF MONITOR
AGREEMENT**

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Johnson & Johnson (“J&J”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from J&J’s acquisition of the volar distal radius plating system assets of Synthes, Inc. (“Synthes”). Under the terms of the proposed Consent Agreement, J&J is required to divest all assets (including intellectual property) related to its “DVR” volar distal radius plating system business to a third party, enabling that third party to make and sell the DVR for the treatment of distal radius wrist fractures.

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

Pursuant to an Agreement and Plan of Merger dated April 26, 2011, J&J proposes to acquire Synthes in exchange for cash and voting securities in a transaction valued at approximately \$21.3

Analysis to Aid Public Comment

billion. 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 combining the two largest competitors in the U.S. market for volar distal radius plating systems. The proposed Consent Agreement would remedy the alleged violations by replacing the competition that otherwise would be lost in these markets as a result of the acquisition.

II. The Parties

J&J is a comprehensive and broad-based manufacturer of products related to all aspects of human health care. In 2011, J&J generated global sales of \$65 billion and U.S. sales of \$28.9 billion. J&J is divided into three business segments: Consumer, Pharmaceutical, and Medical Devices and Diagnostics. The products impacted by the proposed transaction, volar distal radius plating systems, fall within J&J's Medical Devices and Diagnostics segment.

Synthes is a medical device company that manufactures products in five main product groups: trauma, spine, cranio-maxillofacial, biomaterials, and power tools. In 2011, Synthes generated global sales of \$3.97 billion worldwide and U.S. sales of \$2.14 billion. Synthes's volar distal radius plating system sales are part of its trauma unit.

III. Volar Distal Radius Plating Systems

Volar distal radius plates are internal fixation devices that are implanted surgically from the underside of the wrist to achieve and maintain proper alignment of the radius bone following a fracture. Distal radius fractures, which are fractures of the portion of the radius bone closest to the wrist, are among the most common fractures in the human body. Distal radius fractures generally occur as a result of an individual bracing for a fall, whether it is a routine slip and fall by an elderly patient with a weak bone structure or a high-energy fall by a young, active patient engaged in sporting activities.

Analysis to Aid Public Comment

Most patients who experience distal radius fractures do not require surgical intervention and can be treated with simple casting. If the radius bone is displaced, however, it is almost always necessary to realign the fracture surgically. Volar distal radius plating systems are the primary option for treating displaced distal radius fractures in the United States. They are favored by surgeons because they provide solid fracture alignment, are easy to implant, and enable greater patient post-surgical freedom of movement and shorter patient recovery times. Other options exist to treat displaced distal radius fractures, such as external fixation, pinning, dorsal distal radius plating, and intramedullary nails, but those alternative methods are typically used only in specialized cases. For the large percentage of displaced distal radius fractures, the clinical benefits of volar distal radius plating systems cannot be matched by the alternative products available on the market, and doctors and their patients would not switch to using products other than volar distal radius plating systems in response to a small but significant increase in the price of these systems.

The U.S. market for volar distal radius plating systems is highly concentrated, with J&J and Synthes controlling over 70 percent of the market as measured by 2010 revenue. J&J acquired its volar distal radius plating system, the “DVR,” from Hand Innovations in 2006. The DVR was among the first anatomically contoured volar distal radius plating system. The design of the DVR incorporates unique, clinically relevant features that are protected by intellectual property rights. Many surgeons still consider the DVR to be the best volar distal radius plating system on the market, and it accounted for approximately 29 percent of U.S. volar distal radius sales in 2010. Synthes is the leading manufacturer of volar distal radius plating systems in the United States, and accounted for approximately 42 percent of the market by 2010 revenue. Synthes’s success selling distal radius plating systems derives in part from its leading position and strong clinical reputation in the overall trauma field. The next closest competitors to J&J and Synthes – Stryker and Acumed – would each be less than one-sixth the size of the combined firm.

The relevant geographic market for volar distal radius plating systems is the United States. Volar distal radius plating systems

Analysis to Aid Public Comment

are medical devices that are regulated by the United States Food and Drug Administration (“FDA”). Volar distal radius plating systems sold outside the United States, but not approved for sale in the United States, are not viable competitive alternatives for U.S. consumers and hence are not in the relevant market.

IV. Competitive Effects and Entry Conditions

The acquisition would cause significant competitive harm in the market for volar distal radius plating systems. J&J and Synthes are the leading suppliers of volar distal radius plating systems and each other’s most significant competitors. J&J and Synthes have responded directly to competition from each other with lower prices and improved products. Although there are a number of other suppliers of volar distal radius plates, they have not gained significant traction among surgeons and have substantially smaller market shares than the merging parties. By eliminating its closest competitor, the acquisition would allow J&J to unilaterally raise prices in the market for volar distal radius plating systems.

Entry would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Both J&J and Synthes employ patented technology in their volar distal radius plating systems. The patents owned by the two companies have prevented limited competitors from developing products that surgeons consider to be equally effective. Manufacturer product reputation and effective distributionpresence also are important to play a strong role insurgeons and hospitals preferences. Many fringe competitors are limited by their lack of a strong distribution systempresence, and it would take a significant amount of time for one or more current fringe competitors to develop a sufficient reputation for quality, service, and consistency that rivals that of J&J and Synthes in volar distal radius plating. Therefore, timely and sufficient entry in response to a small but significant price increase is unlikely.

V. The Proposed Consent Agreement

The proposed Decision and Order resolves the competitive concerns raised by J&J’s proposed acquisition of Synthes by

Analysis to Aid Public Comment

requiring the divestiture of J&J's U.S. DVR assets to a qualified buyer no later than ten (10) days after the acquisition is consummated. The parties have selected Biomet, Inc. ("Biomet") as the buyer for the assets to be divested. Although the Commission's competitive concerns are limited to the manufacture and sale of volar distal radius plating systems, the parties elected to divest the entire J&J trauma portfolio, including the volar distal radius plating systems, to Biomet. Biomet is a successful orthopedics company with a recognized brand name, an extensive nationwide sales force, and existing service relationships with surgeons and hospitals, but it currently has no meaningful presence in the volar distal radius plating or trauma product markets. Biomet is thus well positioned to replace the competition that will be eliminated as a result of the proposed transaction. A divestiture of J&J's volar distal radius assets will ensure that Biomet has a recognized high-quality volar distal radius plating system offering, enabling it to compete immediately with the merged entity.

The Commission's merger remedies are intended to maintain or to restore the competitive *status quo*. Based on the evidence gathered in the investigation, the Commission has determined that the divestiture of J&J's volar distal radius plating system assets to Biomet should replicate the competitive conditions for volar distal radius plating systems that existed prior to the proposed transaction between J&J and Synthes.

The proposed Consent Agreement contains a provision that allows the Commission to appoint an interim monitor to oversee J&J's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order. The interim monitor is required to file periodic reports with the Commission to ensure that the Commission remains informed about the status of the divestitures, about the efforts being made to accomplish the divestitures, and about the provision of services and assistance during the transition period to ensure the success of the DVR divestiture.

Finally, the proposed Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the above remedies are not accomplished within the time frames required by the Consent Agreement.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**KONINKLIJKE AHOLD N.V.
AND
SAFeway 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. C-4367; File No. 121 0055
Complaint, August 16, 2012 – Decision, August 16, 2012*

This consent order addresses the \$106 million acquisition by Koninklijke Ahold N.V. of certain assets of Safeway Inc. 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 removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The consent order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's in Newtown to McCaffrey's.

Participants

For the *Commission*: *Jill M. Frumin* and *Michelle M. Yost*.

For the *Respondents*: *Douglas M. Jasinski* and *George Paul, White & Case LLP*; *Richard Weisberg, Law Offices of Richard C. Weisberg*.

COMPLAINT

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 (“Commission”), having reason to believe that Respondent Koninklijke Ahold N.V. (“Ahold”), a corporation, and Respondent Safeway Inc. (“Safeway”), a corporation, all subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Ahold acquired certain assets of Safeway, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that

Complaint

a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM.

2. Respondent Safeway is 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 5918 Stoneridge Mall Road, Pleasanton, California 94588. Respondent Safeway operates supermarkets under a number of different banners, including Genuardi's.

II. JURISDICTION

3. Respondent Ahold 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.

4. Respondent Safeway 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. THE PROPOSED ACQUISITION

5. On or about January 4, 2012, Respondents Ahold and Safeway entered into an agreement pursuant to which Ahold would acquire 16 Genuardi's supermarkets owned and operated by Respondent Safeway. The purchase price was approximately \$106 million.

6. Prior to its proposed acquisition, Respondent Ahold owned and operated more than 750 supermarkets in 11 states and the District of Columbia. The Giant Carlisle division of

Complaint

Respondent Ahold operates 49 supermarkets in eastern Pennsylvania, which includes the Philadelphia metropolitan area.

7. Prior to the proposed acquisition, Respondent Safeway owned and operated more than 1,775 supermarkets throughout the United States. Respondent Safeway operated 37 supermarkets in the Philadelphia metropolitan area under the Genuardi's banner.

8. The proposed acquisition would combine two of three retail sellers of food and other grocery products in supermarkets in the Newtown, Pennsylvania, area. Respondent Ahold and Respondent Safeway both own and operate supermarkets in this area and compete and promote their businesses in this area.

IV. THE RELEVANT PRODUCT MARKET

9. The relevant line of commerce in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets.

10. For purposes of this complaint, the term "supermarket" means a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

11. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units or SKUs, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery

Complaint

products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not typically set or change their food and grocery prices in response to prices at other types of stores.

13. Although retail stores other than supermarkets also sell food and grocery products, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, these types of stores do not, individually or collectively, provide sufficient competition to effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small but significant price increase by supermarkets.

V. THE RELEVANT GEOGRAPHIC MARKET

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers’ grocery shopping occurs at stores located very close to where they live.

15. Respondents operate supermarkets under the Giant and Genuardi’s banners within approximately two miles of each other in the Newtown, Pennsylvania area. The primary trade areas of the two stores overlap significantly.

16. The relevant geographic market in which to assess the competitive effects of the acquisition is a roughly three to three-and-a-half mile area surrounding Newtown, which includes Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania. A hypothetical monopolist controlling all

Complaint

supermarkets in this area could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

17. The relevant market is already highly concentrated, and the acquisition will substantially increase concentration, whether measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market post-acquisition. Post-acquisition HHI in the relevant geographic market is 5,017 when measured by total square footage and 5,000 when measured by revenues. The acquisition would increase HHI levels by 1,373 points for square footage and by 1,221 points for revenues. These market concentration levels give rise to a presumption that the acquisition is unlawful in the Newtown, Pennsylvania, geographic market.

18. The acquisition reduces the number of supermarket competitors in the relevant geographic market from three to two.

VII. ENTRY CONDITIONS

19. Entry into the relevant market would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for the supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE ACQUISITION

20. The acquisition, if consummated, may substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic market identified in Paragraph 16 in the following ways, among others:

- a. by eliminating rivalry and competitive initiatives between Respondents Ahold and Safeway;

Decision and Order

- b. by increasing the likelihood that Respondent Ahold will unilaterally exercise market power; or
- c. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining two participants in the relevant market.

21. The ultimate effect of the acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

IX. VIOLATIONS CHARGED

22. The agreement described in Paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixteenth day of August, 2012, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Koninklijke Ahold N.V. (“Ahold”) of certain assets of Safeway Inc. (“Safeway”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to

Decision and Order

present to the Commission for its consideration and which, if issued by the Commission, 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, 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 such Complaint, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Koninklijke Ahold N.V. is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM. Ahold U.S.A., Inc., a subsidiary of Koninklijke Ahold N.V., is 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 1385 Hancock Street, Quincy, MA 02160.
2. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the

Decision and Order

laws of the State of Delaware, with its office and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, CA 94588.

3. 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.**

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

- A. “Ahold” means Koninklijke Ahold N.V, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries (including, but not limited to, Ahold U.S.A. and Giant Food Stores, LLC), divisions, groups, and affiliates controlled by Ahold and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Safeway” means Safeway Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships (including, but not limited to, Genuardi’s Family Markets LP), subsidiaries, divisions, groups, and affiliates controlled by Safeway and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Ahold and Safeway, individually and collectively.
- D. “Acquisition” means Ahold’s acquisition of certain Genuardi’s supermarkets, owned and operated by Safeway, in the greater Philadelphia, PA, area pursuant to the Acquisition Agreement.

Decision and Order

- E. “Acquisition Agreement” means the Asset Purchase Agreement by and among Genuardi’s Family Markets LP, Safeway Inc., and Giant Food Stores, LLC, dated January 4, 2012, together with the Schedules and Exhibits attached thereto, as the same may be amended from time to time in accordance with the terms hereof.
- F. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Genuardi’s Supermarket Assets pursuant to this Order.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Proposed Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Genuardi’s Supermarket Assets, that have been submitted to the Commission for its approval to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the McCaffrey’s Divestiture Agreement.
- H. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.
- I. “Genuardi’s Supermarket” means the Supermarket operated by Genuardi’s Family Markets LP at 2890 South Eagle Road, Newtown, PA 18910, and includes the distribution, marketing, promotion, and sale of all products and services offered at this location.
- J. “Genuardi’s Supermarket Assets” means all Respondents’ rights, title and interest in and to all assets, tangible and intangible, used in, and/or reserved for use in, the Genuardi’s Supermarket, including as follows:
1. Leasehold interest in the premises;
 2. Fixtures and equipment;

Decision and Order

3. Inventory;
4. Permits other than nontransferable permits;
5. Goodwill generated by or associated with the Genuardi's Supermarket;
6. Manufacturers' warranties solely in respect of the fixtures and equipment;
7. Phone and facsimile numbers at the Genuardi's Supermarket;
8. All prepaid expenses that are adjusted pursuant to the Divestiture Agreement; and
9. All property, title, liability, casualty and other insurance proceeds received or receivable under the Acquisition Agreement in connection with the damage or destruction of any of the foregoing assets that would have been included but for such damage or destruction, less the amount paid by Safeway in repairing or replacing such assets prior to the closing.

For the avoidance of doubt, the Genuardi's Supermarket Assets shall include all assets in connection with the Genuardi's Supermarket, as defined herein, that Respondent Ahold acquires from Respondent Safeway pursuant to the Acquisition Agreement; *provided, however*, that the assets shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names.

- K. "McCaffrey's" means a chain of supermarkets organized, existing and doing business under and by virtue of the laws of Pennsylvania and New Jersey, with its offices and principal place of business located at 2200 Cabot Boulevard West, Langhorne, PA 19047-1842.

Decision and Order

- L. “McCaffrey’s Divestiture Agreement” means the Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease made and entered into April 12, 2012, by and between Giant Food Stores, LLC, and an affiliate of McCaffrey’s.
- M. “Newtown, PA,” means Newtown Township, Newtown Borough and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania, as depicted in the map attached to this Order as Appendix II.
- N. “Proposed Acquirer” means any proposed acquirer of the Genuardi’s Supermarket Assets submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, McCaffrey’s.
- O. “Supermarket” means any store that enables consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- P. “Third-Party Consents” means all consents from any person other than the Respondents, including all landlords that are necessary to effectuate the complete transfer to the Commission-approved Acquirer of the Genuardi’s Supermarket Assets.

Decision and Order

II.**IT IS FURTHER ORDERED** that:

- A. Not later than ten (10) days after the date on which the Acquisition is consummated, Respondents shall divest the Genuardi's Supermarket Assets, absolutely and in good faith, as an ongoing business to McCaffrey's, pursuant to and in accordance with the McCaffrey's Divestiture Agreement, which is attached as non-public Appendix I.
- B. *Provided, however,* that if, prior to the date this Order becomes final, Respondents have divested the Genuardi's Supermarket Assets to McCaffrey's pursuant to the McCaffrey's Divestiture Agreement, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. McCaffrey's is not a Commission-approved Acquirer of the Genuardi's Supermarket Assets, then Respondents shall:
 - a. immediately rescind the transaction with McCaffrey's, and
 - b. divest the Genuardi's Supermarket Assets absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, and otherwise comply with the obligations of Paragraph II, no later than sixty (60) days from the date the Commission notifies Respondents that McCaffrey's is not a Commission-approved Acquirer; or
 2. The manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III. of

Decision and Order

this Order, to effect such modifications to the manner of divesting the Genuardi's Supermarket Assets to McCaffrey's (including, but not limited to, entering into additional agreements or arrangements, or modifying the McCaffrey's Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

- C. Pending divestiture of the Genuardi's Supermarket Assets, Respondents shall:
1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Genuardi's Supermarket, to minimize any risk of loss of competitive potential for the Genuardi's Supermarket, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Genuardi's Supermarket Assets or the Genuardi's Supermarket, except for ordinary wear and tear; and
 2. Not sell, transfer, encumber, or otherwise impair the Genuardi's Supermarket Assets or the Genuardi's Supermarket (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Genuardi's Supermarket.
- D. The Divestiture Agreement approved by the Commission:
1. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreement; and
 2. Shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply

Decision and Order

with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

- E. Respondents shall obtain all required Third-Party Consents prior to the Acquisition.
- F. With respect to the McCaffrey’s Divestiture Agreement, no later than fifteen (15) days after signing the Consent Agreement (or with respect to a proposed divestiture to another Proposed Acquirer pursuant to another Divestiture Agreement, no later than fifteen (15) days after signing that Divestiture Agreement), Respondents shall provide an opportunity for McCaffrey’s (or that other Proposed Acquirer):
 - 1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the employees of Genuardi’s Supermarket; and
 - 2. To make offers of employment to any one or more of the employees of Genuardi’s Supermarket;
- G. For a period of one (1) year from the date of the divestiture of the Genuardi’s Supermarket Assets to the Commission-approved Acquirer, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of employees of the Genuardi’s Supermarket, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Commission-approved Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect

Decision and Order

the ability or incentive of those individuals to be employed by such Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to any employees who receive a written offer of employment from such Commission-approved Acquirer; *provided, however*, that this sub-Paragraph shall not prohibit Respondents from continuing to employ any employees of Genuardi's Supermarket under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Commission-approved Acquirer to such employee.

- H. The purpose of the divestiture is to ensure the continuation of the Genuardi's Supermarket as an ongoing viable enterprise engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested the Genuardi's Supermarket Assets as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Genuardi's Supermarket Assets in a manner that satisfies the requirements of Paragraphs II. and III. 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,

Decision and Order

pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents 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 ten (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. Within ten (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 transfer required by the Order.
- D. 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.
 - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the

Decision and Order

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 twelve (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; *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. 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 III. 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

Decision and Order

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 five (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 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,

Decision and Order

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 malfeasance, 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 Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 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.
- E. 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 II.
- F. The Commission or, in the case of a court-appointed 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 required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final,

Decision and Order

Respondent Ahold shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Newtown, PA; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in Newtown, PA;

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Ahold or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Ahold's offer to purchase or lease such facility.

Said 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 Respondent Ahold and not of any other party to the transaction. Respondent Ahold shall provide the notification to the Commission at least thirty (30) days prior to consummating any such 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), Respondent Ahold shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph 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

Decision and Order

to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their reports copies of all non- privileged written communications to and from such parties, all non- privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and
- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent Ahold shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondents;

Decision and Order

- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VII.

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 upon five (5) days' notice to Respondents made to their principal United States office, Respondents 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 relating 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 Respondent; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 16, 2022.

By the Commission.

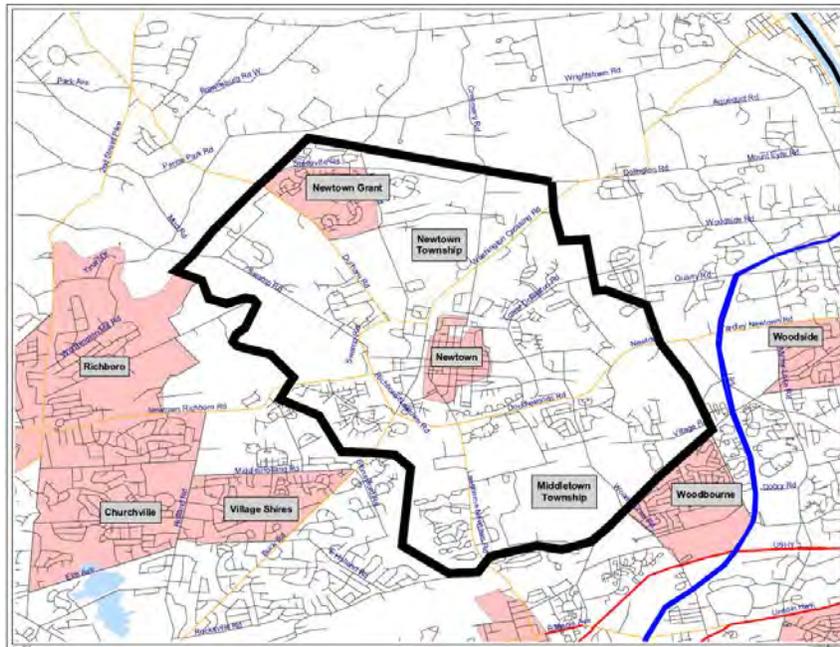
Decision and Order

Confidential Appendix I

[Redacted From the Public Version, But Incorporated By Reference]

Appendix II

[Map of Newtown, Pennsylvania]



Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction and Background**

The Federal Trade Commission (“Commission”) has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Koninklijke Ahold N.V. (“Ahold”), its subsidiary, Giant Food Stores, LLC (“Giant”), Safeway Inc. (“Safeway”), and its subsidiary (“Genuardi’s”) (collectively “Respondents”), that is designed to remedy the anticompetitive effects that otherwise would result from Ahold’s acquisition of certain Genuardi’s supermarkets owned by Safeway. The proposed Consent Agreement requires divestiture of the Genuardi’s supermarket in Newtown, Pennsylvania, and its related assets to a Commission-approved purchaser. The proposed Consent Agreement also requires Ahold and Safeway to divest all related assets and real property necessary to ensure the buyer of the divested supermarket will be able to quickly and fully replicate the competition that would have been eliminated by the acquisition.

The proposed Consent Agreement has been placed 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 again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement, modify it, or make it final without modification.

On January 4, 2012, Ahold and Safeway executed an agreement whereby Ahold would acquire 16 of the Genuardi’s supermarkets from Safeway. 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 removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture that will replace competition that otherwise would be eliminated in this market as a result of the acquisition.

Analysis to Aid Public Comment

II. The Parties

Ahold owns or has an interest in 2,970 supermarkets and specialty stores in Europe and the United States. Net sales for 2010 were \$36.8 billion, which represents a 5.7% increase over 2009. Ahold USA is organized into four retail divisions: Giant Carlisle, Giant Landover, Stop & Shop New York Metro, and Stop & Shop New England. Peapod, a grocery delivery service, also is included within Ahold USA.

Safeway is one of the largest food-and-drug retailers in the United States. It operates over 1,700 stores across the United States under a variety of banners, including Vons in southern California and Nevada, Randalls and Tom Thumb in Texas, Carrs in Alaska, Genuardi's in suburban Philadelphia, and Safeway throughout the rest of the country. There were 36 Genuardi's stores operating in Pennsylvania, New York, and New Jersey when Safeway purchased the chain in February 2001. Safeway is exiting the Philadelphia metropolitan market by selling or closing all 24 remaining Genuardi's markets in eastern Pennsylvania (Bucks, Montgomery, Delaware, and Chester counties), as well as four stores in New Jersey.

III. Supermarket Competition in Newtown, Pennsylvania

Ahold's proposed acquisition of Genuardi's in Newtown presents antitrust concerns in the retail sale of groceries. Competition in food retailing depends on proximity in both retailing format and in geographic location. Stores with similar formats located nearby each other provide a greater competitive constraint on each other's pricing than do stores of different formats or stores located at a greater distance. Giant and Genuardi's have stores in the Newton area, and they have a very similar format.

Giant and Genuardi's compete as supermarket retailers of grocery products. Supermarkets are full-line retail grocery stores that sell thousands of food and non-food products that typical families regularly consume at home (*e.g.*, fresh meat and seafood, dairy products, frozen goods, beverages, bakery goods, dry groceries, soaps, detergents, and health and beauty aids) and offer these products in a variety of sizes and brands. Supermarkets are

Analysis to Aid Public Comment

large stores with at least 10,000 square feet of selling space and 30,000 to 60,000 different items, typically referred to as stock-keeping units or “SKUs.” This broad set of products and services provides a “one-stop shopping” experience for consumers by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is a critical differentiating factor between supermarkets and other food retailers.

Other types of retailers that sell food and grocery items compete less strongly with Giant and Genuardi’s. These others include “mom & pop” stores, convenience stores, specialty food stores, “premium natural and organic” markets,¹ mass merchants, and club stores. Although these types of retailers provide some level of competition to supermarkets, they do not have a supermarket’s full complement of products and services, which means that if customers elect to shop at these retailers, they also must shop at a supermarket in order to satisfy their weekly grocery needs. Because of this, shoppers at one supermarket are more likely to respond to a price increase by switching to another supermarket than to choose a store with a different format, if both are equally convenient.²

To evaluate the effects of the acquisition on market concentration levels, we define the product market to be the retail sale of grocery products in supermarkets, consistent with practice in all but one prior grocery retailing case settled by consent order.³

1 See *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

2 Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets and would be unlikely to switch to one of these retailers in response to a small but significant price increase or “SSNIP” by a hypothetical supermarket monopolist. See U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

3 See, e.g., *Shaw’s/Star Markets*, Docket C- 3934 (June 28, 1999); *Kroger/Fred Meyer*, Docket C - 3917 (January 10, 2000); *Albertson’s/American Stores*, Docket C – 3986 (June 22, 1999); *Ahold/Giant*, Docket C - 3861 (April 5, 1999); *Albertson’s/Buttrey*, Docket C - 3838 (December 8, 1998); *Jitney-Jungle Stores of America, Inc.*, Docket C - 3784 (January 30, 1998). But see *Wal-Mart/Supermercados Amigo*, Docket C - 4066 (November 21, 2002) (the

Analysis to Aid Public Comment

Customers shopping at supermarkets are motivated primarily by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live. Location is a critical component for closeness of competition between supermarkets. Supermarkets are a differentiated products industry with location serving as one of the primary drivers of differentiation and competition. A supermarket tends to be in most direct competition with those supermarkets located closest to it. Giant and Genuardi's are located approximately two miles from each other in the Newtown area, and the supermarkets' primary trade areas overlap significantly with each other. Acme is the only other supermarket operating in this area. The next-closest supermarket is located at least twice as far away as the Newtown supermarkets are to each other.

The relevant geographic market in which to measure concentration and analyze the competitive implications of Ahold's proposed acquisition of the Newtown Genuardi's is a roughly three to three-and-a-half mile circle measured from the center of Newtown and made up of the U.S. census tracts surrounding this area. Specifically, it consists of Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne Yardley Road in Bucks County, Pennsylvania.

The Newtown, Pennsylvania, market for the sale of retail food and groceries in supermarkets is already highly concentrated, and would become significantly more so post-acquisition. The acquisition would reduce the number of supermarket competitors from three to two, creating a duopoly between Giant and Acme Markets. Under the Herfindal-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by

Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

Analysis to Aid Public Comment

more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. Giant's proposed acquisition of the Newtown Genuardi's creates market concentration levels well in excess of these thresholds. The post-acquisition HHI is 5000-5017, representing an increase of between 1221-1373 from pre-acquisition levels.

Staff's investigation and analysis demonstrate that Giant and Genuardi's are close competitors that compete directly for grocery shoppers in Newtown. Because a substantial number of consumers in Newtown consider Giant's and Genuardi's stores to be close substitutes, a post-acquisition price increase at one (or both) of Giant's stores would be profitable because the other Giant-owned supermarket would likely recoup enough of the otherwise lost volume for the price increase to be profitable. Absent relief, the transaction may also facilitate tacit or express coordination since Acme would be Giant's only remaining competitor in Newtown post-acquisition. Given the transparency of pricing and promotional practices between supermarkets and the fact that supermarkets "price check" competitors in the ordinary course of business, reducing the number of nearby competitors from three to two may facilitate collusion between the remaining supermarket competitors by making coordination easier to establish and monitor.

New entry is unlikely to deter or counteract the likely anticompetitive effects of the proposed acquisition. Normally, as here, it takes two or more years for an entrant to secure a viable location, obtain the necessary permits and governmental approvals, build its retail establishment, and open to customers. Moreover, incumbent supermarkets often oppose entry efforts by competitor supermarkets, delaying further any potential entry into the relevant market. It is unlikely that entry sufficient to achieve a significant market impact would occur in a timely manner.

IV. The Proposed Consent Agreement

The proposed remedy, which requires the divestiture of the Genuardi's store in Newtown to a Commission-approved purchaser, will be sufficient to restore fully the competition that otherwise would be eliminated in the market as a result of the acquisition.

Analysis to Aid Public Comment

Respondents Ahold and Genuardi's have agreed to divest the Newtown Genuardi's supermarket to McCaffrey's. McCaffrey's appears to be a highly suitable purchaser, and is well-positioned to enter the relevant market and prevent the increase in market concentration and likely competitive harm that otherwise would have been caused by the acquisition.

All of the current McCaffrey's supermarkets are located outside the relevant geographic area. Its Yardley, Pennsylvania, store is approximately six miles, and approximately 15 minutes driving time, from the Genuardi's in Newtown. The Newtown Genuardi's is outside McCaffrey's primary service area and vice versa.

The proposed Order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's to McCaffrey's no later than ten days following Ahold's acquisition of the 16 Genuardi's stores that are subject to the Asset Purchase Agreement. If McCaffrey's ultimately is not approved by the Commission to purchase the assets, Respondents must immediately rescind the divestiture and divest the Newtown Genuardi's assets to a buyer that receives the Commission's prior approval. The proposed Order contains additional provisions designed to ensure the adequacy of the proposed relief. For example, for a period of one year, the Order prohibits Respondents from interfering with the hiring of or employment of any employees currently working at the Newtown Genuardi's. Additionally, for a period of ten years, Ahold is required to give the Commission prior notice of plans to acquire a supermarket, or an interest in a supermarket, that has operated or is operating in Newtown, Pennsylvania.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed 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, as well as the comments received, and will decide whether to modify the proposed Consent Agreement, withdraw its acceptance of the proposed Consent Agreement, or issue its final Consent Orders.

Analysis to Aid Public Comment

The sole purpose of this Analysis is to facilitate public comment on the proposed Consent Agreement. This Analysis does not constitute an official interpretation of the proposed Consent Agreement, nor does it modify its terms in any way.