FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2019 TO DECEMBER 31, 2019

PUBLISHED BY THE COMMISSION

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DURING THE PERIOD
JULY 1, 2019 TO DECEMBER 31, 2019

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Appointed December 28, 2018.

CONTENTS

Members of the Commission ii

Table of Cases iv

Findings, Opinions, and Orders 1

Interlocutory, Modifying, Vacating, and
Miscellaneous Orders 792

Responses to Petitions to Quash 796

Table of Commodities 801

TABLE OF CASES

VOLUME 168

File or Docket #	Name	Page(s)
	A	
C-4681	**AMAS Holding Spf**	166
	B	
9379	**Benco Dental Supply Co.** *(Interlocutory Order)*	793
9379	**Benco Dental Supply Company**	415
C-4684	**Boston Scientific Corporation**	232
	BTG plc	232
	C	
9383	**Cambridge Analytica LLC** *(Interlocutory Order)*	794, 795
9383	**Cambridge Analytica, LLC**	713
C-4693	**Cambridge Analytica, LLC**	761
C-4694	**Cambridge Analytica, LLC**	776
	Cash-Wa Distributing	648
C-4677	**Collaborative Care Holdings, LLC**	55
	D	
C-4677	**DaVita Inc.**	55
C-4677	**DaVita Medical Holdings, LLC**	55
	DealerBuilt	146
C-4691	**DTE Energy Company**	699
	E	
C-4691	**Enbridge Inc.**	699
	F	
9385	**Fidelity National Financial, Inc.**	281
C-4682	**Fischer, Aaron**	22
C-4688	**Food Services of America, Inc.**	648

G

C-4681 **Global Houghton Ltd.** 166
C-4681 **Gulf Houghton Lubricants Ltd.** 166

H

Harbor Wholesale Foods 648
9379 **Henry Schein, Inc.** 415
9379 **Henry Schein, Inc.** *(Interlocutory Order)* 793

I

Intermountain Healthcare 55

J

C-4689 **Jindal, Neeraj** 303
191 0152 **Johnson & Johnson** *(Petition to Quash)* 796

K

C-4693 **Kogan, Aleksa**ndr 761
C-4694 **Kogan, Aleksandr** 776

L

C-4687 **LightYear Dealer Technologies, L**LC 146
9374 **Louisiana Real Estate Appraisers Board** *(Interlocutory Order)* 792

M

9376 **Mid Dakota Clinic, P.C.** 1

N

C-4686 **National Floors Direct, Inc.** 135
C-4691 **NEXUS Gas Transmission LLC** 699
C-4693 **Nix, Alexander** 761
C-4694 **Nix, Alexander** 776

O

9378 **Otto Bock Healthcare of North America, Inc.** 324

P

9379 **Patterson Companies, Inc.** 415
9379 **Patterson Companies, Inc.** *(Interlocutory Order)* 793

Q

C-4681 **Quaker Chemical Corporation** 166

S

9376 **Sanford Bismarck** 1
9376 **Sanford Health** 1
C-4685 **SecureTest, Inc.** 126
C-4688 **Services Group of America, Inc.** 648
Shamrock Foods Co. 648
C-4683 **Shore to Please Vacations, LLC** 38
C-4682 **Staffordshire Property Management, LLC** 22
C-4683 **Stephens, Robert Aaron** 38
9385 **Stewart Information Services Corporation** 281

T

Total S.A. 166

U

C-4677 **UnitedHealth Group Incorporated** 55
C-4692 **UnrollMe Inc.** 747
C-4688 **US Foods Holding Corp.** 648

V

Varian Medical Systems 232

Y

C-4689 **Yarbray, Sheri** 303
C-4689 **Your Therapy Source, LLC** 303

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2019, TO DECEMBER 31, 2019

IN THE MATTER OF

SANFORD HEALTH, SANFORD BISMARCK, AND MID DAKOTA CLINIC, P.C.

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9376; File No. 171 0019
Complaint, June 21, 2017 – Decision, July 8, 2019

This case addresses the $102.2 million acquisition by Sanford Health and Sanford Bismarck of certain assets of Mid Dakota Clinic, P.C. The complaint alleges that the transaction will violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the markets for adult PCP services, OB/GYN services, pediatric services, general surgery physician services, and outpatient surgical services in the Bismarck-Mandan area of North Dakota. Complaint Counsel and Respondents Sanford Health, Sanford Bismarck and Mid Dakota Clinic, P.C. jointly moved to dismiss the complaint in the above-captioned because Respondents are abandoning their efforts to pursue a proposed merger.

Participants

For the *Commission*: *Christopher Caputo, Stephanie Cummings, Jamie France, Melissa Hill, Laura Krachman, Rohan Pai, Neal Perlman,* and *Cathleen Williams.*

For the *Respondents*: *Robert Cooper, Richard Feinstein, Nicholas Widnell,* and *Herschel Wancjer, Boies, Schiller & Flexner LLP; Timothy Johnson, Gregory Merz,* and *Julia Reiland, Gray Plant Mooty.*

COMPLAINT

REDACTED PUBLIC VERSION

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondents Sanford Health, Sanford Bismarck (together with Sanford Health, "Sanford"), and Mid Dakota Clinic, P.C. ("MDC"), have executed a term sheet ("Term Sheet") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which, if consummated would violate Section 7 of the Clayton Act, as amended, 15

U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Sanford and MDC are the two largest providers of adult primary care physician services, pediatric services, obstetrics and gynecology services, and general surgery physician services in Bismarck and Mandan, North Dakota. The proposed transaction between Respondents ("Transaction") would create by far the largest—and, in one case, the only—group of physicians offering these services in Bismarck and Mandan.

2. The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Respondents consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.

3. Sanford and MDC are each other's closest competitor in the Bismarck-Mandan area. Sanford describes MDC as its "major competitor for primary care" and "main clinical competitor" in the Bismarck-Mandan area. MDC views Sanford as a significant competitor that threatens its market share in the Bismarck-Mandan area, describing it as "a demon to deal with competitively" and observing that "combining with them would put us in the dominant health care system for quite a while." Respondents also directly respond to one another by purchasing new equipment, updating technology, expanding services, recruiting high-quality physicians, and providing patients with convenient and accessible physician and surgical services.

4. The Transaction will substantially lessen competition in the markets for adult primary care physician services ("adult PCP services"), pediatric physician services ("pediatric services"), obstetrics and gynecology physician services ("OB/GYN services"), and general surgery physician services sold and provided to commercial payers and their insured members (together, the "relevant services"). The relevant geographic market in which to analyze the effects of the Transaction is an area no broader than the four-county Bismarck, ND Metropolitan Statistical Area (the "Bismarck-Mandan area").

5. Respondents are the two largest providers of the relevant services in the Bismarck-Mandan area. Post-Transaction, Respondents would control over 75% of the market for adult PCP services, over 80% of the market for pediatric services, over 85% of the market for OB/GYN services, and 100% of the market for general surgery physician services, by physician headcount, in the Bismarck-Mandan area. The Transaction significantly increases concentration in already highly concentrated markets, making it presumptively unlawful under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

6. Today, Sanford and MDC compete for inclusion in commercial payers' provider networks. Without either of these physician groups, it would be very difficult for commercial payers to market a health plan provider network to employers with employees living in the Bismarck-Mandan area. Competition between Sanford and MDC results in lower prices, higher quality, and greater services offerings.

7. By eliminating competition between Sanford and MDC, the Transaction is likely to increase Respondents' bargaining leverage with commercial payers, and enhance Respondents' ability to negotiate more favorable reimbursement terms, including reimbursement rates (i.e., prices). Faced with higher rates and other less favorable terms, commercial payers will have to pass on those higher healthcare costs to employers and their employees in the form of increased premiums and, potentially, higher co-pays, deductibles, or other out-of-pocket expenses. The merged firm will also have a diminished incentive to expand services, acquire new technology, and improve quality and access for patients in the Bismarck-Mandan area.

8. Entry or expansion by other providers into the relevant services will not likely be timely or sufficient to offset the competitive harm that will likely result from the Transaction. It will take [redacted] for CHI St. Alexius Health ("CHI St. Alexius")—a vertically integrated healthcare provider in Bismarck and Mandan with only minimal service line overlap with MDC—to enter or reposition sufficient to offset the potential competitive harm from the Transaction. Smaller, independent physician groups cannot recruit and accommodate new physicians on a necessary scale to counteract or constrain post-Transaction price increases or quality and service decreases, and new independent physicians or large healthcare organizations from outside the Bismarck-Mandan area are unlikely to enter *de novo*.

9. Respondents' speculative efficiency and quality-of-care claims are unsubstantiated, not merger-specific, and not cognizable. Even assuming Respondents' purported efficiencies were cognizable, they are far outweighed by the Transaction's potential harm and would not justify the Transaction.

II.

BACKGROUND

A.

Jurisdiction

10. Respondents, and each of their relevant operating entities and parent entities, are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.

Respondents

12. Respondent Sanford Bismarck is a North Dakota not-for-profit corporation and vertically integrated healthcare delivery system headquartered at 300 N. 7th Street, Bismarck, North Dakota 58501. Sanford Bismarck is a wholly-owned subsidiary of Respondent Sanford Health, a not-for-profit corporation. Together and with other controlled corporations, Sanford Bismarck and Sanford Health constitute and operate Sanford. In the cities of Bismarck and Mandan, North Dakota, Sanford operates Sanford Bismarck Medical Center, a 217-bed general acute care hospital and Level II trauma center offering inpatient and outpatient services; eight clinics that provide primary care services; and a number of specialty clinics. Sanford employs approximately 160 primary care and specialist physicians who work in Bismarck or Mandan, including 36 adult PCPs, 4 pediatricians, 8 OB/GYNs, and 4 general surgeons. Sanford also employs approximately 100 advanced practice providers ("APPs"). Sanford is the largest private employer in the Bismarck-Mandan area and plans to recruit an additional [redacted] physicians over the next [redacted] years, including [redacted] to work in its clinic and facility locations in Bismarck and Mandan. Sanford Health, its Sanford Bismarck subsidiary, and other subsidiaries generated [redacted] in revenue for the fiscal year ending on June 30, 2016.

13. Sanford sells health insurance in four states, including North Dakota, under the operating name Sanford Health Plan. Sanford Health Plan has approximately [redacted] covered lives in North Dakota.

14. Respondent MDC is a for-profit, physician-owned professional corporation under North Dakota law that is headquartered at 401 N. 9th Street, Bismarck, North Dakota 58501. MDC is a multispecialty medical practice that employs 61 physicians who provide primary care and specialty practice medical services in Bismarck, including 23 adult PCPs, 6 pediatricians, 8 OB/GYNs, and 6 general surgeons. MDC also employs 19 APPs. Additionally, MDC operates six clinics, a Center for Women, and an ambulatory surgery center ("ASC") in Bismarck. MDC is the twelfth-largest private employer in Bismarck. For the fiscal year ending on December 31, 2015, MDC generated [redacted] in revenue.

15. MDC's 53 physician shareholders control Mid Dakota Medical Building Partnership, a partnership under North Dakota law that owns real estate and other assets, including two medical office buildings and a warehouse located in Bismarck. For the fiscal year ending on December 31, 2015, Mid Dakota Medical Building Partnership generated over [redacted] in income for its physician shareholders.

16. MDC holds a non-transferable 25% interest in PrimeCare Health Group ("PrimeCare"), a physician-hospital organization that contracts with commercial payers on behalf of MDC's physicians. CHI St. Alexius holds the remaining 75% interest in PrimeCare.

C.

The Transaction

17. In early 2015, MDC initiated discussions with Sanford regarding a potential affiliation. MDC also discussed a potential affiliation with CHI St. Alexius in 2015 and early 2016. In spring 2016, MDC's affiliation discussions with CHI St. Alexius terminated, and Respondents' affiliation discussions became exclusive. On August 22, 2016, Respondents signed a Term Sheet, according to which Sanford will purchase MDC's practice assets, including its clinics, ASC, laboratory, and diagnostic imaging equipment, as well as the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC. Respondents have finalized a Stock Purchase Agreement for the sale of MDC's practice assets at [redacted] and a Real Estate and Asset Purchase Agreement for the sale of the Mid Dakota Medical Building Partnership assets at [redacted] The Transaction value includes [redacted] As part of the Transaction [redacted]

III.

THE RELEVANT SERVICE MARKETS

18. The Transaction threatens substantial harm to competition in four relevant service markets: (1) adult PCP services; (2) pediatric services; (3) OB/GYN services; and (4) general surgery physician services. The appropriate product market in which to analyze the Transaction is the set of services for which a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). This group of services constitutes an appropriate market when payers would accept a SSNIP rather than market a network that omitted the services of the hypothetical monopolist.

A.

Adult PCP Services Market

19. The Transaction threatens substantial competitive harm in the market for adult PCP services sold and provided to commercial payers and their insured members. This market encompasses services provided to commercially insured patients age 18 and over by physicians who are board-certified in internal medicine, family medicine, and general practice. Adult PCP services typically include routine medical services in an outpatient or office setting, such as physical exams, basic medical procedures, treatments of common illnesses and injuries, and long-term management of chronic conditions such as diabetes and hypertension.

20. The adult PCP services market excludes obstetricians and gynecologists ("OB/GYNs") because for many health plan enrollees, including all males, services offered by OB/GYN physicians are not viable substitutes for adult PCP services. The market also excludes services provided by pediatricians because pediatricians typically only treat patients under age 18, and thus do not compete with PCPs that treat adults. A payer would accept a SSNIP rather than market a network that omits adult PCP services even if that network also includes OB/GYN services and pediatric services.

B.

Pediatric Services Market

21. The Transaction also threatens substantial competitive harm in the market for pediatric physician services sold and provided to commercial payers and their insured members. This market includes primary care services provided by pediatricians to children under the age of 18. Pediatricians receive additional training to treat medical conditions affecting pediatric patients, and physicians trained for other specialties generally do not have this required expertise and thus do not compete with pediatricians. A payer would accept a SSNIP rather than market a network that omits pediatricians.

C.

OB/GYN Services Market

22. The Transaction also threatens substantial competitive harm in the market for OB/GYN physician services sold and provided to commercial payers and their insured female members. The market for OB/GYN services includes services provided by OB/GYN physicians related to women's reproductive health, pregnancy, and childbirth. The OB/GYN services market excludes physicians who lack additional training in these services because the services provided by other types of physicians are not viable substitutes for OB/GYN services. A payer would accept a SSNIP rather than market a network that omits OB/GYN services.

D.

General Surgery Physician Services Market

23. The Transaction also threatens substantial competitive harm in the market for general surgery physician services sold and provided to commercial payers and their insured members. The general surgery physician services market encompasses services offered by physicians who are board-certified exclusively in general surgery. General surgeons typically perform basic surgical procedures including abdominal surgeries, hernia repair surgeries, gallbladder surgeries, and appendectomies. Specialty surgeons who receive additional training and certification in particular types of procedures beyond the scope of general surgery training do not perform the same set of services as surgeons who are board-certified exclusively in general surgery, and therefore are excluded from the market. A payer would accept a SSNIP rather than market a network that omits general surgery physician services.

IV.

THE RELEVANT GEOGRAPHIC MARKET

24. The relevant geographic market in which to analyze the effects of the Transaction for each relevant service market is an area no larger than the four-county Bismarck, ND Metropolitan Statistical Area, which includes Burleigh, Morton, Oliver, and Sioux counties. The Bismarck-Mandan area covers a population of more than 125,000 people and includes the cities of Bismarck and Mandan, as well as rural areas and farming communities extending 40 to 50 miles outside of the two cities in every direction.

25. The appropriate geographic market in which to analyze the Transaction is the area where a hypothetical monopolist of the relevant services could profitably impose a SSNIP. If a hypothetical monopolist could impose a SSNIP, the boundaries of that geographic area are an appropriate geographic market.

26. Bismarck-Mandan area residents strongly prefer to obtain the relevant services close to where they live. Indeed, it would be very difficult for a payer to market successfully to employers with employees living in the Bismarck-Mandan area a health plan that did not include PCPs, pediatricians, OB/GYNs, or general surgeons located within the Bismarck-Mandan area. A hypothetical monopolist that controlled all providers of any relevant service in the Bismarck-Mandan area could profitably impose a SSNIP on payers. The Bismarck-Mandan area is therefore a properly defined geographic market.

27. The Bismarck-Mandan area is the main area of competition between Sanford and MDC in each relevant service market. It also comprises the population center from where Respondents draw a significant portion of their patients. Approximately 95% of patients living in the Bismarck-Mandan area stay within the Bismarck-Mandan area for the relevant services. Quantitative and qualitative evidence, including Respondents' own executives and ordinary course documents, confirm that the Bismarck-Mandan area is the relevant geographic market in which to analyze the effects of the Transaction.

V.

MARKET STRUCTURE AND THE TRANSACTION'S PRESUMPTIVE ILLEGALITY

28. Sanford and MDC are the two largest providers of each of the relevant services in the Bismarck-Mandan area.

29. Under relevant case law and the Horizontal Merger Guidelines, the Transaction is presumptively unlawful in all four relevant service markets. Based on physician headcount in the Bismarck-Mandan area, post-Transaction, Respondents will control 77% of the adult PCP services market, 83% of the pediatric services market, 88% of the OB/GYN services market, and 100% of the general surgery physician services market.

30. The courts and antitrust agencies commonly use the Herfindahl-Hirschman Index ("HHI") to measure market concentration. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a market with an HHI that exceeds 2,500 points is considered highly concentrated. A merger or acquisition is presumed likely to create or enhance market power—and is presumptively illegal—when the post-acquisition HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels far exceed these thresholds. As measured by physician headcount in the Bismarck-Mandan area, each of the relevant service markets is already highly concentrated today, and the Transaction further concentrates these markets. The following tables summarize the market shares and HHI figures for each relevant service market.

ADULT PCP SERVICES **Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area**			
Provider	**Adult PCP Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**36**	**47%**	**77%**
Mid Dakota Clinic	**23**	**30%**	
CHI St. Alexius Health	6	8%	8%
UND Center for Family Medicine	6	8%	8%
Independent Doctors, P.C.	3	4%	4%
Baker Family Medicine	1	1%	1%
Glen Ullin Family Clinic	1	1%	1%
Jeffrey Smith, MD	1	1%	1%
HHI		**3,220**	**6,013**
Change in HHI		**2,793**	

Complaint

PEDIATRIC SERVICES Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area			
Provider	**Pediatrician Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**4**	**33%**	**83%**
Mid Dakota Clinic	**6**	**50%**	
Independent Doctors, P.C.	1	8%	8%
UND Center for Family Medicine	1	8%	8%
HHI		**3,750**	**7,083**
Change in HHI		**3,333**	

OB/GYN SERVICES Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area				
Provider	**OB/GYN Headcount**		**Market Share**	
	Pre-Transaction	**Post-Transaction**	**Pre-Transaction**	**Post-Transaction**
Sanford Bismarck	**8**	**15**	**47%**	**88%**
Mid Dakota Clinic	**8**		**47%**	
UND Center for Family Medicine	1	1	6%	6%
CHI St. Alexius Health[1]	0	1	0%	6%

1 CHI St. Alexius's post-Transaction headcount and market share consist of Dr. Jan Bury, a current MDC OB/GYN who is moving to CHI St. Alexius post-Transaction. She is counted as an MDC physician for purposes of calculating the pre-Transaction HHI, and counted as a CHI St. Alexius physician for purposes of calculating the post-Transaction HHI.

HHI	**4,464**	**7,855**
Change in HHI	**3,391**	

GENERAL SURGERY PHYSICIAN SERVICES **Preliminary Market Shares by Physician Headcount for Providers Within Bismarck-Mandan Area**			
Provider	**General Surgeon Headcount**	**Market Share**	
		Pre-Transaction	**Post-Transaction**
Sanford Bismarck	**4**	**40%**	**100%**
Mid Dakota Clinic	**6**	**60%**	
HHI		**5,200**	**10,000**
Change in HHI		**4,800**	

VI.

ANTICOMPETITIVE EFFECTS

A.

Competition Among Healthcare Providers Benefits Consumers

31. Competition between healthcare providers occurs in two distinct but related stages. First, providers compete for inclusion in commercial payers' health plan provider networks. Second, in-network providers compete to attract patients, including commercial payers' health plan members.

32. In the first stage of provider competition, providers compete to be included in commercial payers' health plan provider networks. To become an in-network provider, a provider negotiates with a commercial payer and, if mutually agreeable terms can be reached, enters into a contract. The financial terms under which a provider is reimbursed for services rendered to a health plan's members are a central component of those negotiations, regardless of whether reimbursements are based on fee-for-service contracts, risk-based contracts, or other types of contracts.

33. In-network status benefits a provider by giving it preferential access to the health plan's members. Health plan members typically pay far less to access in-network providers than those out-of-network. Thus, all else being equal, an in-network provider will attract more

patients from a particular health plan than an out-of-network one. This dynamic motivates providers to offer lower rates and other more favorable terms to commercial payers to win inclusion in their networks.

34. From the payers' perspective, having providers in-network is beneficial because it enables the payer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

35. Under a fee-for-service payment model, a provider receives payment (i.e., reimbursement) for the services it provides to a commercial payer's health plan members. Such payment is typically on a per-service, per-diem, or discount-off-charges method. Under a full risk-based payment model, a provider is reimbursed a fixed payment for all services provided to a particular member. As a result, the provider has an incentive to reduce overall utilization of services by patients. Regardless of whether a contract's reimbursement method is based on fee-for-service terms, risk-based terms, or some combination of both, relative bargaining leverage plays a key role in negotiations between commercial payers and providers.

36. A critical determinant of the relative bargaining positions of a provider and a commercial payer during contract negotiations is whether other, nearby, comparable providers are available to the commercial payer and its health plan members as alternatives in the event of a negotiating impasse. Alternative providers limit a provider's bargaining leverage and thus constrain its ability to obtain more favorable reimbursement terms from commercial payers. The more attractive these alternative providers are to a commercial payer's health plan members in a local area, the greater the constraint on that provider's bargaining leverage. Where there are few or no meaningful alternatives, a provider will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

37. A merger between providers that are close substitutes in the eyes of commercial payers and their health plan members therefore tends to increase the merged entity's bargaining leverage. Such mergers lead to higher reimbursement rates by eliminating an available alternative for commercial payers. This increase in leverage is greater when the merging providers are closer substitutes for (and competitors to) each other. This is true even where other factors, such as a payer's leverage as a result of having high market share, may impact the pre-merger bargaining dynamic. Preexisting leverage for the payer does not eliminate the concern about an increase in the post-merger bargaining leverage of the merged entity.

38. Changes in the reimbursement terms negotiated between a provider and a commercial payer, including increases in reimbursement rates, significantly impact the commercial payer's health plan members. "Self-insured" employers rely on a commercial payer for access to its health plan provider network and negotiated rates, but these employers pay the cost of their employees' healthcare claims directly and thus bear the full and immediate burden of any rate increase in the healthcare services used by their employees. Employees may bear some portion of the cost through premiums, co-pays, and deductibles. "Fully-insured" employers pay premiums to commercial payers—and employees pay premiums, co-pays, and deductibles—in exchange for the commercial payer assuming financial responsibility for paying

provider costs generated by the employees' use of provider services. When provider rates increase, commercial payers pass on these increases to their fully-insured customers in the form of higher premiums, co-pays, and deductibles.

39. In the second stage of provider competition, providers compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket costs for in-network providers, providers in the same network compete to attract patients on non-price features—that is, by offering better quality of care, amenities, convenience, and patient satisfaction than their competitors. Providers also compete on these non-price dimensions to attract patients covered by Medicare and Medicaid, and other patients without commercial insurance. A merger of competing providers eliminates that non-price competition and reduces the merged entity's incentive to improve and maintain quality. Providers also compete on price terms in this second stage of competition in circumstances when patients pay the full cost of the procedure out of pocket, regardless of whether they are commercially insured.

B.

The Transaction Would Eliminate Beneficial Head-to-Head Competition and Increase Bargaining Leverage

40. Sanford and MDC are each other's closest competitor in the Bismarck-Mandan area for each of the relevant services. Sanford's ordinary course documents reflect the close competition between the Respondents. Sanford believes MDC is its "main clinical competitor" and "major competitor for primary care" in the Bismarck-Mandan area and identifies MDC as its only competitor for pediatric services in the Bismarck-Mandan area. Sanford also considers MDC's OB/GYN department to be Sanford's "top competitor" delivering babies in the Bismarck-Mandan area and describes MDC's general surgeons as Sanford's "primary competition in Bismarck" for bariatric procedures. Sanford's internal marketing and market research documents closely monitor MDC service offerings and routinely compare MDC's service offerings to its own, particularly in women's services and general surgery, in an effort to assess Sanford's "competitive advantage" over MDC.

41. Similarly, MDC considers Sanford to be a significant competitor and a threat to its market share in the relevant service markets. MDC expressed concern that Sanford "put a large target on [MDC's] finances and market share" and emphasized a need to "work on retaining the market share" in the face of Sanford "making some inroads into OB." Additionally, the results of a 2015 MDC strategy assessment conducted by MDC's marketing consulting focused on Sanford as MDC's closest clinical competitor in the Bismarck-Mandan area. MDC's Chief Financial Officer observed that "Sanford is going to be a demon to deal with competitively. . . . Combining with them would put us in the dominant health care system for quite a while."

42. Respondents track and respond to each other's marketing campaigns and advertising spending, which neither Respondent does with respect to other providers. Sanford and MDC are also each other's closest competitor to recruit adult PCPs, pediatricians, OB/GYNs, and general surgeons, and are the two practices in the Bismarck-Mandan area that

graduating residents and physicians in these service lines relocating to the Bismarck-Mandan area look to for employment. Because Sanford and MDC are close substitutes for each of the relevant services, the Transaction would eliminate significant head-to-head competition between the Respondents.

43. Diversion analysis, a standard economic tool that uses data on where patients receive healthcare services to determine the extent to which providers are substitutes, confirms that Sanford and MDC are close competitors. Preliminary diversion analysis shows that if all Sanford physicians providing adult PCP services were not available to Bismarck-Mandan area patients, approximately 77% of their patients would seek care at MDC. Correspondingly, if all MDC physicians providing adult PCP services were not available to Bismarck-Mandan area patients, approximately 82% of their patients would seek care at Sanford. In other words, each is by far the next-best alternative for patients of the other. Diversions for adult PCP services and other relevant services are shown in the table below:

Service	**Diversion from Sanford to MDC**	**Diversion from MDC to Sanford**
Adult PCP	77%	82%
Pediatric	90%	94%
OB/GYN	77%	70%
General Surgery	96%	98%

44. Offering provider coverage in the Bismarck-Mandan area is essential for a commercial payer to market a health plan provider network successfully to employers with employees in the Bismarck-Mandan area. At present, Sanford and MDC serve as the key providers of the relevant services for consumers living in the Bismarck-Mandan area, and either one can support a marketable health plan provider network. For example, Sanford offers its employees a group health plan that excludes MDC physicians as in-network providers, and MDC offers its employees a group health plan that excludes Sanford physicians as in-network providers. This substitutability leads to lower prices. When developing a provider network for the North Dakota Public Employees Retirement System ("NDPERS"), Sanford Health Plan [redacted] Commercial payers and employers do not view other providers in the Bismarck-Mandan area as adequate substitutes for Sanford or MDC. Consistent with that view, Bismarck-Mandan area residents strongly prefer that their health plan networks include at least one of the Respondents.

45. By combining the two largest providers of the relevant services in the Bismarck-Mandan area, the Transaction would increase Respondents' bargaining leverage in contract

negotiations with commercial payers because employers in the Bismarck-Mandan area would have little, if any, interest in a health plan network that excluded the combined system. Defendants' increased bargaining leverage would enhance their ability to negotiate higher reimbursement rates and more favorable reimbursement terms in payer contracts. Commercial payers would have little choice but to accept the reimbursement terms demanded by the merged system or exclude the merged system and risk having their network fail.

46. Today, when constructing provider networks for Bismarck-Mandan area employers, commercial payers treat Sanford and MDC (as part of PrimeCare) as substitutes—some include Sanford while excluding MDC and PrimeCare, and others exclude Sanford while including MDC and PrimeCare. If the merger is consummated, virtually every provider network marketed to consumers in the Bismarck-Mandan area will need to include the combined entity.

C.

The Transaction Would Eliminate Vital Quality and Service Competition

47. Competition drives providers to invest in quality initiatives and new technologies to differentiate themselves from competitors. Sanford and MDC compete with one another across various non-price dimensions, which has provided patients in the Bismarck-Mandan area with higher quality care and more extensive healthcare service offerings. Sanford and MDC have substantially invested in acquiring new technology, expanding their services and facilities, and improving patient access to compete against one another. The Transaction would eliminate this competition.

48. Sanford and MDC have invested in new technology to attract patients. In 2014, Sanford acquired 3D mammography technology, a state-of-the art technology that provides breast tissue imaging superior to the existing 2D technology. Sanford's capital expense and marketing documents explicitly noted the need to acquire the technology to compete with MDC. MDC subsequently acquired the same 3D mammography technology, and "put a million dollars into 3D [mammography technology] . . . [b]ecause [patients] were walking over to Sanford." Since acquiring the technology, Respondents have continued to compete for 3D mammography patients along several dimensions, including price, access, and breast care services. Similarly, Sanford invested in a tower-free hysteroscopy system to transition certain gynecological procedures from an operating room to a clinical setting. Sanford made this investment to remain competitive with MDC, which offered these procedures in an office setting. Sanford also promotes its use of the da Vinci robotic surgery system for gynecological surgeries as a differentiator between Sanford and MDC's OB/GYN departments, and MDC acknowledged that Sanford's adoption of this technology attracted patients from MDC to Sanford. Ultimately, MDC encouraged CHI St. Alexius Medical Center, the only other acute care hospital in Bismarck apart from Sanford Bismarck Medical Center, to invest in the robot technology and two MDC OB/GYN physicians trained to use the robot in order to compete with Sanford's OB/GYNs.

49. Sanford and MDC have also improved patient access and convenience options in order to attract patients. Both Respondents operate walk-in clinics to provide patients with

convenient options for acute care episodes and utilize the clinics as a way to attract and retain patients. MDC opened its Today Clinic specifically "to answer [Sanford]'s walk-ins; to increase [MDC's] market share and to provide [patient] access." Both Respondents post wait times on their respective websites as a transparent display of the convenience offered by their walk-in clinics. MDC has observed that "Sanford consistently promotes their SameDay [program]" and expressed a desire to promote its own program to attract patients. Similarly, both Respondents offer sports physicals for school-aged children in their walk-in clinics as a convenient and less expensive alternative to comprehensive child wellness/preventative exams. MDC specifically monitors Sanford's sports physical offerings when developing its own sports physical policy. In June 2016, for example, MDC matched Sanford's price for sports physicals. To attract patients and gain a competitive edge over Sanford, MDC also offers services and amenities not available at Sanford, such as MDC's Center for Women, which provides women patients access to multiple services in one location, and a comprehensive breast program with the only breast fellowship-trained radiologist in North Dakota, who coordinates patient care with other specialists such as surgeons and oncologists.

50. Patients benefit from this direct competition in the quality of care and services offered to them by Respondents. Because the merged entity will control the majority of the relevant services in the Bismarck-Mandan area, it will face limited outside competition for patients seeking such services. Thus, the Transaction will dampen the merged firm's incentive to compete on quality of care and service offerings, to the detriment of all patients who use these providers, including commercially insured, Medicare, Medicaid, and self-pay patients. As one longtime MDC physician put it:

> competition is good and maybe no more important place than in health care, that it keeps us all striving to be better to make the best possible scenario for the patient and not settle for mediocre when that would be easier if you weren't competing with someone. . . . [W]hen you have competition it makes you step up and try to be better and provide excellent quality without just settling for average, which you can get away with when there is no one to compete with. . . . I don't feel like I want to drop to a mediocre standard of care, after working my whole life just to build a good reputation, I don't want to be just good enough. I want to be good and competitive. And I think that monopoly in health care is not a good thing.

VII.

ENTRY BARRIERS

51. Entry by new market participants into the relevant service markets in the Bismarck-Mandan area is unlikely to occur in a timely or sufficient manner to deter or counteract the likely anticompetitive effects of the Transaction. Repositioning or expansion by current market participants is also unlikely to offset fully the Transaction's likely harm to competition for the relevant services in the Bismarck-Mandan area.

A.

Adult PCP and Pediatric Services Entry Will Not Be Timely or Sufficient

52. Existing adult PCP and pediatric practices in the Bismarck-Mandan area are unlikely to expand sufficiently and in a timely manner to offset the anticompetitive effects of the Transaction. The Bismarck-Mandan area's geographic location, including its cold climate and distance from larger metropolitan areas, makes it difficult for an existing competitor to attract and retain physicians, including adult PCPs and pediatricians, from outside of the area. Even if an existing competitor successfully recruited adult PCPs and pediatricians, it would be challenging for it to attract the substantial number of patients in the Bismarck-Mandan area needed to be a financially viable competitor. It would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan area, to hire enough physicians, open adequate clinic space, and establish a presence in the area sufficient to replace the adult PCP and pediatric services offered by MDC. The other existing adult PCP and pediatric practices in the Bismarck-Mandan area lack the resources or ability to expand to the magnitude where they could counteract or constrain the anticompetitive effects of the Transaction.

53. New entry by independent physicians into the adult PCP or pediatric services markets in the Bismarck-Mandan area is also unlikely because of the significant financial challenges and risk involved in establishing an independent adult PCP or pediatric practice in the Bismarck-Mandan area, including renting or buying office space, renting or purchasing medical and office equipment, hiring administrative staff, investing in an electronic medical records system, and purchasing malpractice insurance. A local labor shortage in the Bismarck-Mandan area makes starting an independent adult PCP or pediatric practice even more challenging. Moreover, new physicians finishing their residency programs often have substantial debt and lack the financial resources and experience to open an independent practice. After opening an office, it likely would take each adult PCP or pediatrician new to the Bismarck-Mandan area two years or longer to establish a patient base, and substantial time and money for a practice to become self-sustaining and a meaningful competitor, posing additional hurdles to new entrants.

B.

OB/GYN Services Entry Will Not Be Timely or Sufficient

54. New entry or expansion into the OB/GYN services market in the Bismarck-Mandan area will not be timely or sufficient to offset the Transaction's competitive harm. In addition to the financial and practical challenges that adult PCPs and pediatricians face in starting an independent practice, OB/GYNs need access to a hospital in order to provide the full scope of OB/GYN services, and must participate in or provide for call coverage for their patients in the hospital. A solo OB/GYN would have to be on call all the time, which, if even feasible, would likely lower the quality of care. To have a reasonable call rotation, a practice needs a minimum of four to five OB/GYNs. It would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan

area, to recruit five OB/GYNs to a new practice and open an OB/GYN clinic in the Bismarck-Mandan area, and up to another two years for each new OB/GYN to build a patient base.

C.

General Surgery Physician Services Entry Will Not Be Timely or Sufficient

55. Entry or expansion into the general surgery physician services market in the Bismarck-Mandan area is unlikely to be timely and sufficient to offset any competitive harm that results from the Transaction. Sanford and MDC employ the only general surgeons in the Bismarck-Mandan area. In addition to the challenges that adult PCPs, pediatricians, and OB/GYNs face starting a practice in the Bismarck-Mandan area, general surgeons need a source of patient referrals. An independent general surgeon in the Bismarck-Mandan area would be unlikely to receive referrals because PCPs and other physicians are likely to refer patients to affiliated general surgeons. As with OB/GYNs, call requirements for general surgeons make it unlikely that a general surgeon would operate a solo practice and difficult for a hospital or physician group to recruit a single general surgeon to start a general surgery group. A general surgery physician practice needs a minimum of four to five general surgeons to provide call coverage, and it would take [redacted] for CHI St. Alexius, the only remaining market participant positioned to enter or reposition in the Bismarck-Mandan area, to recruit a practice of five general surgeons.

VIII.

EFFICIENCIES

56. Respondents' claimed efficiencies do not outweigh the Transaction's likely harm to competition. The purported benefits would not enhance competition for the relevant services and fall far short of the cognizable efficiencies needed to outweigh the Transaction's likely significant harm to competition in the Bismarck-Mandan area.

57. Respondents have projected several categories of cost savings that will result from the Transaction, but many of these estimated cost savings are unsubstantiated and reflect speculative assumptions. Even if the claimed efficiencies were substantiated and achievable, many are not merger-specific. MDC could achieve many of the claimed cost savings by affiliating with a suitable and interested alternative partner far less harmful to competition. In any event, Respondents' projected cost savings are not nearly of the magnitude necessary to justify the Transaction in light of its potential to harm competition.

58. Respondents' other efficiency claims, including those relating to quality improvements, are speculative and unsubstantiated. The claimed quality efficiencies are also not merger-specific because they could be accomplished absent the Transaction. Sanford and MDC already are high-quality providers and have presented no evidence demonstrating how the Transaction will improve the quality of care either Respondent provides. In fact, Sanford already has engaged in efforts to achieve some of these purported quality improvements independent of

the Transaction, such as recruiting and retaining specialists and subspecialists as well as launching or expanding service lines.

IX.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

59. The allegations of Paragraphs 1 through 58 above are incorporated by reference as though fully set forth herein.

60. The Term Sheet constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

61. The allegations of Paragraphs 1 through 58 above are incorporated by reference as though fully set forth herein.

62. The Transaction, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-eighth day of November, 2017, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the

complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference no later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant service and geographic markets, with the ability to offer such products and services as Sanford and MDC were offering and planning to offer prior to the Transaction.

2. A prohibition against any transaction between Sanford and MDC that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Sanford and MDC provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore MDC as a viable, independent competitor in the relevant service and geographic markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-first day of June, 2017.

By the Commission.

ORDER DISMISSING COMPLAINT

On June 21, 2017, the Commission issued an administrative Complaint alleging that Respondents Sanford Health, Sanford Bismarck (collectively Sanford), and Mid Dakota Clinic, P.C. (MDC) had executed a term sheet in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Complaint further alleged that the acquisition, if consummated, would violate 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.

On June 22, 2017, pursuant to Section 13(b) of the FTC Act and Section 16 of the Clayton Act, the Commission[1] filed a complaint in the United States District Court for the District of North Dakota (District Court) seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating the proposed acquisition until final resolution of this administrative proceeding. On December 13, 2017, the District Court granted the Commission's motion for a preliminary injunction. After an appeal by Sanford and MDC, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision on June 13, 2019.

Complaint Counsel and Respondents have now filed a joint motion to dismiss the Complaint on the grounds that Respondents do not intend to seek further judicial review of the Eighth Circuit's decision and will abandon the proposed transaction.[2]

In light of Respondents' decision to abandon the proposed transaction, the most important elements of the relief set out in the Notice of Contemplated Relief in the Complaint have been accomplished without the need for further administrative litigation.[3] For the foregoing

1 The State of North Dakota was co-Plaintiff in this action.

2 *See* Joint Motion to Dismiss Complaint, Ex. A, 9-10 *(filed* June *25, 2D)9).*

3 *See, e.g., In the Matter of Wilh. Wilhemsen Holding ASA, et al., Dccket No. 9380*, Order Dismissing Complaint (July 31, 2018); *In the Matter of CDK Global, Inc., et al., Docket No. 938::.,* Order Dismissing Complaint (Mar. 26,

reasons, the Commission has determined that the public interest warrants dismissal of the Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits.

Accordingly,

IT IS ORDERED THAT the Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

2018); *In the Matter of The JM Smucker Company and Conagra Brands, Inc., Docket No. 9381,* Order Dismissing Complaint (Mar. 8, 2018); *In the Matter of DraftKings, Inc. and FanDuel Limited, Docket No. 9375,* Order Dismissing Complaint (July 14, 2017); *In the Matter of Advocate Health Care Network, Advocate Health and Hospitals Corporation,and NorthShore University HealthSystem , Docket No. 9365,* Order Dismissing Complaint (Mar. 20, 2017).

STAFFORDSHIRE PROPERTY MANAGEMENT, LLC,
AND
AARON FISCHER

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 2(c) OF THE CONSUMER REVIEW FAIRNESS ACT

Docket No. C-4682; File No. 182 3084
Complaint, July 25, 2019 – Decision, July 25, 2019

This consent order addresses Staffordshire Property Management, LLC and Aaron Fischer's use of non-disparagement provisions in consumer form contracts in the course of processing the applications of prospective tenants to rent residential properties that respondents manage. The complaint alleges that the respondents violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained non-disparagement provisions made void by Section 2(b) of the CRFA. The consent order prohibits, in the sale or leasing of any good or service, the respondents from: offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondents' fulfillment of their obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in customer contracts entered into before the effective date of the order.

Participants

For the *Commission*: *Carl H. Settlemyer.*

For the *Respondents*: *Arthur Hawgood and William Moran II, Hawgood, Hawgood & Moran LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Staffordshire Property Management, LLC and Aaron Fischer, individually and as owner and manager of Staffordshire Property Management, LLC (collectively, "Respondents") have violated the Consumer Review Fairness Act of 2016, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Staffordshire Property Management, LLC ("Staffordshire") is a Maryland limited liability company with its principal office or place of business at 108 East Preston Street, Apt. 1, Baltimore, Maryland 21202. Staffordshire operates a residential property management service and processes consumer applications to rent properties that it manages.

2. Respondent Aaron Fischer is owner and manager of Staffordshire. Individually or in concert with others, he controlled or participated in the acts and practices of Staffordshire, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Staffordshire.

3. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Course of Conduct

4. Between approximately February 2016 and October 2018, Respondents used, in their form contracts offered to hundreds of prospective renters in the course of processing their applications to rent properties that Respondents manage, the following provision:

> The Applicant consents, whether approved or not approved, to hold and maintain the terms, conditions, and communications related to Staffordshire Property Management, this application, and application process in strict confidence, and specifically agrees not to disparage Staffordshire Property Management, and any of its employees, managers, or agents in any way, and also agrees not to communicate, publish, characterize, publicize or disseminate, in any manner, any terms, conditions, opinions and communications related to Staffordshire Property Management, this application, or the application process. . . . Any breach of such confidentiality will support a cause of action and will entitle Staffordshire Property Management to recover any and all damages from such a breach.

A copy of the Staffordshire "Authorization, Agreement & Release Consent Form" that includes this language is attached as Exhibit A hereto. Respondents' form contracts were in effect on or after December 14, 2017.

VIOLATION OF THE CONSUMER REVIEW FAIRNESS ACT

5. The Consumer Review Fairness Act of 2016 ("CRFA"), P.L. 114-258, 15 U.S.C. § 45b, was enacted on December 14, 2016. As of March 14, 2017, Section 2(b) of the CRFA renders void, and Section 2(c) of the CRFA prohibits the offering of, provisions in form contracts that: prohibit or restrict individual consumers' ability to communicate reviews, performance assessments, and similar analyses about a seller's goods, services, or conduct; or that impose a penalty or fee against individual consumers who engage in such communications. 15 U.S.C. §§ 45b(a)(2), 45b(b)(1), and 45b(c).

6. The Commission is authorized to enforce Section 2(c) of the CRFA in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, were incorporated into and made a part of the CRFA. 15 U.S.C. § 45b(d)(2)(A). The Commission's enforcement authority under the CRFA applies to contracts in effect on or after December 14, 2017. 15 U.S.C. § 45b(i)(2).

7. Pursuant to 15 U.S.C. § 45b(d)(1), a violation of 15 U.S.C. § 45b(c) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. § 57a(a)(1)(B).

Count I

8. As described in Paragraph 4 of this Complaint, Respondents have offered, in the course of selling their services, form contracts, as that term is defined in 15 U.S.C. § 45b(a)(3), that contained a provision made void by 15 U.S.C. § 45b(b)(1).

Therefore, the acts and practices set forth in Paragraph 4 of this Complaint occurring on or after March 14, 2017 violated Section 2(c) of the CRFA, 15 U.S.C. § 45b(c).

THEREFORE, the Federal Trade Commission this twenty-fifth day of July, 2019, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

COMPLAINT EXHIBIT A
FTC 182-3084

APPLICATION
ADDRESS
PLEASE PROVIDE A VALID PHOTO ID
Each prospective occupant must complete this application.

Date of Application: _____ Apartment: _____

Monthly Rent: $RENT/month One year lease Term of Lease _____to _____

Applicant:

1. Name: _____
First Middle Last

Date of Birth: _____ Social Security #.: _____
Current Home Address: _____
Personal Cell Phone #: _____ E-mail: _____
Driver's License Number: _____
Name of Co-Occupant(s), if applicable: _____

Current Employer: _____ Telephone No.: _____
Address: _____
Position: _____ Monthly Salary: _____
Employment Period: _____ Supervisor's Name: _____
Supervisor's Number: _____ Supervisor's Email: _____

Previous Employer: _____ Telephone No.: _____
Address: _____
Position: _____ Monthly Salary: _____
Employment Period: _____ Supervisor's Name: _____
Supervisor's Number: _____ Supervisor's Email: _____

2. Other income you wish to be considered when this Application is evaluated?

Amount: _____ Source: _____

3. Bank References:

Checking Account: Bank_____ Account #.: _____

Savings Account: Bank_____ Account #.: _____

4. Motor Vehicles Owned by Applicant:

Year_____ Make_____ Tag No._____

Year_____ Make_____ Tag No._____

5. **Current Address:** _____

Current Rent/Mortgage: _____ Current Landlord: _____

Lease Start Date:_____ Lease End Date:_____

Landlord Address: _____

Landlord Phone #: _____ Landlord Email:_____

Previous Address: _____

Previous Rent/Mortgage: _____ Previous Landlord: _____

Lease Start Date:_____ Lease End Date:_____

Landlord Address: _____

Landlord Phone #: _____ Landlord Email:_____

6. Personal reference:

Name: _____ Address: _____

Telephone No: _____ Relationship: _____

7. Do you wish permission to have a pet: Yes _____ No _____

If yes, what type and how many? _____

Unless specifically agreed to in writing by the Landlord, no pets of any kind will be allowed on the Premises.

8. Have you ever been charged with a criminal offense: Yes _____ No _____

Type of Offense (list all offenses): _____

State(s): _____ Date of Offense(s):_____

Have you ever been evicted: Yes _____ No _____ Date of Eviction: _____

Have you ever been charged with Failure to Pay Rent: Yes _____ No _____

Have you ever been charged with Breach of Lease: Yes _____ No _____

Have you ever had wages or property garnished: Yes _____ No _____

9. Application Processing Fee: $20.00 via PayPal. If initial portion of application is approved, an additional $15 will be paid directly to Experian for processing a credit report. (Instructions will be e-mailed regarding how process payment).

10. Terms and Conditions:

A. It is understood that the Processing Fee is not refundable.

B. If the Landlord accepts this Application, either orally or in writing, Applicant(s) will be required to enter into a Lease in conformity with this Application on the Landlord's standard form of Lease Agreement (a copy of which has been made available for Applicant(s) to review), and pay a security deposit. Until the security deposit is paid and the Lease Agreement is signed by the Applicant(s), Landlord shall not be obligated to lease the Property to Applicant(s).

Complaint

AUTHORIZATION, AGREEMENT & RELEASE CONSENT FORM

The Applicant hereby affirms that the answers to the foregoing questions are true and correct and that the Applicant has not knowingly withheld any fact or circumstance which would, if disclosed, affect the Application unfavorably. The Applicant authorizes Staffordshire Property Management to secure, or secure from a consumer reporting agency, an investigative consumer report. This report may contain, but would not be limited to, consumer credit, rental history, driving records, employment information, and verification of the Applicant's residences, personal identity, and income. It is understood and agreed upon in full by the Applicant and Staffordshire Property Management that this Application & Release is not a contract or proposed contract for the sale or lease of consumer goods or services, but solely a release agreement. The Applicant further authorizes Staffordshire Property Management and/or a consumer reporting agency to verify any and all information contained in this application and to inquire into the character, general reputation, personal characteristics and mode of living of the Applicant, and the Applicant hereby releases all concerns from any liability in connection with the information the Applicant gives. The Applicant also been advised of the right, under the Federal Fair Credit Reporting Act, Section 606(B) to make a written request of Staffordshire Property Management and the consumer reporting agency, within a reasonable time, for a complete and accurate disclosure of the nature and scope of the investigation. The Applicant consents, whether approved or not approved, to hold and maintain the terms, conditions, and communications related to Staffordshire Property Management, this application, and application process in strict confidence, and specifically agrees not to disparage Staffordshire Property Management, and any of its employees, managers, or agents in any way, and also agrees not to communicate, publish, characterize, publicize or disseminate, in any manner, any terms, conditions, opinions and communications related to Staffordshire Property Management, this application, or the application process. Staffordshire Property Management also agrees to hold the details of any investigative report and background history examination in strict confidence and agrees to only share such details with the owner(s) of the property for which the Applicant has applied. Any breach of such confidentiality will support a cause of action and will entitle Staffordshire Property Management to recover any and all damages from such a breach. The Applicant also consents to, and authorizes the use of, any subsequent consumer report(s) under this authorization in connection with the collection of any debt associated with the rental of the residence for which this application was made. Finally, the Applicant acknowledges receipt of the summary of consumer rights required by Section 609 of the Fair Credit Reporting Act entitled "A Summary of Your Rights under the Fair Credit Reporting Act."

I have fully read and understand all of the provisions of this Application & Release and acknowledge receipt of a completed copy of same.

_____	_____	_____(SEAL)
PRINT APPLICANT NAME	DATE	APPLICANT SIGNATURE
_____	_____	_____(SEAL)
APPROVE/REJECT	DATE	STAFFORDSHIRE PROPERTY MANAGEMENT

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Consumer Review Fairness Act of 2016.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Consumer Review Fairness Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

FINDINGS

1. The Respondents are:

   a. Staffordshire Property Management, LLC, a Maryland limited liability company with its principal office or place of business at 108 East Preston Street, Apt. 1, Baltimore, Maryland 21202.

   b. Aaron Fischer, owner and manager of Staffordshire Property Management, LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Staffordshire Property Management, LLC. His principal office or place of business is the same as that of Staffordshire Property Management, LLC.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Communication" means a written, oral, or Pictorial review, performance assessment, or other similar analysis of goods or services, including conduct related to the goods or services.

B. "Review-Limiting Contract Term" means a standardized contract term that:

1. prohibits or restricts the ability of a person who is a party to the contract to engage in a Covered Communication;

2. imposes a penalty or fee against a person who is a party to the contract for engaging in a Covered Communication; or

3. transfers, or requires a person who is a party to the contract to transfer, to any other person any intellectual property rights in a Covered Communication, with the exception of a non-exclusive license to lawfully use a Covered Communication about a Respondent's goods or services.

C. "Pictorial" includes pictures, photographs, video, illustrations, and symbols.

D. "Respondents" means Staffordshire Property Management, LLC and Aaron Fischer, individually or collectively.

1. "Corporate Respondent" means Staffordshire Property Management, LLC, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means Aaron Fischer.

Provisions

I. Prohibited Use of Review-Limiting Contract Terms

IT IS ORDERED that Respondents, and Respondents' members, managers, officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the sale or leasing of any good or service, must not:

A. offer to any prospective customer a contract, or offer to any customer a renewal contract, that includes a Review-Limiting Contract Term;

B. require that a customer accept a Review-Limiting Contract Term as a condition of any Respondent's fulfillment of its obligations under a customer contract that a Respondent entered into before the effective date of this Order; or

C. attempt to enforce or assert the validity of any Review-Limiting Contract Term in any customer contract that a Respondent entered into before the effective date of this Order.

Nothing in this Provision shall require a Respondent to publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

II. Notice to Consumers

IT IS FURTHER ORDERED that Respondents must notify consumers as follows:

A. Within 30 days after the effective date of this Order, each Respondent must notify all customers who entered into a contract with any Respondent that included any term concerning a Covered Communication, such as Respondents' "Authorization, Agreement & Release Consent Form," used on or after March 14, 2017 through the effective date of this Order, by mailing or emailing each a notice as shown in Attachment A:

1. The heading of the notice and the subject line for any email must read "Your Right to Post Honest Reviews," and the email must be sent to each recipient individually from an address with the staffordshirerealty.com domain.

2. The Corporate Respondent's name and return address, for any mailing, must appear on the front of the envelope, the customer's name and address must be printed on the front of the envelope or be visible through a window in the envelope, and the words "Your Right to Post Honest Reviews" must be printed in easily noticed text near the customer's name and address.

3. The notice must not include any other materials or message about a Respondent, or otherwise concern its goods or services.

B. Respondents must notify consumers online:

1. Respondents must post a web page notice as shown in Attachment A, with the heading "Your Right to Post Honest Reviews," on the staffordshirerealty.com "Blog" page, in the same format as Respondents' other "Blog" posts.

2. For as long as the web page notice is posted, Respondents must maintain a link to the web page notice and embed the link in the words "Your Right to Post Honest Reviews" on the staffordshirerealty.com home page in a button substantially similar to, and directly below, the "Staffordshire Blog" button, and on the home page of any other website under Individual Respondent's control used primarily to promote or operate a property management business.

3. The web page notice and any link to it must, by its size, contrast, location, and other characteristics, stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

4. The web page notice must be posted not later than 3 days after the effective date of this Order and for at least 2 years after the effective date of this Order.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after the issuance date of this Order, Individual Respondent for any business that he, individually or collectively with Corporate Respondent, owns a majority of or controls directly or indirectly, and Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for drafting, approving, or enforcing customer contracts, or for responding to Covered Communications and all agents and representatives who participate in drafting, approving, or enforcing customer contracts, or responding to Covered Communications; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered and the means of advertising, marketing, and sales, any conduct toward consumers who have engaged in Covered Communications, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with this Order; and (e) provide a copy of each Acknowledgment of this Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email and Internet addresses, including all residences; (b) identify all his business activities, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest; and (c) describe in detail his involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 5 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which he performs services whether as an employee or otherwise and (ii) any entity in which he has any ownership interest and over which he has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re Staffordshire Property Management, LLC*, C-4682.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 5 years after the issuance date of this Order, and retain each such records for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondents, owns a majority of or controls directly or indirectly, must create and retain the following records:

A. Personnel records showing, for each person providing services in relation to any aspect of this Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. A copy of: each unique rental application or other contract relating to a Covered Communication; each unique contract used in connection with the sale or leasing of Respondent's goods or services, including processing applications to rent property; all communications with consumers threatening any legal action relating to any Covered Communication; and all parties' court filings and Respondents'

discovery responses in any legal action relating to any Covered Communication; and

C. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on July 25, 2039, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after this Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of this Order, and the dismissal or ruling is either not appealed or upheld on appeal, then this Order will terminate according to this Provision as though the complaint had never been filed, except that this Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A TO THE ORDER

Letter, Email, and Web Page Notice Template:

The notice must be in the following form, appearing on Respondents' letterhead, email, and staffordshirerealty.com "Blog" page with the underlined text completed as directed:

Your Right to Post Honest Reviews

Dear Tenants and Rental Applicants:

I am writing to tell you that the Federal Trade Commission (FTC), the nation's consumer protection agency, has alleged that we used contract provisions that violated the Consumer Review Fairness Act (CRFA). The CRFA protects your ability to share your honest opinions about a business's products, services, or conduct in any forum, including social media. According to the FTC, we used provisions in our rental applications that unlawfully restricted our customers [for letter and email notices add "(including you)"] from sharing truthful information and opinions about their experiences with us.

We are contacting our applicants and renters to tell you that these rental application agreement provisions are void and we cannot enforce them against you. You can publish your honest review even if you say something negative about us or our services.

If you have questions about the FTC's case, visit [add case page alias URL provided by FTC staff with embedded hyperlink].

Sincerely,

Aaron Fischer

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order as to Staffordshire Property Management, LLC and Aaron Fischer ("respondents").

The proposed consent order ("order") has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the order and the comments received, and will decide whether it should withdraw the order or make it final.

This matter involves the respondents' use of non-disparagement provisions in consumer form contracts in the course of processing the applications of prospective tenants to rent residential properties that respondents manage. The complaint alleges that the respondents violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained non-disparagement provisions made void by Section 2(b) of the CRFA. The CRFA defines a form contract as a contract with standardized terms, used in the course of selling or leasing goods or services, and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct involving the use of contract terms that prohibit, restrict, penalize, or transfer rights in consumer reviews or evaluation of the respondents, their goods, or their services.

Part I prohibits, in the sale or leasing of any good or service, the respondents from: offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondents' fulfillment of their obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in customer contracts entered into before the effective date of the order. Part I would not require that the respondents publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

Part II requires the respondents to notify customers via letters or emails, and via their web site, that the non-disparagement provisions in their form contracts are void and cannot be enforced, and that customers who entered into contracts with those provisions can publish their honest reviews about the respondents, even if their comments are negative.

Part III requires the respondents to submit signed acknowledgments that relevant personnel received the order.

Part IV requires the respondents to file compliance reports with the Commission, and to notify the Commission of bankruptcy filings or changes in company structure that might affect compliance obligations.

Part V contains recordkeeping requirements for personnel records, consumer contracts, communications with consumers threatening any legal action relating to any review; and court filings and the company's discovery responses in legal actions over consumer reviews, as well as all records necessary to demonstrate compliance or non-compliance with the order.

Part VI contains other requirements related to the Commission's monitoring of the respondent's order compliance.

Part VII provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

IN THE MATTER OF

SHORE TO PLEASE VACATIONS LLC,
AND
ROBERT AARON STEPHENS

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, AND SECTION 2 OF THE CONSUMER REVIEW FAIRNESS ACT

Docket No. C-4683; File No. 182 3088
Complaint, July 29, 2019 – Decision, July 29, 2019

This consent order addresses Shore to Please Vacations LLC and Robert A. Stephens's use of non-disparagement provisions in consumer form contracts in the course of renting vacation properties. The complaint alleges that the respondents violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained non-disparagement provisions made void by Section 2(b) of the CRFA. The consent order prohibits, in the sale or leasing of any good or service, the respondents from: offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondents' fulfillment of their obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in customer contracts entered into before the effective date of the order.

Participants

For the *Commission*: *Carl H. Settlemyer.*

For the *Respondents*: *Daniel W. Uhlfelder, P.A.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shore to Please Vacations LLC and Robert Aaron Stephens, individually and as owner and manager of Shore to Please Vacations LLC (collectively, "Respondents"), have violated the Consumer Review Fairness Act of 2016, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Shore to Please Vacations LLC ("STP") is a Nevada limited liability company, registered to do business in Florida, with its principal office or place of business at 8033 West Sunset Boulevard, #1079, West Hollywood, California 90046. STP has advertised and rented to the public, via VRBO.com (a/k/a "Vacation Rental by Owner"), Rosemary Beach, Florida vacation properties owned by Respondent Robert Aaron Stephens.

2. Respondent Robert Aaron Stephens is the owner and manager of STP. Individually or in concert with others, he controlled or participated in the acts and practices of STP, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of STP.

3. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Course of Conduct

4. From June 2017 through at least August 2017, Respondents used, in their form contracts offered to prospective customers in the course of renting vacation properties, the following provision in the "Disclaimers" paragraph:

> By signing below, you agree not to defame or leave negative reviews (includes any review or comment deemed to be negative by a Shore to Please Vacations LLC officer, or member, as well as any review less than a "5 star" or "absolute best" rating) about this property and/or business in any print form or on any website (including but not limited to www.VRBO.com). Due to the difficulty in ascertaining an actual amount of damages in situations like this, breaching this clause (leaving any negative review or negative comment about this property or business) will immediately result in minimum liquidated damages of $25,000 paid by you to Shore to Please Vacations LLC. By signing below, you agree to all charges mentioned above, if you or your party incurs them, in relation to violating any rules/policies/clauses within this contract. . . . By signing below, you agree to be held liable for any legal fees incurred by Shore To Please Vacations LLC, arising from any legal actions, including but not limited to litigation and collections, filed against you or others in your party.

Copies of STP rental agreements (with renters' personal information redacted) that include this language are attached as Exhibit A hereto. Respondents' form contracts were in effect on or after December 14, 2017.

5. From October 2017 through at least August 2018, Respondents have continued to assert that the contract provision quoted in Paragraph 4 of this Complaint remains in effect in their communications with renters who posted reviews that Respondents deemed to be negative, and in lawsuits STP filed against those renters in the Circuit Court of the First Judicial Circuit, Walton County, Florida in November and December 2017. These lawsuits were pending on or after December 14, 2017.

6. In the lawsuits described in Paragraph 5 of this Complaint, STP alleged among other causes of action, that the renters breached the provision quoted in Paragraph 4 of this Complaint by posting negative reviews in August and September 2017 about their experiences renting Respondents' vacation properties. Respondents have claimed, in demand letters to those renters, that by breaching the provision each renter is liable to Respondents for $25,000 for "liquidated damages" under the contract, plus attorney's fees.

VIOLATION OF THE CONSUMER REVIEW FAIRNESS ACT

7. The Consumer Review Fairness Act of 2016 ("CRFA"), Pub. L. No. 114-258, 15 U.S.C. § 45b, was enacted on December 14, 2016. As of March 14, 2017, Section 2(b) of the CRFA renders void, and Section 2(c) of the CRFA prohibits the offering of, provisions in form contracts that: prohibit or restrict individual consumers' ability to communicate reviews, performance assessments, and similar analyses about a seller's goods, services, or conduct; or that impose a penalty or fee against individual consumers who engage in such communications. 15 U.S.C. §§ 45b(a)(2), 45b(b)(1), and 45b(c).

8. The Commission is authorized to enforce Section 2(c) of the CRFA in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, were incorporated into and made a part of the CRFA. 15 U.S.C. § 45b(d)(2)(A). The Commission's enforcement authority under the CRFA applies to contracts in effect on or after December 14, 2017. 15 U.S.C. § 45b(i)(2).

9. Pursuant to 15 U.S.C. § 45b(d)(1), a violation of 15 U.S.C. § 45b(c) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. § 57a(a)(1)(B).

Count I

10. As described in Paragraph 4 of this Complaint, Respondents have offered, in the course of selling or leasing their goods or services, form contracts, as that term is defined in 15 U.S.C. § 45b(a)(3), that contained a provision made void by 15 U.S.C. § 45b(b)(1).

11. Therefore, the acts and practices set forth in Paragraph 4 of this Complaint violated Section 2(c) of the CRFA, 15 U.S.C. § 45b(c).

THEREFORE, the Federal Trade Commission this twenty-ninth day of July, 2019, has issued this Complaint against Respondents.

By the Commission.

Complaint

Exhibit A

COMPLAINT EXHIBIT A
FTC 182-3088

Shore To Please Vacations LLC

8033 Sunset Blvd. #1079, Los Angeles, CA 90046 **office** (850) 427-0045 **fax** 888-233-1714

Mail Checks To:
Shore To Please Vacations
Attn: Accounting
8033 W Sunset Blvd #1079
Los Angeles, CA 90046

Redacted **Reservation**	
Rate for Accommodations (OWNER APPROVED **SALE RATE**)	PAID VIA HOMEAWAY/VRBO
State and Local Taxes (12% due to Walton Co tax increase)	incl
Cleaning Fee	incl
Processing Fee	WAIVED
Pet Deposit -non refundable (if applicable)	NA
Total due NOW(initial deposit)	PAID VIA HOMEAWAY/VRBO
Total Due on or BEFORE 45 days before check-in date	NA
Grand Total (We require you to purchase CSA damage protection insurance for $79)	PAID VIA HOMEAWAY/VRBO
Property Name	"Shore To Please Main House Only"
Property Address	24 Saint George's Ln. Rosemary Bch, FL 32461
Arriving	**June 24, 2017**
Departing	**July 1, 2017**

Arrival/Departure
Check-in: AFTER 5:00pm central time on check-in date. Check-out: BEFORE 10:00am central time on check out date.
We will make every effort to have your accommodation ready at 4pm but CHECK-IN DELAYS MAY OCCUR during peak rental times. We appreciate your patience and ask that you have alternate plans, such as the beach or dinner, available between 4-6pm. Early Check-ins and late Check-outs are NOT allowed, without written permission from Shore to Please Vacations, and may result in eviction without refund.

Advance Deposits/Payments
Shore To Please Vacations requires a 50% deposit when making the reservation. We will process this deposit by use of Visa, MasterCard, American Express, cashier's check, or personal check. The remaining balance (50%) will be due no less than 45 days from check-in and may be paid by Visa, MasterCard, Money Order, Personal check, cashier's check, or Cash. There will be a $200 fee for returned checks. Failure to pay 2nd deposit, if applicable, within 45 days prior to check in date may result in reservation cancellation and loss of all monies received. For Main House rentals where Grand Total is under $6500, 100% of total is due for initial deposit. For reservations made within 60 days of check in date, 100% of total owed will be due as deposit. A $79 CSA damage insurance policy must be purchased within 48 hours of making this reservation. For check in dates within 7 days of making reservation, the CSA policy must be purchased within 24 hours upon making reservation.

Cancellations/Changes
Should you cancel more than 45 days prior to your arrival, you will forfeit 20% of your deposit plus a $99 processing fee. If a cancellation occurs within 45 days of your arrival date, the entire deposit, including any and all payments received will be non-refundable and non-transferable. If you shorten the length of your stay within 45 days of your arrival date, you will be charged 30% of the rate of the cancelled nights. FOR RESERVATIONS MADE WITHIN 30 DAYS OF YOUR ARRIVAL DATE, cancellations must be made no later than 24 hours after making the reservation and will incur a $300 cancellation fee. 24 hours after making the reservation, 100% of deposit will be forfeited if there is a cancellation. -Any change in accommodation, length or date of stay will be subject to the cancellation policy above. No refunds will be given for late arrivals or early departures.

Pets
This house is designated "pet friendly". There will be a non-refundable $199 deposit to any renters bringing pets collected at original deposit. Dogs of all sizes and birds are allowed. Sorry, CATS ARE NOT allowed. You are responsible for cleaning up after your pets and keeping them from barking excessively, scratching the furniture or doors, or damaging the property in any way. Please keep the grounds clear of pet droppings, if we find pet droppings on Shore To Please LLC Property upon your departure, we will charge your credit card an additional $350 cleaning fee. If your pet(s) sheds excessively, we ask that you keep them off the furniture and beds, failure to do so will result in an additional cleaning charge of $350. IMPORTANT: If your pet defecates or urinates anywhere INSIDE the house, you agree to pay an additional "emergency pet cleaning fee" of $500, NO EXCEPTIONS.

Smoking
Smoking is prohibited in all accommodations. All evidence of outdoor smoking (cigarette butts, ash, cigars, and trash) must be removed from porches, balconies, courtyards and landscaping. Failure to follow our smoking policy will result in a $250 minimum charge for additional housekeeping and/or damages. SMOKING INSIDE HOUSE WILL RESULT IN IMMEDIATE EVICTION AND/OR LEGAL ACTION.

Housekeeping
Our housekeeping staff works diligently to prepare each home for your arrival. Bed linens, bath and pool towels are provided but we do request that you bring beach towels. Damage charges will be applied to your credit card in the event that excessive cleaning is needed following your departure. There is a mandatory $299 cleaning charge added on to all reservations.

(initial)

FTC - Shore to Please -000001

Maximum Occupancy

The maximum occupancy is 14 (18 for both houses). Any child above the age of 2 is considered an occupant and must be included in the occupancy total. If you are found to exceed the maximum occupancy of your accommodation, an additional fee of $200 per person will be required and charged. PARKING: Garage access is not guaranteed for any vehicles. Please refer to the parking addendum.

Hurricane Evacuation

Refunds are not given due to inclement weather unless a mandatory evacuation is issued by the National Weather Service.
In the event of a mandatory evacuation, only the unused portion of your stay will be refunded. No refunds will be given for voluntary evacuations.

Security/ damage deposit

We do require you purchase a $79 CSA insurance policy (damage protection) for your rental at this property. We will provide you with the link to purchase this on your own. Failure on your part to purchase this policy within 48 hours of booking the reservation may result in cancellation of reservation with no monies refunded, or Shore To Please Vacations LLC may, at their sole discretion, purchase the policy on your behalf with your credit card. There is 1 Amenity Access Card in the Main house (1 in carriage) that will give you access to all Rosemary Beach Community Amenities. If these cards are not placed back on the kitchen counter upon your departure (or in a conspicuous place in kitchen), and cannot be located and returned, you will be charged a $150 replacement cost for EACH card. PLEASE DO NOT MISPLACE OR LOSE THESE CARDS. Please place the house key(s) back in their appropriate lock boxes upon departure. Misplaced or lost keys will result in a $500 charge in order to pay for us to change out ALL the locks. PLEASE DO NOT LOSE OR MISPLACE KEY(S).

Rates: All rates, fees and policies are subject to change without notice. Rates will not change after being locked in with a deposit. Rates are subject to 12% tax (8% state and 4% local) and various fees.

Disclaimers

The guest shall indemnify and hold harmless the owner for any damages to the unit, the grounds, furnishings, equipment, and household items therein, which occur during the lessee's period of occupancy, excluding normal wear and tear and acts of God. The accommodations may not be sublet or assigned without the express written consent of the property owner. Excessive cleaning charges will be charged to your credit card if the accommodations are not left in a reasonably neat and orderly fashion. All monies received will be placed into interest bearing account with Agent being the recipient of any accrued interest. Two or more locked closets are considered "owner's closets" and are not included in this rental. They must remain locked at all times. Forcefully attempting to unlock these closets and/or opening them will result in forfeit of all monies paid and immediate eviction. DO NOT move furniture or beds (except roll-away cot in loft). Moving furniture and/or beds will result in immediate eviction. House parties and excessive noise are not permitted. No Fireworks, firecrackers, discharging of guns, and/or illegal activities on property is allowed. Violations of these rules will result in an immediate eviction and no refund will be given. Bringing a pet without paying the pet fee, and/or without owner's consent, will result in a "late pet fee" of $500 charged to your credit card, which you agree to pay. Obtaining this reservation under false pretenses or misrepresentation will result in immediate eviction and no refund. Refunds will not be given due to malfunctioning or broken equipment or appliances. However, every reasonable effort will be made to correct the issue as quickly as possible. If the Main House is rented by a separate party, then the MAIN HOUSE renters will have first rights to the garage, for their vehicles. If damages committed by your party are for some reason not covered by (or in excess of) the CSA damage insurance, your credit card will be charged for the additional damages. Please note that if main house and carriage house are rented by different parties, outdoor areas are considered "common areas." By signing below, you agree not to defame or leave negative reviews (includes any review or comment deemed to be negative by a Shore To Please Vacations LLC officer or member, as well as any review less than a "5 star" or "absolute best" rating) about this property and/or business in any print form or on any website (including but not limited to www.VRBO.com). Due to the difficulty in ascertaining an actual amount of damages in situations like this, breaching this clause (leaving any negative review or negative comment about this property or business) will immediately result in minimum liquidated damages of $25,000 paid by you to Shore To Please Vacations LLC. By signing below, you agree to all charges mentioned above, if you or your party incurs them, in relation to violating any rules/policies/clauses within this contract. You hereby agree if your credit card, which Shore To Please Vacations LLC has on file, is declined for any of these incurred charges, you will overnight a cashier's check or money order (made out to "Shore To Please Vacations LLC") in the amount of the charges and/or damages to the mailing address on page 1 of this contract. By signing below, you agree to be held liable for any legal fees incurred by Shore To Please Vacations LLC, arising from any legal actions, including but not limited to litigation and collections, filed against you or others in your party. By signing below, you hereby release, waive, discharge, and covenant not to sue Shore To Please Vacations LLC, its members, officers, owners, agents, or employees for any liability, claim, and/or cause of action arising out of or related to any loss, damage, or injury, including death, that may be sustained by you or anyone in your party. If you are evicted or asked to leave, either by law enforcement and/or Rosemary Beach security, you forfeit all monies paid. Florida law will govern, in respect to this agreement. Venues for litigation or any other proceedings will be held in Walton County, FL, unless otherwise stated in writing by an Officer or Agent of Shore To Please Vacations LLC.

Sign, date, initial the first page and return one (1) copy of this agreement to the above address, or fax it to us at (888) 233-1714. When first payment (deposit) is received, a receipt will be immediately emailed to you. Please make checks payable to "Shore To Please Vacations LLC." Enjoy your stay!

Signature Redacted Date

Name (print) Redacted

Address Redacted

Of guests in party Redacted

Phone # (cell preferred) Redacted email Redacted

Complaint

Shore To Please Vacations LLC

P.O. Box 27282, Panama City, FL 32411 **office** (310) 560-8045 **fax** 888-233-1714

Mail Checks To:
Shore To Please Vacations LLC
Attn: Accounting
P.O. Box 27282
Panama City, FL 32411

Redacted **Reservation**

Rate for Accommodations (OWNER APPROVED SALE RATE)	PAID VIA HOMEAWAY/VRBO
State and Local Taxes (12% due to Walton Co tax increase)	incl
Cleaning Fee	incl
Processing Fee	WAIVED
Pet Deposit -non refundable (if applicable)	incl
Total due NOW	PAID VIA HOMEAWAY/VRBO
Total Due on or BEFORE 45 days before check-in date	NA
Grand Total	PAID VIA HOMEAWAY/VRBO

Property Name	"Shore To Please Carriage House"
Property Address	24 Saint George's Ln. Rosemary Bch, FL 32461
Arriving	**July 22, 2017**
Departing	**July 29, 2017**

Arrival/Departure
Check-in: AFTER 5:00pm central time on check-in date. Check-out: BEFORE 10:00am central time on check out date.
We will make every effort to have your accommodation ready at 4pm but CHECK-IN DELAYS MAY OCCUR during peak rental times. We appreciate your patience and ask that you have alternate plans, such as the beach or dinner, available between 4-6pm. Early Check-ins and late Check-outs are NOT allowed, without written permission from Shore to Please Vacations, and may result in forfeiture of your security deposit.

Advance Deposits/Payments
Shore To Please Vacations requires a 50% deposit when making the reservation. We will process this deposit by use of Visa, MasterCard, American Express, cashier's check, or personal check. The remaining balance (50%) will be due no less than 45 days from check-in and may be paid by Visa, MasterCard, Money Order, Personal check, cashier's check, or Cash. There will be a $200 fee for returned checks. For Carriage House rentals where the rate is under $1500 (NOT including tax and fees), 100% of total is due for initial deposit. For reservations made within 60 days of check in date, 100% of total owed will be due as deposit. A $79 CSA damage insurance policy must be purchased within 3 days of making this reservation. For check in dates within 7 days, the CSA policy must be purchased immediately upon making reservation. Failure to pay 2nd deposit, if applicable, within 40 days of check in date will result in reservation cancellation and loss of all monies received.

Cancellations/Changes
Should you cancel more than 45 days prior to your arrival, you will forfeit 40% of your deposit plus a $99 processing fee. If a cancellation occurs within 45 days of your arrival date, the entire deposit, including any and all payments received will be non-refundable and non-transferable. No refunds will be given for shortening the length of our stay. FOR RESERVATIONS MADE WITHIN 30 DAYS OF YOUR ARRIVAL DATE, cancellations must be made no later than 24 hours after making the reservation and will incur a $300 cancellation fee. 24 hours after making the reservation, 100% of deposit will be forfeited if there is a cancellation. -Any change in accommodation, length or date of stay will be subject to the cancellation policy above. No refunds will be given for late arrivals or early departures.

Rates: All rates, fees and policies are subject to change without notice. Rates will not change after being locked in with a deposit. Rates are subject to 12% tax (8% state and 4% local) and various fees.

Hurricane Evacuation
Refunds are not given due to inclement weather unless a mandatory evacuation is issued by the National Weather Service.
In the event of a mandatory evacuation, only the unused portion of your stay will be refunded. No refunds will be given for voluntary evacuations.

Smoking
Smoking is prohibited in all accommodations. All evidence of outdoor smoking (cigarette butts, ash, cigars, and trash) must be removed from porches, balconies, courtyards and landscaping. Failure to follow our smoking policy will result in a $250 minimum charge to your credit card for additional housekeeping and/or damages. SMOKING INSIDE HOUSE WILL NOT BE TOLERATED AND WILL RESULT IN IMMEDIATE EVICTION.

_____(initial)

Pets
This house is designated "pet friendly". There will be a non-refundable $199 deposit to any renters bringing pets collected at original deposit. Dogs of all sizes and birds are allowed. Sorry, CATS ARE NOT allowed. You are responsible for cleaning up after your pets and keeping them from barking excessively, scratching the furniture or doors, or damaging the property in any way. Please keep the grounds clear of pet droppings, if we find pet droppings on Shore To Please LLC Property upon your departure, we will charge your credit card an additional $350 cleaning fee. If your pet(s) sheds excessively, we ask that you keep them off the furniture and beds, failure to do so will result in an additional cleaning charge of $350. IMPORTANT: If your pet defecates or urinates anywhere INSIDE the house, you agree to pay an additional "emergency pet cleaning fee" of $500, NO EXCEPTIONS.

Housekeeping
Our housekeeping staff works diligently to prepare each home in preparation for your arrival. Bed linens, bath and pool towels are provided but we do request that you bring beach towels. Damage charges will be applied to your credit card in the event that excessive cleaning is needed following your departure. There is a Mandatory $149 Cleaning charge added on to all reservations.

Security/ damage deposit
We do require you purchase a $79 CSA damage insurance policy (damage protection) for your rental at this property. We will provide you with the link to purchase this on your own. Failure to do so within 3 days of booking the reservation may result in cancellation of reservation with no monies refunded, or Shore To Please Vacations LLC may, at their sole discretion, purchase the policy on your behalf with your credit card. There is 1 Amenity Access Card in the Main house (1 in carriage) that will give you access to all Rosemary Amenities. If these cards are not placed back on the kitchen counter upon your departure (or in a conspicuous place in kitchen), and cannot be located and returned, you will be charged a $150 replacement cost for EACH card. PLEASE DO NOT MISPLACE OR LOSE THESE CARDS. Please place the house key(s) back in their appropriate lock boxes upon departure. Misplaced or lost keys will result in a $500 fee in order to pay for us to change out ALL the locks. PLEASE DO NOT LOSE OR MISPLACE KEY(S).

Disclaimers
The guest shall indemnify and hold harmless the owner for any damages to the unit, the grounds, furnishings, equipment, and household items therein, which occur during the lessee's period of occupancy, excluding normal wear and tear and acts of God. The accommodations may not be sublet or assigned without the express written consent of the property owner. Excessive cleaning charges will be charged to your credit card if the accommodations are not left in a reasonably neat and orderly fashion. All monies received will be placed into interest bearing account with Agent being the recipient of any accrued interest. Two or more locked closets are considered "owner's closets" and are not included in this rental. They must remain locked at all times. Forcefully attempting to unlock these closets and/or opening them will result in forfeit of all monies paid and immediate eviction. DO NOT move furniture or beds (except roll-away cot in loft). Moving furniture and/or beds will result in immediate eviction. House parties and excessive noise are not permitted. No Fireworks, firecrackers, discharging of guns, and/or illegal activities on property is allowed. Violations of these rules will result in an immediate eviction and no refund will be given. Bringing a pet without paying the pet fee, and/or without owner's consent, will result in a "late pet fee" of $500 charged to your credit card, which you agree to pay. Obtaining this reservation under false pretenses or misrepresentation will result in immediate eviction and no refund. Refunds will not be given due to malfunctioning or broken equipment or appliances. However, every reasonable effort will be made to correct the issue as quickly as possible. If the Main House is rented by a separate party, then the MAIN HOUSE renters will have first rights to the garage, for their vehicles. If damages committed by your party are for some reason not covered by (or in excess of) the CSA damage insurance, your credit card will be charged for the additional damages. Please note that if main house and carriage house are rented by different parties, outdoor areas are considered "common areas." By signing below, you agree not to defame or leave negative reviews (includes any review or comment deemed to be negative by a Shore To Please Vacations LLC officer or member, as well as any review less than a "5 star" or "absolute best" rating) about this property and/or business in any print form or on any website (including but not limited to www.VRBO.com). Due to the difficulty in ascertaining an actual amount of damages in situations like this, breaching this clause (leaving any negative review or negative comment about this property or business) will immediately result in minimum liquidated damages of $25,000 paid by you to Shore To Please Vacations LLC. By signing below, you agree to all charges mentioned above, if you or your party incurs them, in relation to violating any rules/policies/clauses within this contract. You hereby agree if your credit card, which Shore To Please Vacations LLC has on file, is declined for any of these incurred charges, you will overnight a cashier's check or money order (made out to "Shore To Please Vacations LLC") in the amount of the charges and/or damages to the mailing address on page 1 of this contract. By signing below, you agree to be held liable for any legal fees incurred by Shore To Please Vacations LLC, arising from any legal actions, including but not limited to litigation and collections, filed against you or others in your party. By signing below, you hereby release, waive, discharge, and covenant not to sue Shore To Please Vacations LLC, its members, officers, owners, agents, or employees for any liability, claim, and/or cause of action arising out of or related to any loss, damage, or injury, including death, that may be sustained by you or anyone in your party. If you are evicted or asked to leave, either by law enforcement and/or Rosemary Beach security, you forfeit all monies paid. Florida law will govern, in respect to this agreement. Venues for litigation or any other proceedings will be held in Walton County, FL, unless otherwise stated in writing by an Officer or Agent of Shore To Please Vacations LLC.

Sign, date, initial the first page and return one (1) copy of this agreement via E-Mail scan, or fax it to us at (888) 233-1714. When first payment (deposit) is received, a receipt will be emailed to you. Enjoy your stay!

Redacted 7/22/17

Signature Redacted

Name (print)

Redacted
Address

Redacted Redacted

Of guests in party

Phone # (cell preferred) Redacted

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondents with violations of the Consumer Review Fairness Act of 2016.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Consumer Review Fairness Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

FINDINGS

1. The Respondents are:

   a. Shore to Please Vacations LLC, a Nevada limited liability company, registered to do business in Florida, with its principal office or place of business at 8033 West Sunset Boulevard, #1079, West Hollywood, California 90046.

   b. Robert Aaron Stephens, the owner and manager of Shore to Please Vacations LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Shore to Please Vacations LLC. His principal office or place of business is the same as that of Shore to Please Vacations LLC.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Communication" means a written, oral, or Pictorial review, performance assessment, or other similar analysis of goods or services, including conduct related to the goods or services.

B. "Review-Limiting Contract Term" means a standardized contract term that:

1. prohibits or restricts the ability of a person who is a party to the contract to engage in a Covered communication;

2. imposes a penalty or fee against a person who is a party to the contract for engaging in a Covered Communication; or

3. transfers, or requires a person who is a party to the contract to transfer, to any other person any intellectual property rights in a Covered Communication, with the exception of a non-exclusive license to lawfully use a Covered Communication about a Respondent's goods or services.

C. "Pictorial" includes pictures, photographs, video, illustrations, and symbols.

D. "Respondents" means Shore to Please Vacations LLC and Robert Aaron Stephens, individually or collectively.

1. "Corporate Respondent" means Shore to Please Vacations LLC, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means Robert Aaron Stephens.

Provisions

I. Prohibited Use of Review-Limiting Contract Terms

IT IS ORDERED that Respondents, and Respondents' members, managers, officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the sale or leasing of any good or service, must not:

A. offer to any prospective customer a contract, or offer to any customer a renewal contract, that includes a Review-Limiting Contract Term;

B. require that a customer accept a Review-Limiting Contract Term as a condition of any Respondent's fulfillment of its obligations under a customer contract that a Respondent entered into before the effective date of this Order; or

C. attempt to enforce or assert the validity of any Review-Limiting Contract Term in any customer contract that a Respondent entered into before the effective date of this Order.

Nothing in this Provision shall require a Respondent to publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

II. Notice to Consumers

IT IS FURTHER ORDERED that each Respondent must, within 30 days after the effective date of this Order, notify all customers whose contact information is available to them who entered into a contract with any Respondent that included any term concerning a Covered Communication, such as Respondents' rental agreements or any settlement or release relating to any rental agreement, used on or after June 1, 2017, through the effective date of this Order, by mailing or emailing each a notice as shown in Attachment A:

A. The heading of the notice and the subject line for any email must read "Your Right to Post Honest Reviews."

B. The Respondent's name and return address for any mailing must appear on the front of the envelope, the customer's name and address must be printed on the front of the envelope or be visible through a window in the envelope, and the words "Your Right to Post Honest Reviews" must be printed in easily noticed text near the customer's name and address.

C. The notice must not include any other materials or message about a Respondent, or otherwise concern its goods or services.

III. Dismissal of Breach of Contract Count Against Renter

IT IS FURTHER ORDERED that, within 3 days after the issuance of this Order, Respondents must file with the Circuit Court of the First Judicial Circuit, in and for Walton County, Florida, a notice of dismissal, with prejudice, of "Count I – Breach of Contract (Negative Review)," and any claim for relief or monetary recovery, including damages, interest, attorney's fees, and costs based on such count, in *Shore to Please Vacations LLC v. Paul A. Jordan*, Case No. 2017 CA 586.

IV. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 3 years after the issuance date of this Order, Individual Respondent for any business that he, individually or collectively with Corporate Respondent, owns a majority of or controls directly or indirectly, and Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for drafting, approving, or enforcing customer contracts, or for responding to Covered Communications and all agents and representatives who participate in drafting, approving, or enforcing customer contracts, or responding to Covered Communications; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered and the means of advertising, marketing, and sales, any conduct toward consumers who have engaged in Covered Communications, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to

his own involvement); (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with this Order; and (e) provide a copy of each Acknowledgment of this Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email and Internet addresses, including all residences; (b) identify all his business activities, including any business for which he performs services whether as an employee or otherwise and any entity in which he has any ownership interest; and (c) describe in detail his involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 3 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which he performs services whether as an employee or otherwise and (ii) any entity in which he has any ownership interest and over which he has direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580. The subject line must begin: *In re Shore to Please Vacations LLC*, C-4683.

VI. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 3 years after the issuance date of this Order, and retain each such records for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondents, owns a majority of or controls directly or indirectly, must create and retain the following records:

A. Personnel records showing, for each person providing services in relation to any aspect of this Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. A copy of: each unique contract relating to a Covered Communication; each unique contract used in connection with the sale or leasing of Respondent's goods or services, including processing applications to rent property; all communications with consumers threatening any legal action relating to any Covered Communication; and all parties' court filings and Respondents' discovery responses in any legal action relating to any Covered Communication; and

C. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any

Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VIII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate July 29, 2039, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after this Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of this Order, and the dismissal or ruling is either not appealed or upheld on appeal, then this Order will terminate according to this Provision as though the complaint had never been filed, except that this Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A to the Order – Letter Notice Template:

The notice must be in the following form, appearing on Respondents' letterhead and email, with the underlined text completed as directed:

Your Right to Post Honest Reviews

Dear <Name of customer>:

Our records show that you rented a vacation property in Rosemary Beach, Florida from my company through VRBO.com. I am writing to tell you that the Federal Trade Commission (FTC), the nation's consumer protection agency, has alleged that we used contract provisions that violated the Consumer Review Fairness Act (CRFA). The CRFA protects your ability to share your honest opinions about a business's products, services, or conduct in any forum, including social media. According to the FTC, we used a provision in our form contracts that unlawfully restricted our customers (including you) from sharing truthful information and opinions about their experiences with us.

We are contacting our customers to tell you that this contract provision is void and we cannot enforce the provision against you. You can publish your honest review even if you say something negative about us or our services.

If you have questions about the FTC's case, visit [add case page alias URL provided by FTC staff with embedded hyperlink].

Sincerely,

Robert Aaron Stephens

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order as to Shore to Please Vacations LLC and Robert A. Stephens ("respondents").

The proposed consent order ("order") has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the order and the comments received, and will decide whether it should withdraw the order or make it final.

Analysis to Aid Public Comment

This matter involves the respondents' use of non-disparagement provisions in consumer form contracts in the course of renting vacation properties. The complaint alleges that the respondents violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained non-disparagement provisions made void by Section 2(b) of the CRFA. The CRFA defines a form contract as a contract with standardized terms, used in the course of selling or leasing goods or services, and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct involving the use of contract terms that prohibit, restrict, penalize, or transfer rights in consumer reviews or evaluation of the respondents, their goods, or their services. The CRFA authorizes the Commission to seek civil penalties for knowing violations, but the complaint does not allege that the respondents' violations were knowing, and the order does not provide for monetary relief.

Part I prohibits, in the sale or leasing of any good or service, the respondents from: offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondents' fulfillment of their obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in customer contracts entered into before the effective date of the order. Part I would not require that the respondents publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

Part II requires the respondents to notify by mail or email customers with whom they entered into form contracts with a non-disparagement provision on or after March 14, 2017 that the non-disparagement provision is void and cannot be enforced, and that those customers can publish their honest reviews about the respondents, even if their comments are negative.

Part III requires that the respondents dismiss their remaining count against a renter for alleged breach of the non-disparagement provision.

Part IV requires the respondents to submit signed acknowledgments that relevant personnel received the order.

Part V requires the respondents to file compliance reports with the Commission, and to notify the Commission of bankruptcy filings or changes in company structure that might affect compliance obligations.

Part VI contains recordkeeping requirements for personnel records, consumer contracts, communications with consumers threatening any legal action relating to any review; and court filings and the company's discovery responses in legal actions over consumer reviews, as well as all records necessary to demonstrate compliance or non-compliance with the order.

Part VII contains other requirements related to the Commission's monitoring of the respondent's order compliance.

Part VIII provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

Complaint

IN THE MATTER OF

UNITEDHEALTH GROUP INCORPORATED, COLLABORATIVE CARE HOLDINGS, LLC, DAVITA INC., AND DAVITA MEDICAL HOLDINGS, LLC

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-4677; File No. 181 0057
Complaint, June 19, 2019 – Decision, August 12, 2019

This consent order addresses the $4.3 billion acquisition by UnitedHealth Group Incorporated of certain assets of DaVita Medical Group ("DMG"). 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 (i) removing an actual, direct, and substantial competitor from the Las Vegas Area for managed care provider organization ("MCPO") services sold to Medicare Advantage health plans ("MA plans") and (ii) lessening competition in the market for MA plans sold to individuals. The consent order requires a complete divestiture of DMG's assets relating to the HealthCare Partners Nevada business ("HCPNV Assets") and granting certain related licenses.

Participants

For the *Commission*: *Emily Bowne, Jeanne Nichols, Rohan Pai, Joshua Smith* and *Jonathan Wright.*

For the *Respondents*: *Ilene Gotts, Wachtell, Lipton, Rosen &Katz; Mark Botti* and *Anthony Swisher, Baker Botts LLP;* and *Karen Silverman, Lathan & Watkins LLP.*

COMPLAINT

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondent Collaborative Care Holdings, LLC, a limited liability company subject to the jurisdiction of the Commission and controlled by Respondent UnitedHealth Group Incorporated ("UnitedHealth Group"), a corporation subject to the jurisdiction of the Commission, and Respondent DaVita Inc. ("DaVita"), a corporation subject to the jurisdiction of the Commission, have reached an agreement (the "Proposed Acquisition") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, pursuant to which UnitedHealth Group will acquire all of the issued and outstanding equity interests of Respondent DaVita Medical Holdings, LLC, the holding company for DaVita Medical Group ("DMG") and a limited liability company subject to the jurisdiction of the Commission, from DaVita, which, if consummated, would violate 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,

and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent UnitedHealth Group is a for-profit corporation headquartered at 9900 Bren Road East, Minnetonka, MN 55343. UnitedHealth Group operates two wholly-owned subsidiaries: UnitedHealthcare and Optum, Inc. ("Optum").

2. UnitedHealth Group's insurance business (operated by UnitedHealthcare, or "United") offers commercial and Medicare Advantage ("MA") health insurance plans to employer groups and individual consumers, including Medicare-eligible seniors (individuals age 65 and over), in the State of Nevada and other states in competition with other MA insurers, known as "Medicare Advantage Organizations" ("MAOs"). United is the largest MAO in the combined Clark and Nye counties in Nevada (the "Las Vegas Area").

3. Respondent Collaborative Care Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 9900 Bren Road East, Minnetonka, Minnesota 55343.

4. Optum's OptumCare unit offers managed care provider organization ("MCPO") services to health insurers, including MAOs, and operates employed medical groups, independent physicians associations or affiliated networks, ambulatory surgery centers, and urgent care centers. In the Las Vegas Area, OptumCare's network consists of primary care physicians and specialists employed by or associated with Southwest Medical Associates, OptumCare Medical Group, and OptumCare Specialty Care.

5. Respondent DaVita Inc. is a for-profit corporation headquartered at 2000 16th Street, Denver, CO 80202. DaVita's DMG division operates MCPOs in six states, including Nevada. In the Las Vegas Area, DMG operates the HealthCare Partners of Nevada ("HCPNV") network, which consists of HCP Medical Group, an employed physician group, and DMG's affiliated providers.

6. Respondent DaVita Medical Holdings, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of California with its executive offices and principal place of business located at 717 17th Street, Denver, Colorado 80202.

7. In the Las Vegas Area, Optum and DMG operate the two largest MCPOs, which are medical groups that employ or affiliate with a significant number of primary care physicians and specialists to ensure the coordination of patient care and control the costs of delivering proper care to patients, including MA members. Optum's and DMG's MCPOs—OptumCare and HCPNV, respectively—are the two largest providers of MCPO services sold to MAOs in the Las Vegas Area.

II. JURISDICTION

8. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

9. The Proposed Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. THE PROPOSED ACQUISITION

10. On December 5, 2017, UnitedHealth Group entered into an equity purchase agreement to acquire DaVita's DMG division for approximately $4.9 billion in cash. The purchase price was amended to $4.3 billion on December 11, 2018. The Proposed Acquisition includes DMG's medical groups and affiliated networks across all six states where DMG operates, including Nevada.

IV. THE RELEVANT MARKETS

A. MCPO Services Sold to MAOs

11. MCPO services sold to MAOs constitute a relevant service market in which to analyze the effects of the Proposed Acquisition. MCPO services include physician service lines—both primary care physicians and specialists—that are integrated with other aspects of care coordination and cost containment provided by MCPOs. MCPOs offer to MAOs a broad set of providers that can independently manage an MA network while effectively coordinating care, managing utilization, and containing costs for a covered patient population.

12. The relevant geographic market in which to analyze the effects of the Proposed Acquisition on MCPO services sold to MAOs is no broader than the Las Vegas Area, which includes Clark and Nye counties in Nevada.

B. MA Plans Sold to Individual MA Members

13. Another relevant product market in which to analyze the effects of the Proposed Acquisition is the market for MA health plans ("MA plans") sold to individual MA members. MA plans are meaningfully differentiated from other types of health insurance products, including Original Medicare, eligibility-restricted Medicare options (e.g., special needs plans or "SNPs"), employer-group MA plans, and commercial health plans. MA plans are differentiated from Original Medicare in several important respects, including MA plans' limited networks, caps on out-of-pocket spending, coordination of care by providers, and members' access to supplemental benefits like prescription drug coverage. SNPs are MA plans specifically designed for qualifying individuals to treat specific medical conditions or needs, and thus are not available to seniors who enroll in a typical MA plan unless they have or develop one of the specified conditions required for SNP eligibility. Likewise, employer-group MA plans are limited to

employees of a participating organization; an MA enrollee cannot enroll in an employer-group MA plan unless they are a former employee of a participating employer. The market for MA plans also excludes commercial health plans because MA plans often feature zero or very low premiums, which are much less expensive than commercial health plans, which frequently charge much higher premiums. Medicare-eligible seniors who purchase MA plans therefore are either not likely to select Original Medicare or purchase a commercial health plan, or are restricted from purchasing a SNP or employer-group MA plan, in the event of a price increase on all MA plans.

14. Clark County and Nye County are each a relevant geographic market in which to analyze the effects of the Proposed Acquisition on MA plans sold to individual MA members; however, the competitive conditions and market structure for MA plans sold to individual MA members are similar in both counties, so it may be appropriate to cluster Clark and Nye counties together as the Las Vegas Area for analytical convenience.

V. THE STRUCTURE OF THE RELEVANT MARKETS

15. UnitedHealth Group's OptumCare and DaVita's HCPNV are the two largest providers of MCPO services sold to MAOs in the Las Vegas Area. The Proposed Acquisition will cause OptumCare and HCPNV to cover over 80% of MA members in the Las Vegas Area and result in a highly concentrated market.

16. In the market for MA plans sold to individual MA members in the Las Vegas Area, United covers over 50% of MA lives. Humana is responsible for approximately 35% of the MA lives in the Las Vegas Area. The remainder of the Las Vegas Area market for MA plans sold to individual MA members comprises a number of MA insurers with less than 10% of the market.

VI. EFFECTS OF THE PROPOSED ACQUISITION

A. Horizontal Effects in the Las Vegas Area

17. The Proposed Acquisition would eliminate direct and substantial price and non-price competition between UnitedHealth Group's OptumCare and DaVita's HCPNV in MCPO services sold to MAOs in the Las Vegas Area. The elimination of this competition would allow UnitedHealth Group to exercise market power unilaterally following the consummation of the Proposed Acquisition. The ultimate effect of the Proposed Acquisition would be to increase the likelihood that prices of MCPO services provided to MAOs in the Las Vegas Area would rise above competitive levels. The Proposed Acquisition would also result in a decrease in incentive to compete on quality, services, and other amenities in the Las Vegas Area.

B. Vertical Effects in the Las Vegas Area

18. The Proposed Acquisition would also result in vertical anticompetitive effects stemming from the integration of UnitedHealth Group and HCPNV, because UnitedHealth Group—which owns United, the leading MAO in the Las Vegas Area—would control a

competitively significant input—HCPNV—for United's rival MAOs' networks. This would give UnitedHealth Group the ability and incentive to negotiate with United's rival MAOs for higher HCPNV rates, or even refuse to allow rival MAOs to contract with HCPNV.

19. The ultimate effect of the Proposed Acquisition would be to increase the likelihood that the Centers for Medicare and Medicaid Services ("CMS") will make higher payments to MAOs, and seniors in the Las Vegas Area would incur higher cost-sharing payments and receive fewer benefits and lower quality healthcare services.

20. The Proposed Acquisition would also reduce the non-price competition that takes place today between United and Humana, an MAO in the Las Vegas Area. Today, Humana and HCPNV closely coordinate on care, quality, and service offerings. The Proposed Acquisition may significantly reduce HCPNV's incentive to work with Humana to compete against United on these non-price dimensions. In turn, a reduction in Humana's MA plan quality and benefits would diminish United's incentives to improve attributes of its own MA plans. Ultimately, this would reduce the quality and breadth of choices available to seniors in the Las Vegas Area.

VII. ENTRY CONDITIONS

21. New entry or expansion by existing market participants is unlikely to occur in a timely or sufficient manner to deter or counteract the likely anticompetitive effects of the Proposed Acquisition in the Las Vegas Area.

VIII. EFFICIENCIES

22. Respondents' claimed efficiencies do not outweigh the Proposed Acquisition's likely harm to competition. The purported benefits fall far short of the cognizable efficiencies needed to outweigh the Proposed Acquisition's likely significant harm to competition in the Las Vegas Area.

IX. VIOLATIONS CHARGED

23. The Proposed Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and if consummated, may substantially lessen competition in the relevant markets in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this nineteenth day of June, 2019, issues its complaint against said Respondents.

By the Commission, Chairman Simons recused.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Collaborative Care Holdings, LLC., controlled by Respondent UnitedHealth Group Incorporated, of all of the issued and outstanding equity interests of Respondent DaVita Medical Holdings, LLC, from Respondent DaVita Inc., collectively referred to as "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint; or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent UnitedHealth Group Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 9900 Bren Road East, Minnetonka, Minnesota 55343.

2. Respondent Collaborative Care Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 9900 Bren Road East, Minnetonka, Minnesota 55343.

3. Respondent DaVita Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

4. Respondent DaVita Medical Holdings, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the

State of California with its executive offices and principal place of business located at 717 17th Street, Denver, Colorado 80202.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "UnitedHealth" means UnitedHealth Group Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by UnitedHealth Group Incorporated (including Collaborative Care Holdings, LLC), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Collaborative Care Holdings" means Collaborative Care Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Collaborative Care Holdings, LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "DaVita" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "DaVita Medical Holdings" means DaVita Medical Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by DaVita Medical Holdings, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Respondents" means UnitedHealth, Collaborative Care Holdings, DaVita Inc., and DaVita Medical Holdings, individually and collectively.

G. "Decision and Order" means the following:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order following its issuance and service by the Commission in this matter.

H. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph VIII of the Decision and Order.

I. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.
Asset Maintenance

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective and until Respondents fully transfer and deliver all of the HealthCare Partners Nevada Assets to an Acquirer:

A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the HealthCare Partners Nevada Business, to minimize any risk of loss of competitive potential for such HealthCare Partners Nevada Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the HealthCare Partners Nevada Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the HealthCare Partners Nevada Assets (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the HealthCare Partners Nevada Business.

B. Respondents shall maintain the operations of the HealthCare Partners Nevada Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business and as consistent with standard operating procedures to ensure professionalism, safety, and quality of any product or service offered by the business, to maintain all related information technology infrastructure and data contained therein, to maintain compliance with all applicable healthcare laws, and to maintain any licenses or approvals with any Government Entity) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such HealthCare Partners Nevada Business and shall use their best efforts to preserve the existing relationships with the following: Healthcare Providers; Healthcare Plans; clients; patients; suppliers; licensors; licensees; advertisers; vendors and distributors; customers; Government Entities; employees; and others having business relations with the HealthCare Partners

Nevada Business. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the HealthCare Partners Nevada 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 HealthCare Partners Nevada Business;

2. continuing, at least at their scheduled pace, any expenditures for the HealthCare Partners Nevada Business authorized prior to the date the Consent Agreement was signed by the Respondents;

3. providing such resources as may be necessary to respond to competition prior to the complete transfer and delivery of the HealthCare Partners Nevada Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of the HealthCare Partners Nevada Business;

5. making available for use by the HealthCare Partners Nevada Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the HealthCare Partners Nevada Divestiture Assets; and

6. providing such support services to the HealthCare Partners Nevada Business as were being provided to such HealthCare Partners Nevada Business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Respondents shall maintain a work force that is (i) materially equivalent in size (as measured in full time equivalents) as, and (ii) comparable in training, professionalism (including licensing within particular professional Healthcare Provider categories), and expertise to what has been associated with the HealthCare Partners Nevada Business for the HealthCare Partners Nevada Business's last fiscal year.

D. Respondents shall:

1. not use, directly or indirectly, any HealthCare Partners Nevada Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

b. Respondents' obligations to the Acquirer under the terms of the HealthCare Partners Nevada Divestiture Agreements; or

c. applicable Law;

2. not disclose or convey any such HealthCare Partners Nevada Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer, (ii) other Persons authorized by the Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor, and *except* to the extent necessary to comply with applicable Law;

3. not provide, disclose or otherwise make available, directly or indirectly, any HealthCare Partners Nevada Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees directly involved in providing Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Information Technology to the Acquirer and only for the purposes of providing such Transition Services or such transfer and delivery;

4. institute procedures and requirements to ensure that the employees providing Transition Services to the Acquirer or who are engaged in the transfer of the Information Technology to the Acquirer:

   a. do not provide, disclose, or otherwise make available, directly or indirectly, any HealthCare Partners Nevada Confidential Business Information in contravention of the Orders;

   b. do not solicit, access, or use any HealthCare Partners Nevada Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

5. take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the HealthCare Partners Nevada Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the HealthCare Partners Nevada Divestiture Agreements, including:

   a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

   b. to the extent practicable, maintaining HealthCare Partners Nevada Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that HealthCare Partners Nevada Confidential Business Information is not shared with Respondents' personnel engaged in the provision of the same or substantially the same type of business in Nevada as the HealthCare Partners Nevada Business.

III.
Monitor

IT IS FURTHER ORDERED that:

A. John P. Harris shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the HealthCare Partners Nevada Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, 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 Orders and in consultation with the Commission;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until Respondents complete the following in a manner required by the Decision and Order:

a. the transfer and delivery of all of the HealthCare Partners Nevada Assets to the Acquirer;

b. the transfer and delivery of all of the Information Technology to the Acquirer;

c. the transfer and delivery of all HealthCare Partners Nevada Confidential Business Information to the Acquirer; and

d. the provision of all Transition Services to the Acquirer.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent UnitedHealth, 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 UnitedHealth, such consultants (including information technology experts), accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents 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, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the date this Order to Maintain Assets is issued and every sixty (60) days thereafter, and at such other times as my be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. After the Decision and Order becomes final, the Monitor shall report to the Commission as described in Paragraph VIII.H. of the Decision and Order.

I. Respondents 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,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission, among other things, may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and

assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent UnitedHealth, which consent shall not be unreasonably withheld;

2. if Respondent UnitedHealth 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 UnitedHealth of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor;

3. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. 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.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as the Monitor pursuant to the Decision and Order.

N. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.
Compliance Reports

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every ninety (90) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and

form in which they intend to comply, are complying, and have complied with the Orders ("Compliance Reports").

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the HealthCare Partners Nevada Assets to the Acquirer, (ii) the transfer and delivery of all of the Information Technology to the Acquirer, (iii) the transfer and delivery of all HealthCare Partners Nevada Confidential Business Information to the Acquirer; (iv) the provision of Transition Services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

D. After the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the Compliance Reports required to be submitted by Respondents pursuant to the Decision and Order.

V.
Change in Respondents

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

A. any proposed dissolution of: UnitedHealth Group Incorporated; Collaborative Care Holdings, LLC; DaVita Inc.; or DaVita Medical Holdings, LLC;

B. any proposed acquisition, merger, or consolidation of: UnitedHealth Group Incorporated; Collaborative Care Holdings, LLC; DaVita Inc.; or DaVita Medical Holdings, LLC; or

C. any other change in a Respondent including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.
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 a Respondent made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

VII.
Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the HealthCare Partners Nevada Business through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the HealthCare Partners Nevada Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the HealthCare Partners Nevada Assets except for ordinary wear and tear.

VIII.
Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later 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;

B. the day after all of the HealthCare Partners Nevada Assets and Information Technology have been transferred to and are in the physical possession of the Acquirer, as required by and described in the Decision and Order; or

C. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission, Chairman Simons recused.

Order to Maintain Assets

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement"), entered into this 13th day of May, 2019, by and between John P Harris ("Harris" or "Monitor") and UnitedHealth Group Incorporated ("UHG" or "Respondent" and Monitor and Respondent together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the UnitedHealth Group Incorporated and DaVita, Inc., File No. _____, 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 the Divestiture Assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondent's compliance with their 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 monitoring Respondent's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall serve as an independent third party and not as an employee or agent of Respondent or the Commission.

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, 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, 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) business days after the date on which Respondent file such report with the Commission.

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by the Respondent, the acquirer of the Divestiture Assets, any supplier or customer of either UHG or DaVita, 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 pursuant to the Orders or (ii) persons employed at the Commission;

(b) 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;

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

(d) for a period of ten (10) 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 relating thereto; and

(e) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in

the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by UHG to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with such request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondent, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

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 (collectively "Other Personnel") as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders, including the engagement of an IT consultant. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Respondent in writing of its intention to do so, andprovide an estimate of the anticipated costs.

2.2 Monitor Compensation. Respondent shall pay Monitor in accordance with the fee schedule and procedure 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 acquirer of the Divestiture Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent shall 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 Article 2.1 of this Agreement.

(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 indemnify and hold harmless Monitor and its employees, agents and Other Personnel against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, decisions, proceedings, and any other action or omission taken or made in good faith (including without limitation 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). For the purposes of this Agreement, "expenses" shall include, without limitation, damages, judgments, fines, settlements, suits, proceedings or claims and appeals and expense of appeals, attachment or similar bonds, except (a) when payment by Respondent is prohibited by Law or (b) to the extent that such losses, claims, damages, liabilities, or expenses result from Monitor's gross negligence or willful misconduct.

2.4 Disputes. In the event of a disagreement or dispute between 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 UHG or Monitor may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve the dispute.

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.

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 the Monitor completes its Final Report pursuant to the Decision and Order; 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, and there shall be no liability to Respondent as a result of such termination.

3.3 Governing Law and Forum Selection. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of the State of Delaware, including all matters of construction, validity and performance. Any dispute arising under this Agreement shall be resolved in the Federal or state courts sitting in the State of Delaware. 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 UHG or Monitor without the consent of UHG 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 Notices. All notices permitted or required under this Agreement shall be in writing and shall be by personal delivery, a nationally recognized overnight courier service (e.g., Federal Express or UPS), e-mail or facsimile transmission, or certified or registered United States mail, return receipt requested. Notices shall be deemed given upon actual receipt of a personal delivery, the earlier of actual receipt or one (1) day after deposit with the courier service, upon receipt by sender of confirmation of any facsimile or e-mail transmission, or five (5) days after deposit with the U.S. Postal Service. Notices shall be sent to the addresses listed below, or to such other address as either party may specify in writing, and, in the case of UHG, shall be addressed "c/o Richard Mattera, Esq.".

3.10 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.11 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.

3.12 Severability. If any provision of this Agreement shall be held to be invalid or unenforceable, the invalidity or unenforceability of such provision shall not affect the validity or enforceability of any of the remaining provisions of this Agreement, and this Agreement shall be enforced as if such invalid or unenforceable provision had not been contained herein and such invalid or unenforceable provision shall be reformed and enforced to the maximum extent permitted under applicable law.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

UnitedHealth Group Incorporated

John P. Harris

By: Richard J. Mattera

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Collaborative Care Holdings, LLC, controlled by Respondent UnitedHealth Group Incorporated, of all of the issued and outstanding equity interests of Respondent DaVita Medical Holdings, LLC, from Respondent DaVita Inc., collectively referred to in this Decision as "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent UnitedHealth Group Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 9900 Bren Road East, Minnetonka, Minnesota 55343.

2. Respondent Collaborative Care Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 9900 Bren Road East, Minnetonka, Minnesota 55343.

3. Respondent DaVita Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

4. Respondent DaVita Medical Holdings, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of California with its executive offices and principal place of business located at 717 17th Street, Denver, Colorado 80202.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in the Orders, the following definitions shall apply:

A. "UnitedHealth" means UnitedHealth Group Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by UnitedHealth Group Incorporated (including, Collaborative Care Holdings, LLC), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Collaborative Care Holdings" means Collaborative Care Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Collaborative Care Holdings, LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "DaVita" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "DaVita Medical Holdings" means DaVita Medical Holdings, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by DaVita Medical Holdings, LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Respondents" means UnitedHealth, Collaborative Care Holdings, DaVita, and DaVita Medical Holdings, individually and collectively.

G. "Acquirer(s)" means the following:

1. Intermountain; and

2. any other Person approved by the Commission to acquire the HealthCare Partners Nevada Assets.

H. "Acquisition Agreement" means the *Equity Purchase Agreement* among DaVita Inc., Collaborative Care Holdings, LLC, and solely with respect to Section 9.3 and Section 9.18, UnitedHealth Group Incorporated dated as of December 5, 2017, and the *First Amendment to the Equity Purchase Agreement* dated as of September 20, 2018, and the *Second Amendment to the Equity Purchase Agreement* dated as of December 11, 2018, pursuant to which Respondent UnitedHealth intends to acquire DaVita Medical Holdings.

I. "Acquisition Date" means the date on which Respondent UnitedHealth acquires any Ownership Interest in DaVita Medical Holdings.

J. "Business Information" means all originals and all copies of any operating, financial or other information, books, records, documents, data computer files (including files stored on a computer hard drive or other storage media), electronic files, ledgers, papers, instruments, and other materials, wherever located and however stored (*i.e.*, whether stored or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media) used in the HealthCare Partners Nevada Business, including the following:

1. customer files and records;

2. patient information, including individually identifiable health information of patients (*i.e.*, patient files and records, including all such electronic medical records) and all patient information used to track patient usage of medical services and health status of patients, patient registries, patient referrals, patient prior authorizations, patient experience reports, claims, hospital admissions, and all other such patient information as contained in Respondent DaVita's data warehouse;

3. Healthcare Plan information, including records related to the negotiating and/or contracting histories with Healthcare Plans, reimbursement histories with Healthcare Plans, correspondence with, and presentations and proposals to, Healthcare Plans;

4. records related to accounts payable, rent, payment processing, financial applications, actuarial services, financial reporting, and tax returns (but only to the extent a particular tax return is requested by the Acquirer);

5. human resource records, including records related to payroll, employee compensation, employee support, employee learning and development, employee benefits and recruitment;

6. records related to information technology systems and contracts with Third-Parties related to the provision of these systems;

7. records related to care and disease management;

8. records related to Government Approvals;

9. records related to compliance with applicable healthcare laws;

10. records related to coding, billing, and health assessments for healthcare services;

11. Healthcare Provider information, including records related to the negotiation and/or contracting histories with Healthcare Providers, contract administration, performance of Healthcare Providers, Healthcare Provider credentialing, and presentations and proposals made to Healthcare Providers; and

12. CMS information, including records related to the CMS Star Quality Rating System, and the CMS risk adjustment factor measurements.

provided, however, that in cases in which such documents and materials contain information: (i) that relates both to the HealthCare Partners Nevada Business and the Retained Businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the HealthCare Partners Nevada Business; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where Respondents provide such copies to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest information that, in content, also relates to a Retained Business.

K. "CMS" means the United States Centers for Medicare and Medicaid Services.

L. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to an Acquirer for the labor of a

Respondent's employee shall not exceed the then-current average hourly wage rate for such employee.

M. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) close on the divestiture of the HealthCare Partners Nevada Assets as required by Paragraph II of this Order.

N. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IX of this Order.

O. "Domain Name(s)" means the domain name(s) and the related uniform resource locator(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

P. "Employee Information" means the following to the extent such disclosure to the Acquirer is permitted by Law:

1. a complete and accurate list containing the name of each Information Technology and Critical Services Employee;

2. with respect to each such employee:

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a description of the employee's responsibilities related to the Information Technology or the provision of the services related to use of the Information Technology; *provided, however*, in lieu of this description, the relevant Respondent may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

   e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

   f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and

   g. any other material terms or conditions or employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

Q. "Essential Employee" means certain managers of the HealthCare Partners Nevada Business and Information Technology experts listed in Non-public Appendix I attached to this Order.

R. "Excluded Assets" means, the following:

1. all cash, cash equivalents and short-term investments of cash (other than minimum operating cash as agreed upon between Respondents and the Acquirer);

2. tax refunds and tax credits that relate to taxes for which Respondents are liable under the Acquisition Agreement or the HealthCare Partners Nevada Divestiture Agreements;

3. rights to the following corporate names or corporate trade dress "Optum", "DaVita", "DaVita Medical Group", "UnitedHealth", "HealthCare Partners", "HCP" and "JSA", or the related corporate logos thereof, or any Trademark or Domain Name that consists of or incorporates any of the foregoing, other than to the extent licensed or divested to the Acquirer pursuant to this Order;

4. rights for employees to participate in employee benefit plans offered by Respondents related to the HealthCare Partners Nevada Companies (other than to the extent the HealthCare Partners Nevada Companies or HealthCare Partners Medical Group (Coats), Ltd. continue to participate in such plans for an interim period pursuant to this Order);

5. all assets owned by HealthCare Partners Medical Group (Coats), Ltd.;

6. any inter-company balances due to or from Respondents or their affiliates (which will be settled, offset, paid, capitalized or cancelled on or before the Divestiture Date); and

7. telecommunication equipment, information systems equipment, and computer hardware not physically located in Nevada.

S. "Geographic Territory" means Clark County and Nye County in the State of Nevada.

T. "Government Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests thereof, required by Government Entities for the operation of the HealthCare Partners Nevada Business.

U. "Government Entity(ies)" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government

commission; or any judicial or regulatory authority of any government. The term "Government Entities" includes CMS and the Bureau of Health Care Quality and Compliance of the State of Nevada.

V. "HealthCare Partners Nevada Assets" means all legal or equitable rights, title, and interest in and to all tangible and intangible assets, wherever located, relating to the HealthCare Partners Nevada Business, to the extent legally transferable and as such assets are in existence as of the date the Respondents sign the Consent Agreement in this matter, including the following:

1. all Ownership Interests in each of the HealthCare Partners Nevada Companies;

2. all Owned Real Property;

3. all rights of the Respondents under the HealthCare Partners Nevada Medical Group Agreements;

4. all Government Approvals;

5. all National Provider Identifiers and CMS Certification Numbers (also known as Medicare/Medicaid Provider Numbers) related to the HealthCare Partners Nevada Companies;

6. all Owned Intellectual Property used exclusively in the HealthCare Partners Nevada Business;

7. the HealthCare Partners Nevada Medical Protocols;

8. the HealthCare Partners Nevada Policies and Procedures;

9. the "My Generation" Trademark;

10. all Marketing Materials;

11. all Website(s) primarily related to the HealthCare Partners Nevada Business;

12. all Domain Name(s) primarily related to the HealthCare Partners Nevada Business, including the following: hcpnv.com, loveathcpnv.com, hcpwomenshealth.com, ccnv.com, and wellhealthqc.com;

13. the content exclusively related to the HealthCare Partners Nevada Business that is displayed on any Website that is related to the Retained Businesses;

14. at the option of the Acquirer, Respondents' rights under any or all of the HealthCare Partners Nevada Contracts; and

15. all Business Information;

provided, however, the term "HealthCare Partners Nevada Assets" does not include the Excluded Assets.

W. "HealthCare Partners Nevada Business" means the business of HealthCare Partners Nevada Companies in connection with:

1. the provision of professional medical and related healthcare services to patients in the State of Nevada, including in a coordinated care, managed care, or fee-for-service model or otherwise;

2. the related care management, decision support, Information Technology, and other administrative or management services; and

3. the operation, management, coordination, or ownership of physician groups and networks, clinics, healthcare facilities, ancillary services, and other activities to provide such healthcare services in the State of Nevada.

X. "HealthCare Partners Nevada Company(ies)" means the following companies, individually and collectively:

1. DaVita Medical Holdings Florida, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 717 17th Street, Denver, Colorado 80202;

2. HCP Medical LV, LLC (f/k/a DaVita Medical LV, LLC; DaVita Medical IPA, LV, LLC), a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its executive offices and principal place of business located at 700 E. Warm Springs Road, Las Vegas, Nevada 89119;

3. HCP IPA Nevada, LLC (f/k/a DaVita Medical IPA Nevada, LLC; JSA P5 Nevada, L.L.C.), a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its executive offices and principal place of business located at 700 E. Warm Springs Road, Las Vegas, Nevada 89119;

4. HealthCare Partners Management Services Nevada, LLC, (f/k/a DaVita Medical Management Services Nevada, LLC; HealthCare Partners Nevada, LLC), a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its

executive offices and principal place of business located at 700 E. Warm Springs Road, Las Vegas, Nevada 89119; and

5. HealthCare Partners of Nevada, LLC (f/k/a DaVita Medical Nevada, LLC; JSA Healthcare Nevada L.L.C.), a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its executive offices and principal place of business located at 700 E. Warm Springs Road, Las Vegas, Nevada 89119.

Y. "HealthCare Partners Nevada Confidential Business Information" means all Business Information owned by, or in the possession or control of, a Respondent that is not in the public domain. The term "HealthCare Partners Nevada Confidential Business Information" *excludes* the following:

1. information relating to a Respondent's general business strategies or practices that does not discuss with particularity the HealthCare Partners Nevada Business;

2. information specifically excluded from the HealthCare Partners Nevada Assets conveyed to the Acquirer; and

3. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the acquisition of DaVita Medical Holdings by UnitedHealth and relating to any United States, state, or foreign antitrust or competition Laws.

Z. "HealthCare Partners Nevada Contract(s)" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the HealthCare Partners Nevada Business, including the following:

1. pursuant to which a Healthcare Provider within the State of Nevada, contracts with a Respondent for the Respondent to provide management services, such as: credentialing, claims payment, utilization management, electronic medical recordkeeping, and care management;

2. pursuant to which a Healthcare Provider within the State of Nevada affiliates with or is employed by a Respondent;

3. pursuant to which a Healthcare Plan contracts with a Respondent;

4. pursuant to which a Third Party provides any specialized services used in the operation of the HealthCare Partners Nevada Business to a Respondent, including, but not limited to, radiologic services, diagnostic services, clinical laboratory services, and consultation arrangements;

5. pursuant to which a Third Party leases any equipment used in the operation of the HealthCare Partners Nevada Business to a Respondent;

6. pursuant to which a Third Party provides any data processing or storage used exclusively in the operation of the HealthCare Partners Nevada Business to a Respondent, including such data processing or storage related to the following: practice management; care/disease management; referral management; data exchange/interfacing; certificate of completion training document management; inpatient charge capture; eligibility management/verification; claims adjudication; electronic data interchange processing/clearinghouse; and patient master data management/master patient index;

7. pursuant to which a Third Party licenses any Intellectual Property exclusively used in the operation of the HealthCare Partners Nevada Business to a Respondent;

8. pursuant to which a Third Party leases any real property used in the operation of the HealthCare Partners Nevada Business to a Respondent;

9. pursuant to which a Third Party leases any machinery, equipment, vehicles or other tangible personal property to a Respondent used in the operation of the HealthCare Partners Nevada Business to a Respondent;

10. intracompany contracts between Respondent-controlled entities for the purposes of the operation of the HealthCare Partners Nevada Business ("Intracompany Contracts"), including:

    a. the *Amended and Restated Intra-Company Services Agreement* between VillageHealth DM LLC and DaVita Medical IPA Nevada, LLC, dated January 1, 2018;

    b. the *Amended and Restated Provider Services Agreement* between DaVita Inc. and DaVita Medical IPA Nevada, LLC, dated December 1, 2017;

provided, however, that where any such contract, agreement, mutual understanding, arrangement, or commitment covers services being provided by a Third Party to a Respondent that are used in both the HealthCare Partners Nevada Business and the Retained Businesses, the Respondent shall, at the Acquirer's option, make available to the Acquirer all such services provided to that Respondent under that contract, agreement, mutual understanding, arrangement, or commitment as are used in the HealthCare Partners Nevada Business;

provided further, however, that HealthCare Partners Nevada Contracts *excludes* Intracompany Contracts where, on or before the Divestiture Date, Respondents

and the Acquirer have agreed in a HealthCare Partners Nevada Divestiture Agreement for Respondents to provide the services covered by the Intracompany Contracts to the Acquirer.

AA. "HealthCare Partners Nevada Divestiture Agreement(s)" means the following:

1. *Equity Purchase Agreement* by and between Collaborative Care Holdings, LLC and IHC Health Services, Inc., dated May 3, 2019, and as amended on May 31, 2019;

2. *Transition Services Agreement* by and between Collaborative Care Holdings, LLC and IHC Health Services, Inc. to be executed on or before the Divestiture Date;

3. *Trademark License Agreement* by and among Collaborative Care Holdings, LLC, DaVita Medical Management, LLC, and IHC Health Services, Inc. to be executed on or before the Divestiture Date;

4. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s); and

5. any other agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

The HealthCare Partners Nevada Divestiture Agreements submitted to the Commission by the Respondents on or before the Order Date are contained in Non-Public Appendix II.

BB. "HealthCare Partners Nevada Licenses" means the following:

1. a perpetual, non-exclusive, fully paid-up, irrevocable, and royalty-free license(s) to use any Shared Intellectual Property to operate the HealthCare Partners Nevada Business; with respect to any Software included in the Shared Intellectual Property that is being used by the Acquirer during the period in which Respondents are providing transition services, such Software shall be licensed to the Acquirer immediately upon the Divestiture Date, and shall include rights to all updates and improvements made to such Software during the time that the Respondents are providing Transition Services to the Acquirer. Respondents are not required to provide rights to any updates or improvements made by Respondents thereafter;

2. an exclusive as to UnitedHealth, Collaborative Care Holdings, and DaVita Medical Holdings and non-exclusive as to DaVita (with respect to the

"DaVita" Trademark), fully paid-up, and royalty-free sublicense within the State of Nevada to use the Trademarks "DaVita" and "DaVita Medical Group" and related logos in the operation of the HealthCare Partners Nevada Business for a period continuing until six (6) months after the Divestiture Date or until March 1, 2020, whichever is later, *provided, however,* that the granting of such sublicense shall not restrict DaVita from using the Trademark "DaVita" and related logos within the State of Nevada; and

3. for at least a three-year period, an exclusive, fully paid-up, and royalty-free license within the State of Nevada, without rights to sublicense, to use the Trademark "HealthCare Partners" and certain related acronyms, corporate names, logos, and social media accounts in the operation of the HealthCare Partners Nevada Business, including rights to use the foregoing in connection with any Marketing Materials, Web Portals, or Websites related to the HealthCare Partners Nevada Business that may be disseminated, or are capable of being viewed or accessed, outside the State of Nevada, for a period continuing until at least three (3) years after the Divestiture Date.

CC. "HealthCare Partners Nevada Medical Group Agreements" means the following:

1. the *Management Services Agreement* between Amir Bacchus, MD, doing business as Fremont Medical Center, Ltd. (now known as HealthCare Partners Medical Group (Coats), Ltd.) and HealthCare Partners Nevada, LLC (now known as HealthCare Partners Medical Management Services Nevada, LLC) dated July 1, 2009;

2. the *Stock Transfer Restriction Agreement* among HealthCare Partners Medical Group (Coats), Ltd., HealthCare Partners Nevada, L.L.C., and Bard Coats, M.D. dated February 24, 2015; and

3. the *Independent Contractor Agreement* between HealthCare Partners Nevada, LLC (now known as HealthCare Partners Medical Management Services Nevada, LLC and Bard Coats, M.D. dated February 24, 2015.

The HealthCare Partners Nevada Medical Group Agreements are contained in Non-Public Appendix II.

DD. "HealthCare Partners Nevada Medical Protocols" means all medical protocols owned by DaVita Medical Holdings, whether in hard copy or electronic format, and the related operational systems that have been used or in effect in the HealthCare Partners Nevada Business at any time since January 1, 2017, including such protocols that are modifications or customizations of protocols adapted from Third-Parties.

EE. "HealthCare Partners Nevada Policies and Procedures" means all policies and procedures owned by DaVita Medical Holdings, whether in hard copy or electronic format, and the related operational systems that have been used or in effect in the HealthCare Partners Nevada Business at any time since January 1, 2017 including such policies and procedures that are modifications or customizations of policies and procedures adapted from Third-Parties.

FF. "Healthcare Plan(s)" means any Person that administers, pays, or insures health or medical expenses on behalf of beneficiaries or recipients including the following: Government Entities (*e.g.*, Medicare or Medicaid), preferred provider organizations, self-insured employers, healthcare maintenance organizations, or health insurance companies.

GG. "Healthcare Provider(s)" means:

1. a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

2. any other Person determined by the United States Secretary of Labor to be capable of providing healthcare services.

HH. "Information Technology" means Software and any tangible or digital computer systems (including computers, servers, workstations, routers, hubs, switches, networks, communications equipment, data processing systems, data centers, data communication lines, and other hardware and related equipment used to develop, test, operate, monitor, manage or support information technology services), and any Business Information stored therein, and Internet-related information technology infrastructure owned or leased by a Respondent to the extent used in the HealthCare Partners Nevada Business (whether or not the infrastructure is physically located within a facility divested to the Acquirer pursuant to this Order) as of the Divestiture Date that are used to provide information and services to Healthcare Providers, Healthcare Plans, employees, patients, vendors, customers, Government Entities, and others having business relations with the HealthCare Partners Nevada Business.

II. "Information Technology and Critical Services Employee(s)" means all current or former salaried employees of a Respondent who are not transferred to the Acquirer pursuant to the HealthCare Partners Nevada Divestiture Agreement(s) who directly have participated in the ongoing operation, installation, maintenance, or administration of the Information Technology related to the HealthCare Partners Nevada Business or the provision of the services related to use of the Information Technology by employees, customers, patients, Healthcare Providers, Healthcare Plans, or others having a business relationship with the HealthCare Partners Nevada Business within the eighteen (18) month period immediately prior to the Divestiture Date (but excluding any such employee who is (i) designated by the Respondents to effect the transfer and delivery of the

Information Technology to the Acquirer pursuant to the Tech Transfer Standards required by this Order, and (ii) who is directly providing such services to the Acquirer).

JJ. "Intellectual Property" means any and all forms of intellectual property, including any and all:

1. technology, procedures, processes, methods, techniques, ideas, creations, inventions, and discoveries (whether patentable or unpatentable and whether or not reduced to practice) and improvements thereto;

2. confidential and proprietary information, including know-how and trade secrets;

3. works of authorship and other copyrightable subject matter;

4. Software;

5. Trademarks; and

6. Information Technology other than hardware or equipment.

KK. "Intermountain" means IHC Health Services, Inc., a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of Utah with its executive offices and principal place of business located at 36 South State Street, Salt Lake City, Utah 84111, and any subsidiaries of IHC Health Services, Inc.

LL. "Law(s)" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

MM. "Las Vegas Healthcare Provider" means any Healthcare Provider in the Geographic Territory.

NN. "Marketing Materials" means all marketing materials used in the marketing or sale of the products or services offered by the HealthCare Partners Nevada Business as of the Divestiture Date, including all advertising materials, training materials, service data, mailing lists, sales materials (*e.g.*, sales reports, sales funnel or process information, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information, sales forecasting models, educational materials, advertising and display materials, and speaker lists.

OO. "Medicare Advantage Plan" means any healthcare insurance offered by a private (non-governmental) Healthcare Plan that covers all of the services that original

Medicare Part A and Part B cover and that is approved by CMS to be offered as a "Part C" or "MA Plan", pursuant to Title XVIII of the Social Security Act, Part C.

PP. "Monitor" means any monitor appointed pursuant to Paragraph VIII of this Order or Paragraph III of the related Order to Maintain Assets.

QQ. "Nevada Medicare Advantage Plan" means a Medicare Advantage Plan offered or to be offered to any Person residing in the Geographic Territory.

RR. "Orders" means this Decision and Order and the related Order to Maintain Assets.

SS. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

TT. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

UU. "Owned Intellectual Property" means Intellectual Property owned by a Respondent as of the Divestiture Date.

VV. "Owned Real Property" means all real property in which any HealthCare Partners Nevada Company has fee title (or equivalent) interest, together with all buildings and other structures, facilities or improvements located thereon, all fixtures, systems, equipment and items of personal property of any HealthCare Partners Nevada Company attached or appurtenant thereto and all easements, licenses, rights and appurtenances relating to the foregoing, including all such property related to the clinics owned or managed by any of the HealthCare Partners Nevada Companies.

WW. "Ownership Interest" means any voting securities, non-voting securities, share capital, non-corporate interest, notes convertible into any voting or non-voting stock, contractual power to designate a director of an entity, equity, or other interest in an entity or its assets.

XX. "Person(s)" means any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.

YY. "Retained Businesses" means all businesses acquired by Respondent UnitedHealth pursuant to the Acquisition Agreement other than the HealthCare Partners Nevada Business.

ZZ. "Shared Intellectual Property" means all Owned Intellectual Property (other than Trademarks and Domains Names) that is (i) used in the operation of the HealthCare Partners Nevada Business as of the Divestiture Date and (ii) that, prior to the Acquisition Date, Respondents can demonstrate has also been used in

the Retained Businesses. The term "Shared Intellectual Property" includes all such DaVita or DaVita Medical Holdings proprietary Software, including the Physicians Information Portal and the Clinical Viewer through which a physician is able to obtain web-based, point of care information regarding a patient, including diagnosis history, provide quality indicators, historical risk adjustment coding information, a pharmacy medication history, and other key information.

AAA. "Software" means computer programs related to the HealthCare Partners Nevada Business, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, firmware (permanent software programmed into a read-only memory), middleware (software that acts as a bridge between an operating system or database and applications), databases and compilations (including any and all data and collections of data), and all associated documentation (including user manuals and training materials). Software includes any data mining technology used to track patient usage of medical services.

BBB. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the Information Technology and related assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, and timely manner that ensures that the services provided by the Information Technology will continue uninterrupted and undiminished in functionality and utility. Such standards and requirements shall include, *inter alia*:

1. designating employees of a Respondent knowledgeable about the Information Technology (and all related Intellectual Property) who will be responsible for communicating directly with the Acquirer and the Monitor for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Information Technology that are acceptable to the Acquirer to the extent that any such technology is not maintained and fully available on a system that is being divested to the Acquirer pursuant to this Order;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer and delivery of all relevant information, data, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Information Technology (including all related Intellectual Property) to the Acquirer to the extent that any such technology and information is not maintained and fully available on a system that is being divested to the Acquirer pursuant to this Order; and

4. to the extent the Persons with the relevant knowledge about the Information Technology remain employees of a Respondent, providing, in a timely manner, assistance and advice from these employees to enable the Acquirer to:

   a. use the Information Technology in the quality and manner consistent with past practices; and

   b. receive, integrate, and use all such Information Technology and all such Intellectual Property related to the HealthCare Partners Nevada Business.

CCC. "Third Party(ies)" means any non-governmental Person other than a Respondent or the Acquirer.

DDD. "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, and the goodwill symbolized thereby and associated therewith.

EEE. "Transition Services" means the following:

1. all services, assistance, training, and access to personnel that, prior to the Acquisition Date, Respondent DaVita or Respondent DaVita Medical Holdings provided to the HealthCare Partners Nevada Companies related to the HealthCare Partners Nevada Business from an entity within Respondent DaVita and/or Respondent DaVita Medical Holdings other than the HealthCare Partners Nevada Companies; and

2. all services and assistance necessary to transfer and deliver the Information Technology to the Acquirer in a manner consistent with the Technology Transfer Standards.

FFF. "Web Portal(s)" means all specially designed websites, whether for internal use (*e.g.*, by employees or by affiliated physicians or other Persons that comprise the network of HealthCare Partners Nevada Business) or for external use, (*e.g.*, by patients or Healthcare Plans) that are (i) acquired or to be acquired by UnitedHealth pursuant to the Acquisition Agreement and (ii) used in the conduct of the HealthCare Partners Nevada Business as of the Divestiture Date, and the related operational systems.

GGG. "Website(s)" means the content of all external Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent as of the Divestiture Date; *provided, however,* the term "Website" shall not include the following: (1) content owned by Third-Parties

and other Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content not directly related to operation of the HealthCare Partners Nevada Business.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Not later than forty (40) days after the Acquisition Date, Respondents shall divest the HealthCare Partners Nevada Assets and grant the HealthCare Partners Nevada Licenses, absolutely and in good faith, to Intermountain pursuant to, and in accordance with, the HealthCare Partners Nevada Divestiture Agreements and in a manner consistent with the Technical Transfer Standards, as applicable.

B. If Respondents have divested the HealthCare Partners Nevada Assets to Intermountain prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that:

1. Intermountain is not an acceptable purchaser of the HealthCare Partners Nevada Assets, then Respondents shall immediately rescind the transaction with Intermountain in whole or in part, as directed by the Commission, and shall divest the HealthCare Partners Nevada Assets and grant the HealthCare Partners Nevada Licenses within one hundred eighty (180) days after the Order Date, 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; or

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the HealthCare Partners Nevada Assets to Intermountain (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.

C. Prior to the Divestiture Date, Respondent shall provide the Acquirer with the opportunity to review all contracts or agreements that are HealthCare Partners Nevada Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

D. Prior to the Divestiture Date, Respondents shall secure all consents and waivers from all Third-Parties that are necessary to permit Respondents to divest the HealthCare Partners Nevada Assets to an Acquirer, and to permit the Acquirer to

continue the HealthCare Partners Nevada Business without interruption or impairment;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third-Parties.

E. Respondents shall not use or license any Third Party to use the Trademark "HealthCare Partners" and related acronyms, corporate names, social media accounts, Domain Names, and logos within the State of Nevada for a period of at least three (3) years following the term of any HealthCare Partners Divestiture Agreement to license such Trademarks to the Acquirer within the State of Nevada, *except* to the extent it would be permissible as nominative or descriptive fair use under the applicable trademark laws.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The HealthCare Partners Nevada Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by a Respondent to comply with any term of the HealthCare Partners Nevada Divestiture Agreements shall constitute a violation of the Order; *provided, however*, that the HealthCare Partners Nevada Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the HealthCare Partners Nevada Divestiture Agreements varies from or conflicts with any provision in the Order such that the Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. The Order shall not be construed to reduce any right or benefits of the Acquirer or to reduce any obligations of the Respondents to the Acquirer under the HealthCare Partners Nevada Divestiture Agreements.

C. Respondents shall include in the HealthCare Partners Nevada Divestiture Agreements a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any HealthCare Partners Nevada Divestiture Agreement, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. Respondents shall not modify or amend any of the terms of any HealthCare Partners Nevada Divestiture Agreement without the prior approval of the

Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Respondents shall, upon written request of the Acquirer, provide Transition Services in a timely manner and under reasonable terms and conditions at no greater than Direct Cost for a period of time sufficient to allow the Acquirer to perform the services independently of Respondents.

B. Respondents shall provide access to, and use of, all of the Information Technology, Business Information, Web Portals, and Intellectual Property (whether owned by, or licensed to, the Respondents) as is necessary to ensure the uninterrupted operations of the HealthCare Partners Nevada Business as of the Divestiture Date in the quality and manner consistent with past practices and for a period of time sufficient to allow the Acquirer to integrate and fully operate the HealthCare Partners Nevada Business.

C. During the term of any agreement with the Acquirer to provide Transition Services and pursuant to such agreement and this Order, Respondents shall:

1. provide such Transition Services to the Acquirer in a manner commensurate to the performance of such services immediately prior to the Divestiture Date (in nature, quality, degree of care, skill, diligence, and timeliness);

2. take all actions as are reasonably necessary to ensure that the provision of Transition Services to the Acquirer are uninterrupted;

3. not limit damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of such agreement;

4. not be entitled to terminate such agreement due to the Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of its creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

5. provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer, for the purposes of enabling the Acquirer to provide such services independently of the Respondents;

6. permit the Acquirer to terminate such agreement at any time upon commercially reasonable notice and without cost or penalty (other than costs or penalties due or owed to Third-Parties pursuant to the termination of any such agreement, which shall be the responsibility of the Acquirer); and

7. upon the Acquirer's request, file with the Commission a written request to extend the time period of any such agreement.

D. For a period of three (3) years after the Divestiture Date, Respondents shall provide to the Acquirer an automatic forwarding of all e-mails sent to any e-mail address with the DaVita or DaVita Medical Holdings domain names that was used by an employee or affiliate of the HealthCare Partners Nevada Business within the three years prior to the Divestiture Date. Such forwarding shall be (i) in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective e-mail(s) and (ii) to an e-mail address or addresses designated by the Acquirer.

V. Employees

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. for a period of one (1) year from the Divestiture Date provide the Acquirer with the opportunity to interview and enter into employment contracts with the Information Technology and Critical Services Employees for a position that is primarily related to the operation of the HealthCare Partners Nevada Business, hereinafter referred to as the "Information Technology and Critical Services Employee Access Period;"

2. not later than ten (10) business days after written request by the Acquirer, provide the Acquirer with the Employee Information. Failure by Respondents to provide the Employee Information for any Information Technology and Critical Services Employee within the time provided herein shall extend the Information Technology and Critical Services Employee Access Period with respect to that employee in an amount equal to the delay; and

3. during the Information Technology and Critical Services Employee Access Period, not interfere with the hiring or employing by the Acquirer of the Information Technology and Critical Services Employees, and remove any impediments within the control of Respondents that may deter or prevent these employees from accepting employment with the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with the Respondents that would affect

the ability or incentive of those individuals to be employed by the Acquirer. In addition, the Respondents shall not make any counteroffer to such Information Technology and Critical Services Employee who has received a written offer of employment from the Acquirer;

provided, however, this Paragraph shall not prohibit Respondents from continuing to employ any Information Technology and Critical Services Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to that employee.

B. From the Divestiture Date until the date that is two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, induce or solicit any Essential Employee to leave the service or employment of the Acquirer;

provided, however, that such prohibitions shall not apply to (i) general solicitations for employment through advertisements or similarly directed efforts, (ii) general solicitations by Third-Parties (such as recruiters), (iii) any such employee that has been terminated by the Acquirer, or (iv) any hiring of any Essential Employee who resigned from the Acquirer at least six (6) months prior to being hired by the Respondents.

C. On or before the Divestiture Date, Respondents shall notify each Essential Employee of the above-described provisions of this Order that pertain to that employee. Respondents shall give such notification by e-mail with return receipt requested or similar transmission with a copy to the Acquirer.

D. From the Divestiture Date until the date that is two (2) years after the Divestiture Date, Respondent UnitedHealth shall not permit any of its employees who are current or former employees of DaVita or DaVita Medical Holdings:

1. to negotiate with any Healthcare Plan to provide Healthcare Provider services for the purposes of a Nevada Medicare Advantage Plan, or

2. to participate in the internal or external discussions or communications related to any negotiations with that Healthcare Plan related to a Nevada Medicare Advantage Plan,

if that employee engaged in such activities in connection with that Healthcare Plan as an employee of DaVita or DaVita Medical Holdings prior to the Divestiture Date.

VI. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until Respondents complete the divestiture of the HealthCare Partners Nevada Assets to the Acquirer, Respondents shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the HealthCare Partners Nevada Assets;

2. minimize any risk of loss of competitive potential for the HealthCare Partners Nevada Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the HealthCare Partners Nevada Assets; and

4. ensure that each of the assets comprising the HealthCare Partners Nevada Assets is provided to the Acquirer without disruption, delay, or impairment of any regulatory approval processes related to the HealthCare Partners Nevada Business.

B. Respondents shall not sell, transfer, encumber, or otherwise impair HealthCare Partners Nevada Assets other than in the manner prescribed in this Order.

VII. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. transfer and deliver to the Acquirer, at Respondents' expense, all HealthCare Partners Nevada Confidential Business Information:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

2. pending complete delivery of all such HealthCare Partners Nevada Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor with access to all such HealthCare Partners Nevada Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain such HealthCare Partners Nevada

Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. not use, directly or indirectly, any such HealthCare Partners Nevada Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

   b. Respondents' obligations to the Acquirer under the terms the HealthCare Partners Nevada Divestiture Agreements; or

   c. applicable Law;

4. not disclose or convey any HealthCare Partners Nevada Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer, (ii) other Persons authorized by that Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor, and *except* to the extent necessary to comply with applicable Law;

5. not provide, disclose or otherwise make available, directly or indirectly, any HealthCare Partners Nevada Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees directly involved in providing Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Information Technology to the Acquirer and only for the purposes of providing such Transition Services or such transfer and delivery;

6. institute procedures and requirements to ensure that the employees providing Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Information Technology to the Acquirer:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any HealthCare Partners Nevada Confidential Business Information in contravention of the Orders; and

   b. do not solicit, access, or use any HealthCare Partners Nevada Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the HealthCare Partners Nevada Confidential Business Information by or to any Person(s) not authorized to access,

receive, and/or use such information pursuant to the terms of the Orders or the HealthCare Partners Nevada Divestiture Agreements, including:

a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

b. to the extent practicable, maintaining HealthCare Partners Nevada Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that HealthCare Partners Nevada Confidential Business Information is not shared with Respondents' personnel engaged in the provision of the same or substantially the same type of business in Nevada as the HealthCare Partners Nevada Business.

B. Each Respondent shall ensure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer (*except* that such counsel shall (i) not be required to delete copies of such materials from back up, archival electronic storage that is not available to an end user and cannot be expunged without considerable effort and (ii) be entitled to keep a copy of any such materials to the extent required by applicable Law or bona fide internal compliance or document retention policies) or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. to ensure such Respondent's compliance with the HealthCare Partners Nevada Divestiture Agreements, this Order, any Law (including any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the HealthCare Partners Nevada Business;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however,* that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such

unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. John P. Harris shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the HealthCare Partners Nevada Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, 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 Orders and in consultation with the Commission or its staff;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until Respondents complete the following in a manner as required by this Order:

a. the transfer and delivery of all of the HealthCare Partners Nevada Assets to the Acquirer;

b. the transfer and delivery of all of the Information Technology to the Acquirer;

c. the transfer and delivery of all HealthCare Partners Nevada Confidential Business Information to the Acquirer; and

d. the provision of all Transition Services to the Acquirer.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent UnitedHealth, 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 UnitedHealth, such consultants (including information technology experts), accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents 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, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the Order Date and every ninety (90) days thereafter, and at such other times as my be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders.

I. Respondents 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,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission, among other things, may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent UnitedHealth, which consent shall not be unreasonably withheld. If Respondent UnitedHealth 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 UnitedHealth of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor; and

2. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. 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.

M. The Monitor may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the HealthCare Partners Nevada Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets 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 Section 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 assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade

Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent 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. Not later than ten (10) days after the 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 divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, 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 assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the 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 one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) 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(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable 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(s) 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 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 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 Respondent UnitedHealth, 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 UnitedHealth, 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 UnitedHealth, 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, 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, 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; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

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,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission, among other things, may 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 related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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.

G. 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 divestiture(s) required by this Order.

X. Prior Notification of Acquisitions

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years beginning on the Order Date, Respondent UnitedHealth shall not, without providing advanced written notification to the Commission in the manner described in this paragraph ("Notification"), directly or indirectly, through subsidiaries, partnerships or otherwise:

1. acquire any Ownership Interest in (i) any Person that owns any interest in, operates, or employs any Las Vegas Healthcare Provider, or (ii) any

Person that owned any interest in, operated, or employed any Las Vegas Healthcare Provider within six (6) months prior to such proposed transaction;

2. acquire rights to control, choose, or designate any Ownership Interest in any of the Persons described in Paragraph X.A.1; or

3. enter into any contract to affiliate with and to become a management services organization (*e.g.*, control all back office or administrative functions) for any of the Persons described in Paragraph X.A.1.

B. The Notification shall contain:

1. either a detailed term sheet for the proposed transaction, or the proposed agreement with all attachments; and

2. documents that would be responsive to Item 4 (c) and 4 (d) of the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended.

C. Respondent UnitedHealth shall provide the Notification to the Commission and a copy of the Notification to the Attorney General of the State of Nevada 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 UnitedHealth shall not consummate the transaction until twenty (20) 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 the advanced written notification provisions of this Paragraph shall not apply to any 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.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Within five (5) days of the Divestiture Date, Respondents shall submit to Commission staff a letter certifying the date of the Divestiture Date, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have completed all of the following: (i) the transfer and delivery of all of the HealthCare Partners Nevada Assets to the Acquirer, (ii) the transfer and delivery of all of the Information Technology to the Acquirer, (iii) the transfer and delivery of all HealthCare Partners Nevada Confidential Business Information to the Acquirer, and (iv) the provision of Transition Services to the Acquirer, Respondents shall submit to the Commission and, at the same time, to the Monitor, a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with the requirements of the Orders ("Compliance Reports").

D. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the HealthCare Partners Nevada Assets to the Acquirer, (ii) the transfer and delivery of all of the Information Technology to the Acquirer, (iii) the transfer and delivery of all HealthCare Partners Nevada Confidential Business Information to the Acquirer, and (iv) the provision of Transition Services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

E. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent UnitedHealth shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

F. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary

of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

XII. Change in Respondents

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

A. any proposed dissolution of: UnitedHealth Group Incorporated; Collaborative Care Holdings, LLC; DaVita Inc.; or DaVita Medical Holdings, LLC;

B. any proposed acquisition, merger, or consolidation of: UnitedHealth Group Incorporated; Collaborative Care Holdings, LLC; DaVita Inc.; or DaVita Medical Holdings, LLC; or

C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XIII. 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 a Respondent made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of the divestiture of the HealthCare Partners Nevada Assets and the related obligations imposed on the Respondents by this Order is:

A. to ensure the continued use of the HealthCare Partners Nevada Assets for the purposes of the HealthCare Partners Nevada Business;

B. to create a viable and effective competitor that is independent of Respondents in the lines of business associated with the HealthCare Partners Nevada Business; and

C. to remedy the lessening of competition resulting from the acquisition of DaVita Medical Holdings by UnitedHealth as alleged in the Commission's Complaint in a timely and sufficient manner.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on August 12, 2029**.**

By the Commission, Chairman Simons recused.

NON-PUBLIC APPENDIX I

ESSENTIAL EMPLOYEES

[Cover Page]

NON-PUBLIC APPENDIX II

AGREEMENTS RELATED TO THE DIVESTITURE OF HEALTHCARE PARTNERS NEVADA ASSETS

[Cover Page]

PUBLIC APPENDIX III

MONITOR AGREEMENT

This Monitor Agreement (this "Agreement"), entered into this 13th day of May, 2019, by and between John P Harris ("Harris" or "Monitor") and UnitedHealth Group Incorporated ("UHG" or "Respondent" and Monitor and Respondent together, the "Parties") provides as follows:

WHEREAS the Federal Trade Commission (the "Commission"), in the UnitedHealth Group Incorporated and DaVita, Inc., File No. _____, 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 the Divestiture Assets, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondent's compliance with their 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 monitoring Respondent's compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall serve as an independent third party and not as an employee or agent of Respondent or the Commission.

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, 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, 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) business days after the date on which Respondent file such report with the Commission.

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by the Respondent, the acquirer of the Divestiture Assets, any supplier or customer of either UHG or DaVita, 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 pursuant to the Orders or (ii) persons employed at the Commission;

(b) 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;

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

(d) for a period of ten (10) 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 relating thereto; and

(e) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in

the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by UHG to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with such request. Notwithstanding the foregoing, the Monitor shall not be required to return or destroy confidential information contained in an archived computer back-up system for its disaster recovery and/or security purposes, and it may retain a copy of confidential information, subject to the terms of this Agreement, in accordance with its internal record retention procedures for legal or regulatory purposes. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor for ten (10) years after termination of this Agreement.

For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondent, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

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 (collectively "Other Personnel") as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders, including the engagement of an IT consultant. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Respondent in writing of its intention to do so, andprovide an estimate of the anticipated costs.

2.2 Monitor Compensation. Respondent shall pay Monitor in accordance with the fee schedule and procedure 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 acquirer of the Divestiture Assets, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondent shall 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 Article 2.1 of this Agreement.

(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 indemnify and hold harmless Monitor and its employees, agents and Other Personnel against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor's duties, decisions, proceedings, and any other action or omission taken or made in good faith (including without limitation 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). For the purposes of this Agreement, "expenses" shall include, without limitation, damages, judgments, fines, settlements, suits, proceedings or claims and appeals and expense of appeals, attachment or similar bonds, except (a) when payment by Respondent is prohibited by Law or (b) to the extent that such losses, claims, damages, liabilities, or expenses result from Monitor's gross negligence or willful misconduct.

2.4 Disputes. In the event of a disagreement or dispute between 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 UHG or Monitor may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve the dispute.

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.

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 the Monitor completes its Final Report pursuant to the Decision and Order; 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, and there shall be no liability to Respondent as a result of such termination.

3.3 Governing Law and Forum Selection. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of the State of Delaware, including all matters of construction, validity and performance. Any dispute arising under this Agreement shall be resolved in the Federal or state courts sitting in the State of Delaware. 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 UHG or Monitor without the consent of UHG 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 Notices. All notices permitted or required under this Agreement shall be in writing and shall be by personal delivery, a nationally recognized overnight courier service (e.g., Federal Express or UPS), e-mail or facsimile transmission, or certified or registered United States mail, return receipt requested. Notices shall be deemed given upon actual receipt of a personal delivery, the earlier of actual receipt or one (1) day after deposit with the courier service, upon receipt by sender of confirmation of any facsimile or e-mail transmission, or five (5) days after deposit with the U.S. Postal Service. Notices shall be sent to the addresses listed below, or to such other address as either party may specify in writing, and, in the case of UHG, shall be addressed "c/o Richard Mattera, Esq.".

3.10 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

Decision and Order

3.11 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.

3.12 Severability. If any provision of this Agreement shall be held to be invalid or unenforceable, the invalidity or unenforceability of such provision shall not affect the validity or enforceability of any of the remaining provisions of this Agreement, and this Agreement shall be enforced as if such invalid or unenforceable provision had not been contained herein and such invalid or unenforceable provision shall be reformed and enforced to the maximum extent permitted under applicable law.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

UnitedHealth Group Incorporated

John P. Harris

By: Richard J. Mattera

NON-PUBLIC APPENDIX III-1

MONITOR COMPENSATION

[Cover Page]

STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS AND COMMISSIONER CHRISTINE S. WILSON

UnitedHealth Group, Inc. ("United'') proposes to acquire DaVita Medical Group ("DMG"). United's insurance business, operated by United's subsidiary UnitedHealthcare, offers commercial and Medicare Advantage ("MA") health insurance plans to employer groups and individual consumers across the country. United and DMG both offer managed care provider organization ("MCPO") services to health insurers. The merger is therefore both horizontal in nature - because it combines two competing MCPO service providers - and vertical, as it combines MCPO and insurance assets.

Staff spent more than a year and a half investigating the competitive effects of this acquisition, which involves assets in several states, including Colorado, Florida, New Mexico, Nevada, and Washington. Based on the findings from that investigation, the Commission has accepted a proposed consent agreement requiring United to divest DMG's healthcare provider organization (its MCPO) in the Las Vegas, Nevada, area to Intermountain Healthcare, a non-profit healthcareprovider system without a presence in the market. We join Commissioners Slaughter and Chopra in supporting this remedy and in thanking staff for their exceptional effort and diligence throughthis long investigation.

Our colleagues write separately, stating they would have asked a federal judge to block United's acquisition of DMG based on their belief that the vertical integration of United's health insurance business and DMG's MCPOs and physicians in Colorado would harm consumers. In our view, the evidence in support of likely harm in Colorado was not compelling, and therefore afederal judge was unlikely to grant that relief.

As Commissioners Slaughter and Chopra point out, the acquisition in Colorado is purely vertical. 1n other words, in that state the transaction combines firms that operate at different levels of the supply chain and do not compete with one another. Specifically, DMG's MCPO services and physicians serve as "inputs'' to the MA insurance plans that United and other health insurers sell to employers and individuals. The putative theory of harm in Colorado involved raising rivals' costs ("RRC"). It posited that, after acquiring DMG, United would find it profitable to raise DMG's prices to rival MA insurance plans, because doing so would reduce these plans' benefits and induce some customers to switch

to United's MA products. The more business United recaptures in the market for MA plans, the greater its incentive to raise DMG's prices to rivals.

We do not rule out the possibility that vertical mergers can harm competition under a RRC theory. We both voted to issue the complaint, which alleges a similar vertical theory of harm in Nevada. And given both substantially stronger facts and the significant horizontal overlap in thatstate, that was the right call.

But vertical mergers often generate procompetitive benefits that must also factor into the antitrust analysis.[1] A major source of these benefits is the elimination of double-marginalization, which places downward pressure on prices in the output market. We conclude that the evidence in Colorado, quantitative and qualitative, reflected both dynamics, with mixed results. In our view, taken together, the evidence would not have convinced a judge that the proposed acquisition was likely, on balance, to harm consumers in Colorado.

As our colleagues note, a lawsuit based upon this evidence posed significant litigation risk. Among other things, the law on vertical mergers is relatively underdeveloped, and an adverse decision can impact enforcement in later cases that present clearer harm. Of course, all litigation presents risks, and sometimes the risks are worth taking. But, faced with a body of evidence of harm that was ambiguous in the first place, we cannot agree with our colleagues that this was a case on which to roll the dice.

STATEMENT OF COMMISSIONERS ROHIT CHOPRA AND REBECCA KELLY SLAUGHTER

UnitedHealth Group, Inc. ("United") proposes to acquire DaVita Medical Group ("DMG"), which provides healthcare services in Nevada and Colorado, among other states. Today, the Commission voted to accept a proposed consent agreement that requires a divestiture of the DMG business serving Clark and Nye counties in Nevada to maintain competition. We agree with the proposed remedy for Nevada, but we disagree with the Commission's decision to not pursue an enforcement action in Colorado.

We believe the evidence uncovered by Commission staff demonstrates that the vertical merger of United's health insurance and DMG's healthcare services businesses would likely result in actionable harm to competition in Colorado. We were prepared to challenge the transaction in court, given the likelihood of harm. We acknowledge that Commission action

1 *See, e.g., United States v. AT&T,* 310 F.Supp.3d 161, 192-94 (DD.C. 2018).

involving Colorado would have borne significant litigation risks, but we believe such risks were worth taking.

Fortunately, the Attorney General of Colorado has taken action in an effort to address some of the harmful effects of the merger in a separate action. We hope all state attorneys general actively enforce the antitrust laws to protect their residents from harmful mergers and anticompetitive practices.

We thank Commission staff for their tireless work on a complex and very resource-intensive matter. While we would have preferred a different outcome, staff put the Commission in a very strong position to make a well-informed decision and serve the public interest.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from UnitedHealth Group Incorporated ("UnitedHealth Group"), Collaborative Care Holdings, LLC, DaVita Inc. ("DaVita") and DaVita Medical Holdings, LLC (collectively, "Respondents") to remedy the anticompetitive effects that otherwise would result from UnitedHealth Group's acquisition of DaVita Medical Group ("DMG") (the "Proposed Acquisition") in Clark and Nye Counties, Nevada (the "Las Vegas Area"). The proposed Consent Agreement, among other things, requires UnitedHealth Group to divest DMG assets related to the Healthcare Partners of Nevada ("HCPNV") business to IHC Health Services, Inc. ("Intermountain Healthcare") or another buyer approved by the Commission.

On December 5, 2017, UnitedHealth Group entered into an equity purchase agreement to acquire DaVita's DMG division. The Proposed Acquisition would combine the two largest managed care provider organizations ("MCPOs") in the Las Vegas Area. The Proposed Acquisition would also combine DMG's MCPO with the largest Medicare Advantage insurer in the Las Vegas Area. On June 19, 2019, by a vote of 4-0-1 with Chairman Simons recused, the Commission issued an administrative complaint alleging 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 (i) removing an actual, direct, and substantial competitor from the Las Vegas Area for MCPO services sold to Medicare Advantage health plans ("MA plans") and (ii) lessening competition in the market for MA plans sold to individuals. The proposed Consent Agreement would remedy the alleged violations by requiring a complete divestiture of DMG's HCPNV assets relating to the HealthCare Partners Nevada business ("HCPNV Assets") and granting certain related licenses.

This divestiture will replace the competition that otherwise would be lost in the Las Vegas Area because of the Proposed 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 will review the comments received and decide whether it should withdraw, modify, or make the Consent Agreement final.

II. THE PARTIES

UnitedHealth Group is a for-profit healthcare company headquartered in Minnetonka, Minnesota. UnitedHealth Group is comprised of two business entities: (1) UnitedHealthcare ("United"), which operates as United's health insurance branch; and (2) Optum, which operates as its health services unit. Within Optum is the OptumCare business segment, which includes employed medical groups, independent physicians associations ("IPAs") or affiliated physician networks, ambulatory surgical centers, and urgent care centers. In 2018, United had revenues of $226.2 billion.

DaVita is the parent company to DMG and DaVita Kidney Care, its dialysis division. Headquartered in Denver, Colorado, DaVita had revenues of $11.4 billion in 2018. DMG operates medical groups and affiliated physician networks across six states: California, Colorado, Florida, Nevada, New Mexico, and Washington.

III. THE PRODUCTS AND THE STRUCTURE OF THE MARKET

A. Industry Overview

Individuals age 65 or over are eligible for Medicare, through which the federal government provides health insurance benefits to seniors. The provision of health insurance to Medicare-eligible beneficiaries is administered through two programs: (1) government-provided Medicare ("Original Medicare"), and (2) privately-provided MA plans funded by the federal government. Under Original Medicare, a beneficiary receives inpatient acute care coverage under Medicare Part A and coverage for physician and outpatient services under Medicare Part B, and the federal government reimburses healthcare providers according to a fee schedule determined by the Centers for Medicare and Medicaid Services ("CMS"). Original Medicare enrollees may obtain care from any healthcare provider that accepts Original Medicare rates.

Rather than enroll in Original Medicare, a senior may choose to enroll in an MA plan sold by a private insurer. Under the Medicare Advantage ("MA") program, the federal government pays private insurers to provide health insurance to Medicare-eligible seniors. Participating insurers, known as Medicare Advantage Organizations ("MAOs"), enter into contracts with CMS, pursuant to which they are permitted to offer MA plans to seniors. Many MA plans also offer vision, dental, hearing, or fitness benefits that are unavailable through Original Medicare.

The amount the federal government pays an MAO for each enrollee is determined by an annual bid process overseen by CMS. To be successful, MAOs need to deliver care at a cost that is below the payments they receive from CMS (plus any additional premiums they charge to enrollees). Accordingly, MAOs control costs by proactively managing the health of their enrollees to reduce the amount of healthcare services required by their enrollees.

Like commercial health insurance plans sold to the under-65 population, MA plans feature negotiations between MAOs and providers, provider networks, and plan designs that incentivize members to seek care from in-network providers. In order to align providers' financial incentives with their own, MAOs have implemented a number of different reimbursement models in their contracts with providers, and these models vary in the way "risk" is distributed between insurers and providers. In healthcare, "risk" refers to financial liability for unexpected medical expenditures. While some proportion of healthcare spending is predictable (e.g., preventive care), a large proportion of healthcare spending goes to high-cost, low-probability events that are unexpected (e.g., an emergency hospital admission or non-elective surgery). In some cases, those provider relationships are centered on risk-based contracts, which pay providers according to various measures of care quality, outcomes, or the ability to control healthcare costs rather than the volume of services they provide. When these cost control measures are successful, MAOs may funnel the savings back into their MA plans in the form of reduced out-of-pocket costs or additional benefits for members.

B. Relevant Product Markets

The Proposed Acquisition poses substantial antitrust concerns in two relevant product markets. First, the horizontal consolidation of the Optum and DMG MCPOs raises concerns in the market for the sale of MCPO services to MAOs and their members. Second, the vertical integration of DMG's MCPO and United's MAO business raises competition concerns in the market for MA plans sold to individuals.

1. MCPO Services Sold to MAOs

One relevant service market in which to analyze the effects of the Proposed Acquisition is the sale of MCPO services to MAOs. An MAO's provider network—and its primary care physicians in particular—is critical to the success of the MAO. The most successful MAOs utilize networks of providers willing to work closely together to coordinate patient care and control healthcare costs. MCPOs are collaborative organizations of such healthcare providers. To varying degrees, MCPOs orchestrate networks of owned, employed, and affiliated providers—including hospitals, outpatient clinics, physician groups, and individual physicians—for the purpose of managing the care of an MA plan's patient population. MCPOs often employ a variety of clinical and non-clinical support personnel (e.g., social workers, nurses, care coordinators, and utilization managers) and have developed information technology systems dedicated to managing care utilization and monitoring patient care.

MCPOs can materially affect the attractiveness of an MA plan to seniors. MA members seek MA plans that offer high quality networks at a competitive price. Without an MCPO's cost control and utilization management functions, an MAO faces a significant chance of increased

costs, which can in turn increase MA plan prices and decrease the value of the MA plan's benefits. MCPOs also engage the MAO regularly to address performance issues and improve MA Plan quality scores.

2. Medicare Advantage Health Plans Sold to Individual MA Members

The second relevant product market implicated by this transaction is the sale of MA plans to individuals. MA plans are meaningfully differentiated from other types of health insurance products, including Original Medicare plans, eligibility-restricted Medicare options (e.g., special needs plans or "SNPs"), employer-group MA plans, and commercial health plans.

Once seniors "age into" Medicare, they may choose between coverage through Original Medicare or MA plans. As noted in *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017), seniors who choose to enroll in an MA plan overwhelmingly tend to remain in MA plans as opposed to transitioning to Original Medicare. MA plans are differentiated from Original Medicare in several important respects, including MA plans' limited networks, caps on out-of-pocket spending, coordination of care by providers, and members' access to supplemental benefits like prescription drug coverage. *See Aetna*, 240 F. Supp. 3d at 26-28, 30, 41. Therefore, the market for individual MA plans excludes Original Medicare. *See Aetna*, 240 F. Supp. 3d at 41.

The market for MA plans also excludes eligibility-restricted Medicare options such as SNPs and employer-group MA plans. SNPs are MA plans specifically designed to provide targeted care and limit enrollment to special needs individuals through specialized benefits and networks designed to treat specific conditions or needs.[1] Unless an individual MA member has or develops a qualifying need, that member cannot enroll in a SNP. Employer-group MA plans are customized for Medicare-eligible retirees of a particular employer. An MA enrollee cannot enroll in an employer-group MA plan unless they are a former employee of a participating employer.

Finally, the market for MA plans also excludes commercial health plans. MA plans often feature zero or very low premiums and are thus much less expensive for individuals compared to commercial health insurance products, which frequently charge much higher premiums. Seniors who purchase MA plans therefore are not likely to purchase a commercial health plan in the event of a price increase on all MA plans.

C. Relevant Geographic Market

The relevant geographic market in which to analyze the effects of the Proposed Acquisition is no broader than the Las Vegas Area. Healthcare markets are local in nature. Evidence gathered from market participants shows that patients—and particularly seniors—

1 https://www.cms.gov/Medicare/Health-Plans/SpecialNeedsPlans/index.html. Special needs patients include people who are institutionalized, have dual-eligibility for Medicare and Medicaid, or have a severe or disabling chronic condition specified by CMS.

strongly prefer to receive care as close to home as possible. Accordingly, MAOs that wish to market MA plans to seniors in the Las Vegas Area must offer MCPOs within the Las Vegas Area in their provider networks (i.e., they cannot substitute MCPOs located outside the Las Vegas Area). Moreover, as a general matter, seniors may only subscribe to MA plans approved for sale in their county of residence. Therefore, a Medicare-eligible senior typically cannot substitute an MA plan approved for another county for an MA plan offered in their county of residence.

IV. THE EFFECTS OF THE PROPOSED ACQUISITION

The Proposed Acquisition would likely result in substantial competitive harm to consumers in the two relevant markets. First, the Proposed Acquisition would combine the two leading MCPOs in the Las Vegas Area. Together, the Optum and DMG MCPOs cover more than 80% of MA members in the Las Vegas Area. Accordingly, the Proposed Acquisition would lead to a presumptively anticompetitive increase in market concentration in the MCPO market. This presumption of anticompetitive harm is supported by evidence of the close competition between Optum and DMG that would be eliminated by the Proposed Acquisition. Seniors in the Las Vegas Area benefit from this head-to-head competition in the form of lower health care costs and higher quality of care. If combined, DMG and Optum would gain additional leverage and be able to demand higher reimbursement rates from MAOs, and would have reduced incentives to maintain and improve their quality of care. Ultimately, these effects would be felt by local seniors in the form of higher premiums, co-pays, and out-of-pocket costs, as well as reduced access to high quality care.

The Proposed Acquisition would also likely harm competition in the market for MA plans sold to individuals in the Las Vegas Area by combining DMG's strong position in the MCPO market with United's strong position in the MAO market. The merged firm would have the incentive and ability to negotiate higher reimbursement rates for MCPO services from United's MAO rivals, making those rivals less competitive. This would worsen seniors' options, reduce competition, and ultimately increase prices or reduce quality (e.g., supplemental benefits) in the market for MA plans sold to individuals in the Las Vegas Area.

V. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition by requiring UnitedHealth Group to divest the HCPNV Assets and grant related licenses to Intermountain Healthcare or another buyer approved by the Commission. The HCPNV Assets include all assets and rights related to the HCPNV business, including ownership interest in the relevant operating companies, rights under the medical group agreements, real property, governmental approvals, and business information. The proposed Consent Agreement requires the Respondents to provide transition services and allow the use of the HealthCare Partners brand for a period of time to facilitate the transfer of the business. In addition, the proposed Consent Agreement limits UnitedHealth Group and DaVita's use of, and access to, confidential business information pertaining to the divestiture assets.

With the HCPNV Assets and related licenses, Intermountain Healthcare can preserve the competition that currently exists in the two relevant markets. Intermountain Healthcare is a successful, not-for-profit healthcare system consisting of hospitals, clinics, medical groups, and a health plan, SelectHealth. Headquartered in Salt Lake City, Utah, Intermountain Healthcare serves MA patients across the entire continuum of care in Utah and Idaho. Intermountain Healthcare has the experience to ensure the continued use of the HCPNV business such that they remain an effective competitor to United in the Las Vegas Area. Moreover, Intermountain Healthcare is familiar with the Las Vegas Area through SelectHealth, which began offering an MA plan in Clark County this year. Intermountain Healthcare also has a minority ownership interest in P3 Health Group Holdings LLC, which owns and operates P3 Health Partners, a recent MCPO entrant to the Las Vegas Area. However, contingent on consummation of the proposed divestiture, Intermountain Healthcare has entered into a contract to divest this ownership interest in P3 Health Group Holdings, LLC, and forfeit its associated board seats. SelectHealth's current negligible share of the MA market in the Las Vegas Area and our analysis of Intermountain's and competitors' business incentives following the proposed divestiture indicate that Intermountain's ownership of SelectHealth does not raise concern for overall competition.

United must complete the divestiture within 40 days of closing the Proposed Acquisition. The proposed Consent Agreement provides for the appointment of a monitor to ensure UnitedHealth Group's and DaVita's compliance with the obligations set forth in the Orders. The proposed Consent Agreement requires Respondents to provide transition assistance to facilitate the transfer of the business to the buyer. The proposed Consent Agreement also contains appropriate compliance reporting requirements. If Respondents do not fully comply with the obligation to divest the HCPNV Assets, the Commission may appoint a Divestiture Trustee to divest the HCPNV Assets.

The proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by Respondent UnitedHealth Group of any ownership interest in any healthcare provider in the Las Vegas Area. Under the proposed Consent Agreement, for the next ten years, Respondent UnitedHealth Group will be required to give the Commission 30 days' advanced notice of any such acquisition that is not subject to the Hart-Scott-Rodino Act, and provide a copy to the Attorney General of the State of Nevada. If 30 days expire without Commission action, Respondent UnitedHealth Group may consummate the proposed acquisition. Otherwise, Respondent UnitedHealth Group must produce to the Commission information and documents relating to the proposed acquisition in response to a written request, and not consummate the transaction until 20 days after substantially complying with the Commission's request.

The proposed Decision and Order will have a term of ten years.

* * *

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 or modify its terms in any way.

IN THE MATTER OF

SECURTEST, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4685; File No. 182 3152
Complaint, August 12, 2019 – Decision, August 12, 2019

This consent order addresses SecurTest, Inc.'s representations concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and, respectively, the European Union ("EU") and the Swiss Federation. The complaint alleges that that Respondent violated Section 5(a) of the Federal Trade Commission Act by falsely representing that it was a certified participant in the EU-U.S. and Swiss-U.S. Privacy Shield Frameworks. The consent order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Participants

For the *Commission*: *Elisa Jillson* and *Robin Wetherill.*

For the *Respondents*: *Doug Kilby* and *Martin Sipple, Ausley McMullen;* and *Bricker S. Daughtry, Fortson, Bentley and Griffin.*

COMPLAINT

The Federal Trade Commission ("FTC"), having reason to believe that SecurTest, Inc., a corporation, has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent SecurTest, Inc. ("SecurTest") is a Florida corporation with its principal office or place of business at 600 Grand Panama Boulevard, Suite 202, Panama City Beach, FL 32407.

2. Respondent offers background screening services.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, http://securtest.com/, privacy policies and statements about its practices, including statements related to its participation in the EU-U.S. Privacy Shield framework agreed upon by the U.S. government and the European Commission.

Privacy Shield

5. The EU-U.S. Privacy Shield framework ("Privacy Shield") was designed by the U.S. Department of Commerce ("Commerce") and the European Commission to provide a

mechanism for U.S. companies to transfer personal data outside of the EU that is consistent with the requirements of the European Union Directive on Data Protection. Enacted in 1995, the Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, Commerce and the European Commission negotiated the EU-U.S. Privacy Shield framework, which went into effect in July 2016. The EU-U.S. Privacy Shield framework allows companies to transfer personal data lawfully from the EU to the United States. To join the EU-U.S. Privacy Shield framework, a company must self-certify to Commerce that it complies with the Privacy Shield Principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the FTC, as well as the U.S. Department of Transportation, are eligible to join the EU-U.S. Privacy Shield framework. A company under the FTC's jurisdiction that claims it has self-certified to the Privacy Shield Principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework and is consistent with the requirements of the Swiss Federal Act on Data Protection. The Swiss-U.S. Privacy Shield framework went into effect in April 2017.

9. Commerce maintains a public website, https://www.privacyshield.gov/welcome, where it posts the names of companies that have self-certified to the EU-U.S. and/or Swiss-U.S. Privacy Shield framework. The listing of companies, https://www.privacyshield.gov/list, indicates whether the company's self-certification is current.

10. Until July 2018, Respondent disseminated or caused to be disseminated privacy policies and statements on the http://securtest.com/2012/privacy_policy.php website, including, but not limited to, the following statements:

> SecurTest, Inc. complies with the EU-US Privacy Shield Framework and the Swiss-US Privacy Shield Framework as set forth by the US Department of Commerce regarding the collection, use, and retention of personal information transferred from European Union and Switzerland to the United States, respectively. SecurTest, Inc. has certified to the Department of Commerce that it adheres to the Privacy Shield Principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov/ The [sic] terms of this policy apply to SecurTest's Web site and Background Screening Solutions, except where noted.

11. Although Respondent initiated an application to Commerce in September of 2017 for Privacy Shield certification, and in October 2017 added language at the bottom of its webpage that its application was pending, Respondent did not complete the steps necessary to participate in the EU-U.S. Privacy Shield or Swiss-U.S. Privacy Shield frameworks within the timeframes established by Commerce. Nevertheless, Respondent continued to make the statements described in Paragraph 10 in its privacy policy until July 2018. After FTC Staff contacted Respondent regarding this matter, Respondent completed the steps necessary to participate in the frameworks and received its certification on August 31, 2018.

Count I

Privacy Misrepresentation

12. As described in Paragraph 10, from September 2017 until July 2018, Respondent represented, directly or indirectly, expressly or by implication, that it was a participant in the EU-U.S Privacy Shield framework and the Swiss-U.S Privacy Shield framework.

13. In fact, as described in Paragraph 11, although Respondent initiated an application to Commerce for Privacy Shield certification, it did not complete the steps necessary to participate in either the EU-U.S. Privacy Shield framework or the Swiss-U.S Privacy Shield framework until August 2018. Therefore, the representation set forth in Paragraph 12 was false or misleading.

Violations of Section 5 of the FTC Act

14. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, on this twelfth day of August 2019, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the

Commission, the draft Complaint would charge Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of thirty (30) days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent SecurTest, Inc. is a Florida corporation with its principal office or place of business at 600 Grand Panama Boulevard, Suite 202, Panama City Beach, FL 32407.

2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

3. The Commission makes no findings of fact or law, other than as expressly set forth in paragraphs 1 and 2, above.

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means SecurTest, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Participation in Privacy or Security Programs

IT IS ORDERED that Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service must not misrepresent in any manner, expressly or by implication, the extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization, including but not limited to the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

II. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

III. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Sixty (60) days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use

to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re SecurTest, Inc., FTC File No. 182 3152*.

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for ten (10) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

C. a copy of each unique advertisement or other marketing material making a representation subject to this Order, and all materials that were relied upon in making the representation.

V. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on August 12, 2039, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Provision in this Order that terminates in less than twenty (20) years;

B. this Order's application to any respondent that is not named as a defendant in such complaint; and

C. this Order if such complaint is filed after the order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the

complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from SecurTest, Inc. ("SecurTest" or "Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that SecurTest made concerning its participation in the Privacy Shield frameworks agreed upon by the U.S. and, respectively, the European Union ("EU") and the Swiss Federation. The Privacy Shield frameworks allow U.S. companies to receive personal data transferred from the EU and Switzerland without violating EU or Swiss law. The frameworks consist of a set of principles and related requirements that have been deemed by the European Commission and the Swiss authorities as providing "adequate" privacy protection. The principles include notice; choice; accountability for onward transfer; security; data integrity and purpose limitation; access; and recourse, enforcement, and liability. The related requirements include, for example, securing an independent recourse mechanism to handle any disputes about how the company handles information about EU citizens.

To participate in the frameworks, a company must comply with the Privacy Shield principles and self-certify that compliance to the U.S. Department of Commerce ("Commerce"). Commerce reviews companies' self-certification applications and maintains a public website, https://www.privacyshield.gov/list, where it posts the names of companies who have completed the requirements for certification. Companies are required to recertify every year in order to continue benefitting from Privacy Shield.

SecurTest is a background screening company. It primarily performs pre-employment background screening for private companies and government entities. According to the Commission's complaint, from approximately October 2017 until July 2018, SecurTest published on its website, http://www.securtest.com, a privacy policy containing statements related to its participation in Privacy Shield.

The Commission's proposed one-count complaint alleges that Respondent violated Section 5(a) of the Federal Trade Commission Act. Specifically, the proposed complaint alleges that Respondent engaged in a deceptive act or practice by falsely representing that it was a certified participant in the EU-U.S. and Swiss-U.S. Privacy Shield Frameworks.

Part I of the proposed order prohibits the company from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the EU-U.S. Privacy Shield framework and the Swiss-U.S. Privacy Shield framework.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part III ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Part IV requires the company to create certain documents relating to its compliance with the order for ten years and to retain those documents for a five-year period. Part V mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Part VI is a provision "sun-setting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

NATIONAL FLOORS DIRECT, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE CONSUMER REVIEW FAIRNESS ACT

Docket No. C-4686; File No. 182 3085
Complaint, August 14, 2019 – Decision, August 14, 2019

This consent order addresses National Floors Direct, Inc.'s use of non-disparagement provisions in consumer form contracts in its sale and installation of flooring and carpeting. The complaint alleges that the respondent violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained a non-disparagement provision made void by Section 2(b) of the CRFA. The consent order prohibits, in the sale or leasing of any good or service, the respondent from offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondent's fulfillment of its obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in a customer contract entered into before the effective date of the order.

Participants

For the *Commission*: *Carl H. Settlemyer.*

For the *Respondents*: *David Rich, Todd & Weld LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Floors Direct, Inc. ("Respondent") has violated the Consumer Review Fairness Act of 2016, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent National Floors Direct, Inc. ("NFD") is a Massachusetts corporation with its principal office or place of business at 100 Messina Drive, Braintree, Massachusetts 02184. NFD sells and installs carpeting and flooring in the northeastern United States.

2. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Course of Conduct

3. Between approximately July 2016 and April 2018, NFD used, in its form contracts offered to thousands of customers in the course of selling its goods and services in the states of Massachusetts, Rhode Island, and New Hampshire, the following provision:

> **Non-Disparagement:** National Floors Direct takes customer service very seriously. We want all of our customers to be 100% satisfied. We also

> take our reputation very seriously. By signing this purchase order you are agreeing, under penalty of civil suit, for an amount not to exceed three times the monetary value of this order, plus attorney's fees for National Floors Direct, not to publicly disparage or defame National Floors Direct in any way or through any medium.

A copy of NFD's flooring purchase order "Additional Terms and Conditions" that includes this paragraph is attached as Exhibit A hereto. NFD's form contracts were in effect on or after December 14, 2017.

VIOLATION OF THE CONSUMER REVIEW FAIRNESS ACT

4. The Consumer Review Fairness Act of 2016 ("CRFA"), Pub. L. No. 114-258, 15 U.S.C. § 45b, was enacted on December 14, 2016. As of March 14, 2017, Section 2(b) of the CRFA renders void, and Section 2(c) of the CRFA prohibits the offering of, provisions in form contracts that: prohibit or restrict individual consumers' ability to communicate reviews, performance assessments, and similar analyses about a seller's goods, services, or conduct; or that impose a penalty or fee against individual consumers who engage in such communications. 15 U.S.C. §§ 45b(a)(2), 45b(b)(1), and 45b(c).

5. The Commission is authorized to enforce Section 2(c) of the CRFA in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, were incorporated into and made a part of the CRFA. 15 U.S.C. § 45b(d)(2)(A). The Commission's enforcement authority under the CRFA applies to contracts in effect on or after December 14, 2017. 15 U.S.C. § 45b(i)(2).

6. Pursuant to 15 U.S.C. § 45b(d)(1), a violation of 15 U.S.C. § 45b(c) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. § 57a(a)(1)(B).

Count I

7. As described in Paragraph 3 of this Complaint, Respondent has offered, in the course of selling its goods and services, form contracts, as that term is defined in 15 U.S.C. § 45b(a)(3), that contained a provision made void by 15 U.S.C. § 45b(b)(1).

8. Therefore, the acts and practices set forth in Paragraph 3 of this Complaint occurring on or after March 14, 2017 violated Section 2(c) of the CRFA, 15 U.S.C. § 45b(c).

THEREFORE, the Federal Trade Commission this fourteenth day of August 14, 2019, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

COMPLAINT EXHIBIT A
FTC 182-3085

ADDITIONAL TERMS AND CONDITIONS

Buyer's Responsibilities: If customer is removing existing carpeting, it must be removed at least one day prior to installation of the new carpet. Buyer is responsible for removing all breakable items from installation areas inside the home prior to installation and for inspecting all areas prior to installation. The rooms are to be empty of furniture. Buyer must arrange for the moving of furniture or extra-heavy furniture such as pianos, stoves, pool tables, etc. and must disconnect any electrical appliances in the installation area or which must be moved prior to time of installation. Any unused carpet should be saved by the customer in the event of future unforeseen damage – such as cigarette burns. All other waste will be left in area designated by the customer. Any furniture moved by NFD is at customer's sole risk and NFD is not responsible for any damages incurred.

National's Responsibilities: National will perform all work in a professional manner and in keeping with industry standards. If National is removing your carpet it will be done at the time your new flooring is installed. If carpeting is being removed, it will be rolled and discarded where you direct the installers to do so. Installers cannot dispose of carpet and pad by hauling it away in their truck. National is not responsible for structural defects, conditions beyond its control or for leaks caused by connecting or disconnecting refrigerators, icemakers, gas or water lines, toilets or plumbing. National is not responsible for resizing doors before or after installation or for any inadvertent damage to moldings, wiring, baseboards, walls or damage caused by the moving of heavy furniture. National is not responsible for the effects of disturbing asbestos materials. If the customer elects to have NFD remove and reinstall their existing wall base, on a hard surface installation, in lieu of purchasing new wall base, NFD is not responsible for breakage or any damage to old wall base, which will likely occur.

Warranties/ Intended Use: Your carpet and/or hard surface flooring are covered by a limited manufacturer's warranty. National Floors Direct Inc. also provides you with a limited installation warranty which will cover all labor and installation for the carpet or hard surface flooring for one hundred and twenty days. Both the limited manufacturer's warranty and the limited installation warranty will be provided to you upon installation of your carpet and/or hard surface flooring and apply to owner occupied residences only. National does not provide any further express or implied warranties other than those specifically set forth in writing and as referenced above.

Delay/Unknown Conditions: Events beyond the control of National, such as Acts of God, labor strikes, inclement weather, material shortages, Buyer's inability to qualify for or obtain financing, or other events resulting in delays in performance of this Agreement do not constitute abandonment and are not included in calculating time frames for performance by National. In the event National determines that this Agreement can not be performed as intended by the parties due, for example, to incorrect pricing, unforeseen structural defects or pre existing conditions to the Buyer's property, National may cancel this Agreement within 60 days of its execution, notify the buyer of such cancellation in writing and return all monies paid by the buyer. National and the Buyer(s) have determined that a definite completion date is not of the essence to this Agreement.

Restocking Fee: All orders which change the installaion date from the date on the front of the contract with less than 72 hours notice given to NFD shall be subject to a restocking fee to be no less than 15% of the entire dollar value of the purchase order. Installations that have been scheduled for installation greater than two times are also subject to the same restocking fee. The restocking fee must be paid in full prior to the installation. If you must change your date from the contract date we require greater than 72 hours notice to do so in order to avoid a restocking fee.

Late Cancellation, Late Payment/Default: If Buyer attempts to cancel this Agreement at any time subsequent to midnight of the third business day after the date of the Agreement as more fully described on the Notice of Right to cancel form, and National accepts such late cancellation, then buyer agrees that any deposit paid shall be forfeited and the Buyer shall only be entitled to a company credit to be used toward a future purchase which will be good for 180 days. Buyer agrees to pay a late fee of 10% per month on all amounts due and owing from the Buyer to National accruing from the date due and running to the date the payment is made. If at any time the buyer is in default of this Agreement, buyer agrees to pay all of National's attorney fees and costs incurred in enforcing it's rights under this agreement. Buyer also agrees to pay any other costs or expenses of repossession, collection, or realization on it's security.

Deposit Refunds: All refunds of refundable deposits shall be processed within 30 business days from date of receipt of deposit. Deposits of cash, check or money order shall be refunded by company check. All other deposits shall be refunded through the same medium that the deposit was tendered to National.

No Set-Offs or Retentions: Buyer shall pay all amounts due under this Agreement in accordance with its terms without any right of set-off or retention. If after making full payment, the buyer alleges that the work is defective in any respect National, without waiving any of its rights, shall cause an inspection of the premises and perform any remedial work to the extent the Buyer is entitled thereto under this Agreement or National's warranty.

Performance by Seller during Cancellation Period: If Seller commences performance during the three-day cancellation period, and if Buyer provides timely and valid notice of cancellation, Seller shall be required to refund any amounts paid under this agreement to Buyer. In such event, the Seller shall have the right to reclaim and the Buyer shall return or make available to the Seller any goods received by the Buyer under this agreement. All carpets must be uncut and all hard surface boxes must be unopened and inspected upon return otherwise this clause is void.

Miscellaneous: In construing this Agreement, the gender and number of words used may be changed to meet the context. Any part of this agreement contrary to the law of this State shall not invalidate other parts of this Agreement. This Agreement is to be governed by the laws of the State in which it is performed, except as may be preempted by federal law. The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement. Any modification of this Agreement shall not be effective unless in writing, signed by the Buyer(s) and a President or Vice President of National.

Non Disparagement: National Floors Direct takes customer service very seriously. We want all of our customers to be 100% satisfied. We also take our reputation very seriously. By signing this purchase order you are agreeing, under penalty of civil suit, for an amount not to exceed three times the monetary value of this order, plus attorney's fees for National Floors Direct, not to publicly disparage or defame National Floors Direct in any way or through any medium.

Arbitration of Disputes: National and Buyer(s) agree that any and all disputes, claims or controversies (hereafter referred to as a "Claim") arising under or relating to this Agreement and any related documents, loans, security instruments accounts or notes, including by way of example and not as a limitation: (i) the relationships resulting from this Agreement and the transactions arising as a result thereof, (ii) the terms of this Agreement, or (iii) the validity of this Agreement or the validity or enforceability of this arbitration agreement, shall be subject to binding Arbitration to be determined by one arbitrator, in accordance with and pursuant to the prevailing rules and procedures of the Commercial Rules of the American Arbitration Association, to be held and arbitrated in the state of Massachusetts. The Buyer(s) agree that they will not assert a Claim on behalf of, or as a member of, any group or class.

The findings of the Arbitrator shall be final and binding on all parties to this Agreement, and may include an award of costs and legal fees to National. Such fees and costs shall be awarded on any decision rendered in favor of National. This agreement to arbitrate, and any award, finding or verdict of or from the arbitration, will be specifically enforceable under the prevailing law of any court having jurisdiction. Notice of the demand for arbitration will be filed by the party asserting the claim with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made within a reasonable time after the Claim in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statue of limitations. Any arbitration proceeding brought under this Agreement, and any award finding or verdict of or from such preceding shall remain confidential between the parties and shall not be made public. Both Buyer(s) and National are hereby agreeing to choose arbitration, rather than litigation or some other means of dispute resolution to address their grievances or alleged grievances. The parties believe this will allow a faster and more cost-effective method of addressing a Claim. By entering into this Agreement and this arbitration provision, the Buyers are giving up their constitutional right to have any dispute decided in a court of law before a jury, and instead are accepting the use of arbitration, other than as set forth immediately below.

Notwithstanding anything herein to the contrary, National retains the option to use judicial or non-judicial relief to enforce any and all monetary obligations arising out of or in connection with this Agreement including legal fees and costs. Such judicial relief may take the form of a lawsuit. The institution and maintenance of such an action for judicial relief in a court to foreclosure upon any collateral or to enforce or collect upon a monetary debt or judgment shall not constitute a waiver of the right of National to compel arbitration of any Claim subject to Arbitration in this Agreement, including the filing of a counterclaim by Buyer(s) in a suit brought by National.

Moisture: Moisture in a home will damage any floor covering. During and prior to the installation NFD checks every home for signs of moisture. If, at the time of installation, moisture is found, we do not install the flooring until the issue has been resolved. After your installation, if there are problems with the flooring or installation thereof and the moisture level in the area of the home where installation took place is greater than seven percent, the customer's installation warranty is void for that area.
On Berber carpets or carpets with a loop pile: You cannot drag furniture or equipment or a pull will result. Such pulls are not manufacturing defects and should be trimmed with scissors so that the raised loop is snipped even with the rest of the carpet.
Any pulled or raised loop or any raised yard must be trimmed before vacuuming. Vacuuming a carpet with a high loop ("pulled") will result in the full row being pulled out. Such a row pull is not a manufacturing defect.
On all carpet: Moving chairs with wheels or casters require the use of a plastic chair mat or severe matting and pile breakdown will occur.
Protect Your Investment: Carpets require vacuuming with a vacuum cleaner that has a revolving brush and beater bar. A good recommendation is to vacuum the rug per week a number that is equal to the number of people in the household. i.e. if there are 3 people, vacuum 3 times a week.
On wood and laminate floors: NEVER USE WATER, soap and water, or detergent and water to clean your floor. You must use wood or laminate cleaner only. Use of water to clean or wipe down your wood or laminate floor will void your manufacturer and installation warranty and may cause the floors to buckle.

PAYMENT IN FULL MUST BE MADE PRIOR TO INSTALLATION. NO PERSONAL CHECKS CAN BE ACCEPTED ON DELIVERY. WE RECOMMEND CASH, CERTIFIED CHECK OR MONEY ORDER. IT IS THE RESPONSIBILITY OF THE CUSTOMER TO OBTAIN A RECEIPT FOR CASH PAYMENTS. QUALIFYING FOR THIRD PARTY FINANCING IS THE SOLE RESPONSIBILITY OF THE CUSTOMER AND NO GUARANTEE OF QUALIFICATION FOR SUCH FINANCING IS MADE BY NATIONAL.

NFD00001

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondent with violations of the Consumer Review Fairness Act of 2016.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Consumer Review Fairness Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent is National Floor Direct, Inc., a Massachusetts corporation with its principal office or place of business at 100 Messina Drive, Braintree, Massachusetts 02184.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Communication" means a written, oral, or Pictorial review, performance assessment, or other similar analysis of goods or services, including conduct related to the goods or services.

B. "Review-Limiting Contract Term" means a standardized contract term that:

1. prohibits or restricts the ability of a person who is a party to the contract to engage in a Covered Communication;

2. imposes a penalty or fee against a person who is a party to the contract for engaging in a Covered Communication; or

3. transfers, or requires a person who is a party to the contract to transfer, to any other person any intellectual property rights in a Covered Communication, with the exception of a non-exclusive license to lawfully use a Covered Communication about Respondent's goods or services.

C. "Pictorial" includes pictures, photographs, video, illustrations, and symbols.

D. "Respondent" means National Floors Direct, Inc., a corporation, and its successors and assigns.

Provisions

I. Prohibited Use of Review-Limiting Contract Terms

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the sale or leasing of any good or service, must not:

A. offer to any prospective customer a contract, or offer to any customer a renewal contract, that includes a Review-Limiting Contract Term;

B. require that a customer accept a Review-Limiting Contract Term as a condition of Respondent's fulfillment of its obligations under a customer contract that Respondent entered into before the effective date of this Order; or

C. attempt to enforce or assert the validity of any Review-Limiting Contract Term in any customer contract that Respondent entered into before the effective date of this Order.

Nothing in this Provision shall require Respondent to publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

II. Notice to Consumers

IT IS FURTHER ORDERED that Respondent must, within 45 days after the effective date of this Order, notify all customers who entered into a contract with Respondent that included any term concerning a Covered Communication, such as Respondent's purchase orders

or releases, used on or after March 14, 2017 through the effective date of this Order, by mailing or emailing each a notice as shown in Attachment A:

A. The heading of the notice, and the subject line for any email, must read "Your Right to Post Honest Reviews."

B. Respondent's name and return address, for any mailing, must appear on the front of the envelope, the customer's name and address must be printed on the front of the envelope or be visible through a window in the envelope, and the words "Your Right to Post Honest Reviews" must be printed in easily noticed text near the customer's name and address.

C. The notice must not include any other materials or message about Respondent, or otherwise concern its goods or services.

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 3 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for drafting, approving, or enforcing customer contracts, or for responding to Covered Communications, and all agents and representatives who participate in conduct related to drafting, approving, or enforcing customer contracts, or responding to Covered Communications; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Report and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IV. Compliance Report and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. 180 days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and any conduct toward consumers who have engaged in Covered Communications; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with this Order; and (5) provide a copy of each Acknowledgment of this Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. For 3 years after the issuance date of this Order, Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re National Floors Direct, Inc.*, C-4686.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 3 years after the issuance date of this Order, and retain each such records for 5 years, unless otherwise specified below. Specifically, Respondent, for any business of which Respondent is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Personnel records showing, for each person providing services in relation to any aspect of this Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

B. A copy of each unique contract relating to a Covered Communication; each unique contract used in connection with selling or leasing Respondent's goods or services; all communications with consumers threatening any legal action relating to any Covered Communication; and all parties' court filings and Respondent's discovery responses in any legal action relating to any Covered Communication; and

C. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on August 14, 2039 or 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after this Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of this Order, and the dismissal or ruling is either not appealed or upheld on appeal, then this Order will terminate according to this Provision as though the complaint had never been filed, except that this Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A to the Order – Letter and Email Notice Template:

The notice must be in the following form, appearing on Respondent's letterhead and email, with the underlined text completed as directed:

Your Right to Post Honest Reviews

Dear <Name of customer>:

Our records show that our company installed carpeting or flooring for you. I am writing to tell you that the Federal Trade Commission (FTC), the nation's consumer protection agency, has alleged that we used contract provisions that violated the Consumer Review Fairness Act (CRFA). The CRFA protects your ability to share your honest opinions about a business's products, services, or conduct, in any forum, including social media. According to the FTC, we

used a provision in our customer contracts that unlawfully restricted our customers (including you) from sharing truthful information and opinions about their experiences with us.

We are contacting our customers to tell you that this contract provision is void and we cannot enforce the provision against you. You can publish your honest review about National Floors Direct, even if you say something negative about us or our products or services.

If you have questions about the FTC's case, visit [add case page alias URL provided by FTC staff with embedded hyperlink].

Sincerely,

<signature>

[*identify Respondent's officer responsible for signing the notification letter*]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order as to National Floors Direct, Inc. ("respondent").

The proposed consent order ("order") has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the order and the comments received, and will decide whether it should withdraw the order or make it final.

This matter involves the respondent's use of non-disparagement provisions in consumer form contracts in its sale and installation of flooring and carpeting. The complaint alleges that the respondent violated Section 2(c) of the Consumer Review Fairness Act ("CRFA") by offering to consumers form contracts that contained a non-disparagement provision made void by Section 2(b) of the CRFA. The CRFA defines a form contract as a contract with standardized terms, used in the course of selling or leasing goods or services, and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

The order includes injunctive relief that prohibits these alleged violations and fences in similar and related conduct involving the use of contract terms that prohibit, restrict,

penalize, or transfer rights in consumer reviews or evaluation of the respondent, its goods, or its services. The CRFA authorizes the Commission to seek civil penalties for knowing violations, but the complaint does not allege that the respondent's violations were knowing, and the order does not provide for monetary relief.

Part I prohibits, in the sale or leasing of any good or service, the respondent from: offering to any prospective customer a contract, or offering to any customer a renewal contract, that includes a review-limiting term; requiring that a customer accept such a term as a condition of the respondent's fulfillment of its obligations under contracts entered into before the effective date of the order; or attempting to enforce or assert the validity of such a term in a customer contract entered into before the effective date of the order. Part I would not require that the respondent publish or host the content of any person, affect any other legal duty of a party to a contract, or affect any cause of action arising from the breach of such duty.

Part II requires the respondent to notify by mail or email customers with whom it entered into form contracts with a non-disparagement provision on or after March 14, 2017 that the non-disparagement provision is void and cannot be enforced, and that those customers can publish their honest reviews about the respondent, even if their comments are negative.

Part III requires the respondent to submit signed acknowledgments that relevant personnel received the order.

Part IV requires the respondent to file compliance reports with the Commission, and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations.

Part V contains recordkeeping requirements for personnel records, consumer contracts, communications with consumers threatening any legal action relating to any review; and court filings and the company's discovery responses in legal actions over consumer reviews, as well as all records necessary to demonstrate compliance or non-compliance with the order.

Part VI contains other requirements related to the Commission's monitoring of the respondent's order compliance.

Part VII provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the order, and it is not intended to constitute an official interpretation of the complaint or order, or to modify the order's terms in any way.

IN THE MATTER OF

LIGHTYEAR DEALER TECHNOLOGIES, LLC

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE STANDARDS FOR SAFEGUARDING CUSTOMER INFORMATION RULE

Docket No. C-4687; File No. 172 3051
Complaint, September 3, 2019 – Decision, September 3, 2019

This consent order addresses LightYear Dealer Technologies, LLC's storage of personal information about more than 14 million consumers. The complaint alleges that Respondent has violated Section 5(a) of the Federal Trade Commission Act and the Standards for Safeguarding Customer Information Rule issued pursuant to Title I of the Gramm-Leach-Bliley Act by engaging in a number of unreasonable security practices that led to a hacker's unauthorized access of personal information about 12.5 million consumers. The consent order prohibits Respondent, and any business that Respondent controls directly, or indirectly, from transferring, selling, sharing, collecting, maintaining, or storing personal information unless it establishes and implements, and thereafter maintains, a comprehensive information security program that protects the security, confidentiality, and integrity of such personal information.

Participants

For the *Commission*: *Jamie Hine* and *Elisa Jillson.*

For the *Respondents*: *Andrew Berg, Greenberg Traurig, LLP* and *Craig A. Harris, Munsch Hardt Kopf & Harr, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that LightYear Dealer Technologies, LLC, a limited liability company ("Respondent"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and the Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title I of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 *et seq.*; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent LightYear Dealer Technologies, LLC, also doing business as DealerBuilt ("DealerBuilt"), is a Missouri limited liability company with its principal office or place of business at 2570 4th Street, SW, Suite A, Mason City, Iowa 50401.

2. The acts and practices of Respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Respondent's Dealer Management Software

3. Respondent is a technology company with approximately 80 employees located in offices in Iowa and Texas and working remotely from locations around the country. Respondent develops and sells dealer management system ("DMS") software and data processing services to automotive dealerships nationwide. A DMS is a suite of electronic applications that track, manage, and store information related to all aspects of a dealership's business: sales, finance, inventory, accounting, payroll, consumer resource management, and parts and service. A DMS is designed to collect and maintain large quantities of personal and competitively sensitive information relating to both consumers and employees.

4. Since 1996, Respondent has licensed its LightYear Dealer Management System ("LightYear") to automotive dealerships across the United States. Respondent has approximately 180 customers, which comprise nearly 320 dealership locations. Among Respondent's customers are large dealerships with multiple storefronts and hundreds of employees. Respondent advertises that its clients include the world's largest Ford dealership and one of the nation's largest Honda dealerships. Also among Respondent's customers are dozens of small businesses with only a handful of employees.

5. Respondent's customers can either license the LightYear DMS and have Respondent host their data, or they can license the LightYear DMS and host their data locally (*i.e.*, on their own servers) and use Respondent's backup service. Customers that choose the latter option regularly back up their databases onto Respondent's network, which is then stored on Respondent's servers and accessed only in case of a catastrophic event, such as recovery from a corrupt local database.

6. Respondent's LightYear DMS software is designed to collect large quantities of personal information about dealership consumers and employees. Specifically, Respondent's dealership customers upload personal information about consumers who visit their dealerships or purchase their automobiles, including, but not limited to: (1) name; (2) gender; (3) physical and mailing address; (4) phone number; (5) email address; (6) date of birth; (7) Social Security number ("SSN"); (8) driver's license number; (9) vehicles owned, identified by license plate number, vehicle identification number, and key code; and (10) credit card numbers. Respondent stores or has stored at least some personal information about more than 14 million individual consumers.

7. In addition, Respondent's customers upload payroll data about dealership employees, including, but not limited to: (1) name; (2) gender; (3) physical and mailing address; (4) phone number; (5) email address; (6) date of birth; (7) Social Security number; (8) wages;

and (9) bank account information. Respondent stores or has stored personal information about approximately 39,000 dealership employees.

8. Respondent stored all of the information described in paragraphs 6-7 in clear text, without any access controls or authentication protections, such as passwords or tokens. Respondent also transmitted this information between servers at the dealerships and Respondent's back up database in clear text.

9. In approximately April 2015, to increase available backup storage, Respondent directed a company employee to purchase a storage device and attach it to Respondent's backup network. At no time did any manager provide the employee guidance or take any steps to ensure the new storage device was securely configured.

10. The storage device that the employee attached to Respondent's network created an open connection port that allowed transfers of information for approximately 18 months (from approximately April 2015 through November 7, 2016). During this time, Respondent did not perform any vulnerability scanning, penetration testing, or other diagnostics to detect the open port, nor did Respondent maintain a device inventory or employ procedures that would have enabled Respondent to prevent exposure of the open port. To the contrary, throughout this 18-month period, the device remained undetected until it was exploited in the breach of personal information described below.

Respondent's Data Security Practices

11. Until at least June 2017, Respondent engaged in a number of practices that, taken together, failed to provide reasonable security for the personal information stored on its network. Among other things, Respondent:

a. Failed to develop, implement, or maintain a written organizational information security policy;

b. Failed to implement reasonable guidance or training for employees or third-party contractors, regarding data security and safeguarding consumers' personal information;

c. Failed to assess the risks to the personal information stored on its network, such as by conducting periodic risk assessments or performing vulnerability and penetration testing of the network;

d. Failed to use readily available security measures to monitor its systems and assets at discrete intervals to identify data security events (*e.g.*,

unauthorized attempts to exfiltrate consumers' personal information across the company's network) and verify the effectiveness of protective measures;

e. Failed to impose reasonable data access controls, such as restricting inbound connections to known IP addresses, and requiring authentication to access backup databases;

f. Stored consumers' personal information on Respondent's computer network in clear text; and

g. Failed to have a reasonable process to select, install, secure, and inventory devices with access to personal information.

Breach of Personal Information

12. Respondent's failures led to a breach of its backup database. Beginning in late October 2016 and lasting at least ten days, a hacker gained unauthorized access to Respondent's backup database through the unsecured storage device, including the unencrypted personal information of approximately 12.5 million consumers, stored by 130 of Respondent's customers.

13. The hacker attacked Respondent's system multiple times, downloading the personal information of 69,283 consumers, the entire backup directories of five customers. The information stolen included full names and addresses, telephone numbers, SSNs, driver's license numbers, and dates of birth about dealership customers as well as wage and financial account information about dealership employees.

14. Respondent failed to detect the breach. Respondent only became aware of the breach on November 7, 2016, when a customer called Respondent's Chief Technology Officer and demanded to know why customer data was publicly accessible on the Internet. Further, only after a security reporter provided Respondent information regarding the security vulnerability did Respondent discover the source of the vulnerability (*i.e.*, the open port on the storage device).

15. Respondent notified its dealership customers of the breach and then notified affected consumers. Respondent's dealership customers spent hours attempting to match pieces of breached personal information to their customer pool, in order to notify the appropriate consumers. The dealerships received numerous consumer complaints.

Injury to Consumers and Businesses

16. Breached personal information, such as that stored in Respondent's backup database, is often used to commit identity theft and fraud. For example, identity thieves use

stolen names, addresses, and SSNs to apply for credit cards in the victim's name. When the identity thief fails to pay credit card bills, the victim's credit suffers. Identity thieves also use stolen personal information, such as the wage and bank account information that Respondent holds, to obtain tax refunds fraudulently. As a result, victims of identity theft often experience long delays before receiving their tax refunds.

17. Similarly, stolen financial information, such as the credit card numbers, expiration dates, and security codes that Respondent holds, can be used to commit fraud. Specifically, a thief could make unauthorized purchases using stolen credit card information.

18. Even if identity theft and fraud do not occur immediately after a breach, a breach of personal information, such as that stored in Respondent's system, makes identity theft and fraud likely. Respondent's backup database was vulnerable for 18 months and its insecure settings were indexed on Shodan, a publicly accessible website that hackers use to locate insecure Internet-connected devices. Respondent was aware that at least one hacker downloaded consumer data from the breached database.

19. The breach of Respondent's database imposed costs on its dealership customers. Specifically, these businesses spent many hours handling breach response communications, identifying affected consumers, and responding to consumer complaints. Some dealerships retained legal counsel to respond to the breach.

20. Respondent's failures to provide reasonable security for the sensitive personal information about dealership consumers and employees, and business financial information, has caused or is likely to cause substantial injury to consumers and small businesses in the form of fraud, identity theft, monetary loss, and time spent remedying the problem.

21. Dealership customers and consumers had no way of independently knowing about Respondent's security failures and could not reasonably have avoided possible harms from such failures.

22. Respondent could have prevented or mitigated these failures through readily available and relatively low-cost measures.

Gramm-Leach-Bliley Act

23. Respondent is a financial institution, as that term is defined by Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A), and is subject to the GLB Act, because, among other things, Respondent is significantly engaged in data processing for its customers, auto dealerships that extend credit to consumers. 12 C.F.R. § 225.28(b)(14). Respondent collects nonpublic

personal information, as defined by 16 C.F.R. § 313.3(n), and is subject to the requirements of the GLB Safeguards Rule, 16 C.F.R. Part 314.

Safeguards Rule

24. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing, implementing, and maintaining a comprehensive information security program that is written in one or more readily accessible parts, and that contains administrative, technical, and physical safeguards that are appropriate to the financial institution's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue, including:

a. Designating one or more employees to coordinate the information security program;

b. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

c. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;

d. Overseeing service providers by requiring them by contract to protect the security and confidentiality of customer information; and

e. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances. 16 C.F.R. §§ 314.3 and 314.4. Violations of the Safeguards Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

25. Until at least June 2017, Respondent violated the Safeguards Rule. For example:

a. Respondent failed to develop, implement, and maintain a written information security program;

b. Respondent failed to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information

and failed to assess the sufficiency of any safeguards in place to control those risks; and

c. Respondent failed to design and implement basic safeguards and to regularly test or otherwise monitor the effectiveness of such safeguards' key controls, systems, and procedures.

VIOLATION OF THE FTC ACT

Count 1
Unfair Data Security Practices

26. As described in Paragraphs 11 to 22, Respondent's failure to employ reasonable measures to protect personal information caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

VIOLATION OF THE GLB SAFEGUARDS RULE

Count 2
Violation of the Safeguards Rule

27. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

28. As set forth in Paragraph 25a, Respondent failed to develop, implement, and maintain a written information security program.

29. As set forth in Paragraph 25b, Respondent failed to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and failed to assess the sufficiency of any safeguards in place to control those risks.

30. As set forth in Paragraph 25c, Respondent failed to design and implement basic safeguards and to regularly test or otherwise monitor the effectiveness of such safeguards' key controls, systems, and procedures.

31. Therefore, the conduct set forth in Paragraphs 28-30 is a violation of the Safeguards Rule, 16 C.F.R. Part 314.

32. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this third day of September 2019, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and the Federal Trade Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title I of the Gramm-Leach-Bliley ("GLB") Act, 15 U.S.C. § 6801 *et seq*.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is LightYear Dealer Technologies, LLC, a Missouri limited liability company, also doing business as DealerBuilt, with its principal office or place of business at 2570 4th Street, SW, Suite A, Mason City, Iowa 50401.

2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Incident" means any instance in which any United States federal, state, or local law or regulation requires Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

B. "Personal Information" means individually identifiable information from or about an individual consumer, including: (a) a first and last name; (b) a home or other physical address; (c) an email address; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other government issued identification number; (g) a financial account number; (h) credit or debit card information; (i) a date of birth; and (j) a license plate, vehicle identification number, or key code.

C. "Respondent" means LightYear Dealer Technologies, LLC, a limited liability company, also doing business as DealerBuilt, and its successors and assigns.

Provisions

I. Mandated Information Security Program

IT IS ORDERED that Respondent, and any business that Respondent controls directly, or indirectly, shall not transfer, sell, share, collect, maintain, or store Personal Information unless it establishes and implements, and thereafter maintains, a comprehensive information security program ("Information Security Program") that protects the security, confidentiality, and integrity of such Personal Information. To satisfy this requirement, Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to Respondent's board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer of Respondent responsible for Respondent's Information Security Program at least once every twelve (12) months and promptly after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve (12) months and promptly following a Covered Incident, internal and external risks to the security, confidentiality, or integrity of Personal Information that could result in the unauthorized disclosure, misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks Respondent identifies to the security, confidentiality, or integrity of Personal Information identified in response to sub-Provision I.D. Such safeguards shall also include:

1. Training of all of Respondent's employees, at least once every twelve (12) months, on how to safeguard Personal Information;

2. Technical measures to monitor all of Respondent's networks and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks;

3. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) restricting inbound connections to approved IP addresses, (b) requiring authentication to access them, and (c) limiting employee access to what is needed to perform that employee's job function;

4. Encryption of all Social Security numbers and financial account information on Respondent's computer networks; and

5. Policies and procedures to ensure that all devices on Respondent's network with access to Personal Information are securely installed and inventoried at least once every twelve (12) months.

F. Assess, at least once every twelve (12) months and promptly following a Covered Incident, the sufficiency of any safeguards in place to address the risks to the security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results.

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly following a Covered Incident, and modify the Information Security Program based on the results. Such testing shall include vulnerability testing of Respondent's network once every four months and promptly after a Covered Incident, and penetration testing of Respondent's network at least once every twelve (12) months and promptly after a Covered Incident;

H. Select and retain service providers capable of safeguarding Personal Information they access through or receive from Respondent, and contractually require service providers to implement and maintain safeguards for Personal Information; and

I. Evaluate and adjust the Information Security Program in light of any changes to Respondent's operations or business arrangements, a Covered Incident, or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the Information Security Program. At a minimum, Respondent must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

II. Information Security Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with Provision I of this Order titled Mandated Information Security Program, Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from a qualified, objective, independent third-party professional ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Information Security Program; and (3) retains all documents relevant to each Assessment for five (5) years after completion of such Assessment and will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney client privilege, statutory exemption, or any similar claim.

B. For each Assessment, Respondent shall provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name and affiliation of the person selected to conduct the Assessment, which the Associate Director shall have the authority to approve in his sole discretion.

C. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment; and (2) each 2-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must: (1) determine whether Respondent has implemented and maintained the Information Security Program required by Provision I of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of Respondent's implementation and maintenance of sub-Provisions I.A-I; (3) identify any gaps or weaknesses in the Information Security Program; and (4) identify specific evidence (including, but not limited to, documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is sufficient to justify the Assessor's findings. No finding of any Assessment shall rely solely on assertions or attestations by Respondent's management. The Assessment shall be signed by the Assessor and shall state that the Assessor conducted an independent review of the Information Security Program, and did not rely solely on assertions or attestations by Respondent's management.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re LightYear Dealer Technologies, LLC, d/b/a DealerBuilt, FTC File No. 172 3051." All subsequent biennial Assessments shall be retained by Respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

III. Cooperation with Third Party Information Security Assessor

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision II of this Order titled Information Security Assessments by a Third Party, must disclose all material facts to the Assessor, and must not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondent has implemented and maintained the Information Security Program required by Provision I of this Order, titled Mandated Information Security

Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions I.A-I; or (3) identification of any gaps or weaknesses in the Information Security Program.

IV. Annual Certification

IT IS FURTHER ORDERED that, in connection with compliance with Provision I of this Order titled Mandated Information Security Program, Respondent shall:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of Respondent responsible for Respondent's Information Security Program that: (1) Respondent has established, implemented, and maintained the requirements of this Order; (2) Respondent is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of a Covered Incident. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re LightYear Dealer Technologies, LLC, d/b/a DealerBuilt, FTC File No. 172 3051."

V. Covered Incident Reports

IT IS FURTHER ORDERED that Respondent, within a reasonable time after the date of Respondent's discovery of a Covered Incident, but in any event no later than ten (10) days after the date Respondent first notifies any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes and scope of the Covered Incident, if known;

C. A description of each type of information that triggered the notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that Respondent has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of each materially different notice required by U.S. federal, state, or local law or regulation and sent by Respondent to consumers or to any U.S. federal, state, or local government entity.

Unless otherwise directed by a Commission representative in writing, all Covered Incident reports to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re LightYear Dealer Technologies, LLC, d/b/a DealerBuilt, FTC File No. 172 3051."

VI. GLB Rule Violations

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, are hereby permanently restrained and enjoined from violating any provision of The Standards for Safeguarding Consumer Information Rule, 16 C.F.R. Part 314, appended hereto.

VII. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order.

B. For twenty (20) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives with responsibilities related to the subject matter of the Order; and (3) any business

entity resulting from any change in structure as set forth in Provision VIII of this Order titled Compliance Reports and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

VIII. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within fourteen (14) days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the

United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re LightYear Dealer Technologies, LLC, d/b/a DealerBuilt, FTC File No. 172 3051."

IX. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for twenty (20) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, confidentiality, security, or integrity of any Personal Information, including any representation concerning a change in any website or other service controlled by Respondent that relates to the privacy, confidentiality, security, or integrity of Personal Information;

E. For five (5) years after the date of preparation of each Assessment required by this Order, all materials and evidence that the Assessor considered, reviewed, relied upon or examined to prepare the Assessment, whether prepared by or on behalf of Respondents, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondents' compliance with related Provisions of this Order, for the compliance period covered by such Assessment; and

F. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission.

X. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within ten (10) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on September 3, 2039, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than twenty (20) years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any Provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from LightYear Dealer Technologies, LLC, also doing business as DealerBuilt ("Respondent").

The proposed consent order ("proposed order") has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves DealerBuilt ("DealerBuilt"), a technology company that develops and sells dealer management system software and data processing services to automotive dealerships nationwide. Respondent has stored personal information about more than 14 million consumers.

The Commission's proposed two-count complaint alleges that Respondent has violated Section 5(a) of the Federal Trade Commission Act and the Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), issued pursuant to Title I of the Gramm-Leach-Bliley Act ("GLB").

First, the proposed complaint alleges that Respondent has engaged in a number of unreasonable security practices that led to a hacker's unauthorized access of personal information about 12.5 million consumers. During that breach, the hacker also downloaded the personal information of approximately 70,000 consumers, which was contained in the back-up directories of five DealerBuilt customers. The proposed complaint alleges that Respondent:

- failed to develop, implement, or maintain a written organizational information security policy;

- failed to implement reasonable guidance or training for employees or third-party contractors, regarding data security and safeguarding consumers' personal information;

- failed to assess the risks to the personal information stored on its network, such as by conducting periodic risk assessments or performing vulnerability and penetration testing of the network;

- failed to use readily available security measures to monitor its systems and assets at discrete intervals to identify data security events (*e.g.*, unauthorized attempts to exfiltrate consumers' personal information across the company's network) and verify the effectiveness of protective measures;

- failed to impose reasonable data access controls, such as restricting inbound connections to known IP addresses, and requiring authentication to access backup databases;

- stored consumers' personal information on Respondent's computer network in clear text; and

- failed to have a reasonable process to select, install, secure, and inventory devices with access to personal information.

The proposed complaint alleges that Respondent could have addressed each of the failures described above by implementing readily available and relatively low-cost security measures.

The proposed complaint alleges that Respondent's failures caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. Such practice constitutes an unfair act or practice under Section 5 of the FTC Act.

Second, the proposed complaint alleges that Respondent violated the Safeguards Rule, which requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing, implementing, and maintaining a comprehensive information security program that is written in one or more readily accessible parts, and that contains administrative, technical, and physical safeguards that are appropriate to the financial institution's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue. The proposed complaint alleges that Respondent:

- failed to develop, implement, and maintain a written information security program;

- failed to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and failed to assess the sufficiency of any safeguards in place to control those risks; and

- failed to design and implement basic safeguards and to regularly test or otherwise monitor the effectiveness of such safeguards' key controls, systems, and procedures.

The proposed order contains injunctive provisions addressing the alleged unfair conduct in connection with Respondent's sale of dealer management system software and services. Part I of the proposed order prohibits Respondent, and any business that Respondent controls directly, or indirectly, from transferring, selling, sharing, collecting, maintaining, or storing personal information unless it establishes and implements, and thereafter maintains, a comprehensive information security program that protects the security, confidentiality, and integrity of such personal information.

Part II of the proposed order requires Respondent to obtain initial and biennial data security assessments for twenty years.

Part III of the agreement requires Respondent to disclose all material facts to the assessor and prohibits Respondent from misrepresenting any fact material to the assessments required by Part II.

Part IV requires Respondent to submit an annual certification from a senior corporate manager (or senior officer responsible for its information security program) that Respondent has implemented the requirements of the Order, is not aware of any material noncompliance that has not been corrected or disclosed to the Commission, and includes a brief description of any covered incident involving unauthorized access to or acquisition of personal information.

Part V requires Respondent to submit a report to the Commission of its discovery of any covered incident.

Part VI is a prohibition against violating GLB.

Parts VII through X of the proposed order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance. Part XI states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

QUAKER CHEMICAL CORPORATION, GLOBAL HOUGHTON LTD., GULF HOUGHTON LUBRICANTS LTD., AND AMAS HOLDINGS SPF

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTIONS 7 AND 11 OF THE CLAYTON ACT

Docket No. C-4681; File No. 171 0125
Complaint, July 23, 2019 – Decision, September 9, 2019

This consent order addresses the $172.5 million acquisition by Quaker Chemical Corporation of certain assets of Global Houghton LTD. The complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act and that the asset purchase agreement constitutes a violation of Section 5 of the Federal Trade Commission Act by substantially lessening competition in the manufacture and sale of aluminum hot rolling oils ("AHRO") and steel cold rolling oils ("SCRO") in North America. The consent order requires Quaker to divest Houghton's North American AHRO and SCRO product lines to Total S.A.

Participants

For the *Commission*: *Steven Couper* and *Terry Thomas.*

For the *Respondents*: *Joanne Lewers, Drinker Biddle & Reath LLP; Scott Perlman, Mayer Brown LLP; Karen Kazmerzak* and *Timothy Muris, Sidley Austin LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Quaker Chemical Corporation ("Quaker") intends to acquire Global Houghton Ltd. ("Houghton"), in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and which, if the acquisition is consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. RESPONDENTS

1. Respondent Quaker is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its executive offices and

principal place of business located at One Quaker Park, 901 E. Hector Street, Conshohocken, Pennsylvania 19428-2380.

2. Respondent Houghton is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its executive offices and principal place of business located at 945 Madison Avenue, Valley Forge, Pennsylvania 19403.

3. Respondent Gulf Houghton Lubricants Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its executive offices and principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102.

4. Respondent AMAS Holding Spf is a société de gestion de patrimoine familial, organized, existing, and doing business under and by virtue of the laws of the Grand Duchy of Luxembourg, with its executive offices and principal place of business located at 412F, Route d'Esch, L, 2086, Luxembourg City, Luxembourg.

II. JURISDICTION

5. Respondents, either directly or through corporate entities under their control, are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

III. PROPOSED ACQUISITION

6. Pursuant to a Share Purchase Agreement dated April 4, 2017, Quaker proposes to acquire the voting securities of Houghton. Quaker will acquire all the voting securities of Houghton. Shareholders of Houghton will receive, in the aggregate, $172.5 million of cash and newly issued shares of Quaker stock representing 24.5 percent ownership interest in Quaker. ("the Acquisition").

7. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

IV. THE RELEVANT MARKETS

8. A relevant product market in which to analyze the effects of the Acquisition is aluminum hot rolling oil ("AHRO") and associated technical support services. AHRO is used in the production of aluminum sheet. At an aluminum rolling mill, AHRO is applied directly to the metal as it passes through the mill's rollers, providing lubrication and protecting the metal. AHRO is necessary for the production of aluminum sheet. There is no viable or economic substitute for AHRO.

9. A relevant product market in which to analyze the effects of the Acquisition is steel cold rolling oil ("SCRO") and associated technical support services. SCRO includes (1)

sheet cold rolling oil; (2) tin plate rolling oil ("TPRO"); and (3) pickle oil. SCRO is used in the production of steel sheet. At a steel rolling mill, SCRO is applied directly to the metal as it passes through the mill's rollers, providing lubrication and protecting the metal. TPRO is a type of SCRO used for rolling steel to a thinner gauge with a narrower width. Pickle oil is a type of SCRO used by steel producers to prevent corrosion on steel sheet after it goes through an acid bath. SCRO is necessary for the production of steel sheet. There are no viable or economic substitutes for SCRO.

10. North America is the relevant geographic market for AHRO and associated technical support services. Customers typically receive AHRO shipments via tanker truck. Given the large volumes of AHRO required to run an aluminum mill, and the need for timely re-supply, shipping AHRO from outside North America is cost- and supply-prohibitive. Additionally, when AHRO issues arise at an aluminum mill, customers require on-site technical assistance as soon as possible to prevent an expensive delay in production.

11. North America is the relevant geographic market for SCRO and associated technical support services. Customers typically receive SCRO shipments via heated tanker truck. Given the large volumes of SCRO required to run a steel mill, and the need for timely re-supply, shipping SCRO from outside North America is cost- and supply-prohibitive. Additionally, the SCRO used in North America is often supplied via heated tanker truck because it will congeal under typical tanker truck conditions. When SCRO issues arise at a steel mill, customers require on-site technical assistance as soon as possible to prevent an expensive delay in production.

V. MARKET STRUCTURE

12. The market for the manufacture and sale of AHRO and provision of the associated technical support services in North America is highly concentrated.

13. Quaker and Houghton are the only two commercial suppliers of AHRO in North America.

14. The market for the manufacture and sale of SCRO and provision of the associated technical support services in North America is highly concentrated.

15. Quaker and Houghton are the two largest commercial suppliers of SCRO in North America. Smaller SCRO suppliers exist, but these suppliers do not possess the technical expertise or staff to replace competition lost as a result of this merger.

VI. ENTRY CONDITIONS

16. Entry, repositioning, or fringe firm growth would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. Switching to a new AHRO provider is an expensive process for customers and the testing can take up to 18 months.

17. Entry, repositioning, or fringe firm growth would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. Switching to a new SCRO provider is an expensive process for customers and the testing can take more than 18 months.

VII. EFFECTS OF THE ACQUISITION

18. Absent relief, the Acquisition may substantially lessen competition by creating a monopoly in the market for AHRO and associated technical support services.

19. Absent relief, the Acquisition may substantially lessen competition in the SCRO market by increasing the likelihood that Quaker will unilaterally exercise market power in the market for SCRO and associated technical support services.

VIII. VIOLATIONS CHARGED

20. The Acquisition agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15.U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-third day of July, 2019, issues its complaint against Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of (i) the proposed acquisition by Quaker Chemical Corporation of the voting securities of Global Houghton Ltd., and (ii) the proposed acquisition of newly issued shares of Quaker Chemical Corporation stock by AMAS Holding Spf, the ultimate parent entity of Global Houghton Ltd. and Gulf Houghton Lubricants Ltd. (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint; or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Quaker Chemical Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its executive offices and principal place of business located at One Quaker Park, 901 E. Hector Street, Conshohocken, Pennsylvania 19428-2380.

2. Respondent Global Houghton Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

3. Respondent Gulf Houghton Lubricants Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its executive offices and principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

4. Respondent AMAS Holding Spf is a *société de gestion de patrimoine familial*, organized, existing, and doing business under and by virtue of the laws of the Grand Duchy of Luxembourg, with its executive offices and principal place of business located at 412F, Route d'Esch, L, 2086, Luxembourg City, Luxembourg, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter,

Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I.
Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

A. "Quaker" means: Quaker Chemical Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Quaker Chemical Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Houghton" means: Global Houghton Ltd.; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Global Houghton Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Gulf Houghton" means: Gulf Houghton Lubricants Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Gulf Houghton Lubricants Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "AMAS" means: AMAS Holding Spf, its directors, officers, members authorized to act on behalf of AMAS Holding Spf or manage AMAS Holding Spf, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by AMAS Holding Spf, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Respondents" means Quaker, Houghton, Gulf Houghton, and AMAS, individually and collectively.

G. "Decision and Order" means the following:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order following its issuance and service by the Commission in this matter.

H. "Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph IX of the Decision and Order.

I. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.
Asset Maintenance

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective and until Respondents fully transfer and deliver all of the Divestiture Product Assets to an Acquirer in the manner as required by the Decision and Order:

A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Product Businesses.

B. Respondents shall maintain the operations of the Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business and as consistent with standard operating procedures to ensure professionalism, safety, and quality of any product or service offered by the business, to maintain all related manufacturing technology, to maintain compliance with all applicable Laws, and to maintain any licenses or approvals with any Government Entity) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses, and shall use their best efforts to preserve the existing relationships with the following: customers; suppliers; licensors; licensees; advertisers; vendors and distributors; Government Entities; employees; and others having business relations with the Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Divestiture Product Businesses 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 Divestiture Product Businesses;

2. continuing, at least at their scheduled pace, any expenditures for the Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by the Respondents;

3. providing such resources as may be necessary to respond to competition prior to the complete transfer and delivery of the Divestiture Product Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of the Divestiture Product Businesses;

5. making available for use by the Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Divestiture Product Assets; and

6. providing such support services to the Divestiture Product Businesses as were being provided to such Divestiture Product Businesses by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Respondents shall maintain a work force that is (i) at least as large (as measured in full time equivalents) as, and (ii) comparable in training, education, professionalism, and expertise to what has been associated with the Divestiture Product Businesses for the Divestiture Product Businesses' last fiscal year.

D. Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

   b. Respondents' obligations to the Acquirer under the terms of any related Divestiture Agreement; or

   c. applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except*:

a. the Acquirer;

b. other Persons authorized by the Acquirer or staff of the Commission to receive such information;

c. the Commission; or

d. the Monitor; and

except to the extent necessary to comply with applicable Law;

3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees directly involved in providing Contract Manufacturing or Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Manufacturing Technology to the Acquirer and only for the purposes of providing such products, assistance, and information to the Acquirer;

4. institute procedures and requirements to ensure that the employees providing Contract Manufacturing or Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Manufacturing Technology to the Acquirer:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and

   b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

5. take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

   a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

   b. to the extent practicable, maintaining Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that Confidential Business Information is not shared with Respondents' personnel engaged in the provision of the same or substantially the same type of Divestiture Product Businesses.

III.
Monitor

IT IS FURTHER ORDERED that:

A. James B. Mynaugh shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, 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 Orders and in consultation with the Commission;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until Respondents complete the following in a manner required by the Decision and Order:

a. the transfer and delivery of all of the Divestiture Product Assets to the Acquirer;

b. the transfer and delivery of all of the Manufacturing Technology to the Acquirer;

c. the transfer and delivery of all Confidential Business Information to the Acquirer; and

d. the provision of all Transition Services to the Acquirer.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants (including information technology experts), accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents 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, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the date this Order to Maintain Assets is issued and every thirty (30) days thereafter, and at such other times as my be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. After the Decision and Order becomes final, the Monitor shall report to the Commission as described in Paragraph IX.H of the Decision and Order.

I. Respondents 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,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission, among other things, may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent Quaker, which consent shall not be unreasonably withheld;

2. if Respondent Quaker 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 Quaker of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor;

3. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. 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.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as the Monitor pursuant to the Decision and Order.

N. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.
Compliance Reports

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every ninety (90) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders ("Compliance Reports").

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the Divestiture Product Assets to the Acquirer, (ii) the transfer and delivery of all of the Manufacturing Technology to the Acquirer, (iii) the transfer and delivery of all Confidential Business Information to the Acquirer; (iv) the provision of Transition Services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

D. After the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the Compliance Reports required to be submitted by Respondents pursuant to the Decision and Order.

V.
Change in Respondents

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

A. any proposed dissolution of: Quaker Chemical Corporation; Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf;

B. any proposed acquisition, merger, or consolidation of: Quaker Chemical Corporation; Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf; or

C. any other change in a Respondent including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.
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 a Respondent made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

VII.
Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

VIII.
Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later 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 day after all of the Divestiture Product Assets and Manufacturing Technology have been transferred to and are in the physical possession of the Acquirer, as required by and described in the Decision and Order; or

C. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of (i) the proposed acquisition by Quaker Chemical Corporation of the voting securities of Global Houghton Ltd., and (ii) the proposed acquisition of newly issued shares of Quaker Chemical Corporation stock by AMAS Holding Spf, the ultimate parent entity of Global Houghton Ltd. and Gulf Houghton Lubricants Ltd. (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and an Order to Maintain Assets; and

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Quaker Chemical Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of

Pennsylvania with its executive offices and principal place of business located at One Quaker Park, 901 E. Hector Street, Conshohocken, Pennsylvania 19428-2380.

2. Respondent Global Houghton Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

3. Respondent Gulf Houghton Lubricants Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its executive offices and principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

4. Respondent AMAS Holding Spf is a *société de gestion de patrimoine familial*, organized, existing, and doing business under and by virtue of the laws of the Grand Duchy of Luxembourg, with its executive offices and principal place of business located at 412F, Route d'Esch, L, 2086, Luxembourg City, Luxembourg, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in the Orders, the following definitions shall apply:

A. "Quaker" means: Quaker Chemical Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Quaker Chemical Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Quaker shall include Houghton.

B. "Houghton" means: Global Houghton Ltd.; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Global Houghton Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Gulf Houghton" means: Gulf Houghton Lubricants Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Gulf Houghton Lubricants Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "AMAS" means: AMAS Holding Spf, its directors, officers, members authorized to act on behalf of AMAS Holding Spf or manage AMAS Holding Spf, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by AMAS Holding Spf, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Respondents" means Quaker, Houghton, Gulf Houghton, and AMAS, individually and collectively.

G. "Acquirer(s)" means the following:

1. Total; or

2. any other Person approved by the Commission to acquire the Divestiture Product Assets pursuant to this Order.

H. "Acquisition" means Quaker's acquisition of Houghton pursuant to the Acquisition Agreement.

I. "Acquisition Agreement" means the *Share Purchase Agreement* dated as of April 4, 2017, by and among Global Houghton Ltd., Quaker Chemical Corporation, Gulf Houghton Lubricants Ltd., The Other Sellers Party Hereto, and Gulf Houghton Lubricants Ltd., as Seller's Representative. The Acquisition Agreement is contained in Non-Public Appendix I.

J. "Acquisition Date" means the earlier of the following: (i) the date on which Quaker acquires any Ownership Interest in Houghton; or (ii) the date on which AMAS or Gulf Houghton acquires any Ownership Interest in Quaker.

K. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s),

license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Divestiture Product.

L. "AHRO Product Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to AHROs, to the extent the transfer is permitted by Law, including the Categorized Assets related to the AHROs which also include the following:

1. NOA Patent;

2. the following Trademarks or tradenames: Tandemol®; NOA; NOA ARC; Rodshield; and NOALUBRIC.

M. "AHRO(s)" or "Aluminum Hot Rolling Oils" means all Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the aluminum in the Hot Rolling Process of the aluminum. "Aluminum Hot Rolling Oils" include all such Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the aluminum in the Hot Rolling Process of the aluminum at any width or gauge sheet and for any further processing (*e.g.*, printing or coating) or any end-use.

N. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, exportation, advertisement, and sale of a product.

O. "Business Information" means all originals and all copies of any operating, financial, or other information, books, records, documents, data computer files (including files stored on a computer hard drive or other storage media), electronic files, ledgers, papers, instruments, and other materials, wherever located and however stored (*i.e.,* whether stored or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media).

P. "Categorized Assets" means all rights, title, and interest in and to all assets related to the Business of the specified Divestiture Product(s), including the research, Development, manufacture, distribution, marketing, and sale of such Divestiture Product(s), including:

1. all Product Intellectual Property;

2. all Product Approvals;

3. at the Acquirer's option, Manufacturing Equipment;

4. all Manufacturing Technology;

5. all Marketing Materials;

6. all Quality and Safety Reports;

7. all Research and Development Reports;

8. all Website(s);

9. the content related exclusively to a Divestiture Product that is displayed on any Website that is not dedicated exclusively to the Divestiture Product;

10. at the option of the Acquirer, all Product Contracts;

11. for each Divestiture Product:

    a. a list of all Customers for each Divestiture Product and a listing of the net sales (in either units or dollars) of that Divestiture Product to such Customers during the one (1) year period immediately prior to the Divestiture Date, stated on either an annual, quarterly, or monthly basis, including (i) the name of the Customer's employee(s) for each Customer that is or has been responsible for the purchase of the product on behalf of the Customer and that employees business contact information and (ii) the name of Customer's employees at each mill that is or has been the primary contact person at the mill related to the use of the product;

    b. a list for each formulation of each Divestiture Product containing the following: (i) the net price per formulation of the Divestiture Date, *i.e.*, the final price per unit charged by the Respondents net of all customer-level discounts, rebates, or promotions; (ii) the net price per unit charged by the Respondents at the end of each quarter during the one (1) year immediately prior to the Divestiture Date; and (iii) any supply outages by unit during the one (1) year period immediately prior to the Divestiture Date; and

    c. backorders as of the Divestiture Date;

12. for each Divestiture Product, a list of all suppliers of inputs to the Divestiture Product;

13. a description of any disruptions during the three (3) year period immediately prior to the Divestiture Date in the supply of any inputs to any Divestiture Product, for each such disruption: (i) a description of the input(s); (ii) name of the supplier(s); (iii) the length of time of the

disruption; and (iv) the corrective actions taken to remediate the disruption;

14. to the extent available, a list of each Divestiture Product that has had any finished product determined to be out-of-specification during the three (3) year period immediately preceding the Divestiture Date, and, for each such Divestiture Product: (i) a description of the deficiencies; and (ii) the corrective actions taken to remediate the deficiencies in the Divestiture Product;

15. at the option of the Acquirer, all inventory in existence as of the Divestiture Date including raw materials, packaging materials, work-in-process, and finished goods related to the Divestiture Products;

16. the quantity and delivery terms in all unfilled Customer purchase orders for each Divestiture Product as of the Divestiture Date, to be provided to the Acquirer not later than five (5) days after the Divestiture Date;

17. at the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for each Divestiture Product as of the Divestiture Date; and

18. all of the Respondents' Business Information directly related to the foregoing;

provided, however, that "Divestiture Product Assets" shall not include: (i) documents relating to a Respondent's general business strategies or practices relating to the conduct of its Business outside of the Divestiture Products, where such documents do not discuss with particularity a Divestiture Product; and (ii) information that is exclusively related to the Retained Products;

provided further, *however*, that in cases in which documents or other materials included in the Divestiture Product Assets contain information: (i) that relates both to a Divestiture Product and to Retained Products or Businesses of a Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest information that, in content, also relates to Retained Product(s).

Q. "Cold Rolling" means the Rolling of metal at a temperature below its recrystallization temperature.

R. "Compatible Hydraulic Fluids-Aluminum" mean all hydraulic fluids that are composed of the same raw materials as the AHRO fluids manufactured, Developed, in Development, marketed, or sold that are used in the equipment used to roll Aluminum in the Hot Rolling Process.

S. "Compatible Hydraulic Fluids-Aluminum Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to each of the Compatible Hydraulic Fluids-Aluminum, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Compatible Hydraulic Fluids-Aluminum.

T. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to a Respondent's general business strategies or practices that does not discuss with particularity the Divestiture Products;

2. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products or that is exclusively related to Retained Product(s); and

3. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

U. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (including for the purposes of testing or qualification and/or commercial sales); or

2. to provide, or to cause to be provided, any part of the manufacturing process or shipping/transportation process including the blending, dispensing into containers, and shipping/transporting of a Contract Manufacture Product on behalf of an Acquirer.

V. "Contract Manufacture Product(s)" means the Divestiture Products, individually and collectively, and any ingredient, material, or component used in the manufacture of the foregoing products including the packaging/containers.

W. "Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory.

X. "Customer(s)" means any Person that is a direct purchaser or end-user of any Divestiture Product in the Geographic Territory.

Y. "Development" means all research and development activities, including the following: design (including customized design for a particular Customer(s)); formulation (customized formulation(s) for particular Customers or mills); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; lubrication and dispersion properties testing; performance testing; safety testing; and qualification testing for the purpose of obtaining or achieving any and all Product Approvals. "Develop" means to engage in Development.

Z. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee.

AA. "Divestiture Agreement(s)" means the following:

1. *Asset Purchase Agreement* by and among Quaker Chemical Corporation, Global Houghton Ltd., and Total Marketing Services, dated as of March 25, 2019;

2. *Transition Service Agreement* by and between Total Marketing Services and Quaker Chemical Corporation to be executed on or before the Divestiture Date;

3. *Patent Assignment Agreement* by and between Houghton Technical Corp. and Total Marketing Services to be executed on or before the Divestiture Date;

4. *Trademark Assignment Agreements* by and between Houghton Technical Corp. and Total Marketing Services to be executed on or before the Divestiture Date;

5. *Partial Assignment and Assumption Agreement* by and among Houghton Technical Corp., Total Marketing Services, and Henkel US Operations Corporation;

6. all amendments, exhibits, attachments, and schedules attached to and submitted to the Commission with the foregoing listed agreements, other than the *License Agreement*; and

7. any other agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

The Divestiture Agreements that have been submitted to the Commission by the Respondents prior to the Order Date are contained in Non-Public Appendix II.

BB. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) closes on the sale of the Divestiture Product Assets to an Acquirer.

CC. "Divestiture Product(s)" means all of the following products manufactured, Developed, in Development, marketed, sold, owned, or controlled by Houghton:

1. Aluminum Hot Rolling Oils;

2. Compatible Hydraulic Fluids-Aluminum;

3. Pickle Oils;

4. Steel Cold Rolling Oils; and

5. Steel Cleaners.

DD. "Divestiture Product Asset(s)" means the following, individually and collectively:

1. Aluminum Hot Rolling Oil Assets;

2. Compatible Hydraulic Fluids-Aluminum Assets;

3. Pickle Oil Assets;

4. Steel Cold Rolling Oil Assets; and

5. Steel Cleaner Assets.

EE. "Divestiture Product Core Employees" means:

1. the Sales and Marketing Employees related to each Divestiture Product;

2. the Research and Development Employees related to each Divestiture Product;

3. the Manufacturing Employees related to each Divestiture Product; and

4. the Essential Employees.

FF. "Divestiture Product Business(es)" means the Business related to the Divestiture Product(s).

GG. "Divestiture Product License" means a perpetual, non-exclusive, fully paid-up, and royalty-free license(s) under a Divestiture Agreement with rights to sublicense to all Manufacturing Technology related to general manufacturing know-how that was owned, licensed, held, or controlled by a Respondent:

1. to research and Develop each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) for marketing, distribution, or sale within the Geographic Territory;

2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) within the Geographic Territory;

3. to import or export each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) to or from the Geographic Territory to the extent related to the marketing, distribution, or sale of the Divestiture Products in the Geographic Territory; and

4. to have the Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) made anywhere in the world for distribution or sale within, or import into the Geographic Territory;

provided, however, that for any Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent and rights to any modifications made by the Respondents.

HH. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph X of this Decision and Order.

II. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.

JJ. "Essential Employees" means any Person listed in Non-Public Appendix III attached to this Order.

KK. "Geographic Territory" means the following:

1. United States of America;

2. Canada; and

3. United Mexican States.

LL. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, government department, or government commission; or any judicial or regulatory authority of any government.

MM. "Hot Rolling Process" means the Rolling of metal at a temperature above its recrystallization temperature.

NN. "Law(s)" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

OO. "Manufacturing Employees" means all employees of a Respondent that have directly participated within the two (2) year period immediately prior to the Divestiture Date in any of the following related to a Divestiture Product:

1. defining the commercial manufacturing process;

2. confirming that the manufacturing process is capable of reproducible commercial manufacturing;

3. formulating the manufacturing process performance qualification protocol;

4. controlling the manufacturing process to assure performance product quality;

5. assuring that during routine manufacturing the process remains in a state of control;

6. collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality products;

7. managing the operation of the manufacturing process;

8. defining packaging and materials handling procedures; or

9. managing the technological transfer of the manufacturing process from a facility to a different facility, of the Manufacturing Technology of a Divestiture Product;

unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance.

PP. "Manufacturing Equipment" means all fixtures, equipment (including technical equipment and computers), and machinery that is being used or has been used at any time since the Respondents entered into the Acquisition Agreement, in the research, Development, or manufacture of a Divestiture Product and that is suitable for use in the research, Development, or manufacture of a Divestiture Product as of the Divestiture Date.

QQ. "Manufacturing Technology" means all technology, Trade Secrets, know-how, designs, formulas, ideas, concepts, and proprietary information (whether patented, patentable, or otherwise) used by Respondents to manufacture each Divestiture Product, including:

1. all product specifications, product formulation, and formulation protocols, including the exact formulation, combination, design, array and identity and specifications of all components or ingredients (*e.g.*, synthetic ester oils) that achieve a particular set of application and end-use characteristics in a final Divestiture Product;

2. manufacturing processes, analytical methods, flow diagrams, instructions, and other related manuals and drawings;

3. standard operating procedures;

4. quality assurance and control procedures, and quality manuals;

5. quality system documentation;

6. Customer quality surveys;

7. Customer quality certifications;

8. control history;

9. corrective actions stemming from Customer complaints;

10. non-conformance audits on products or processes used to manufacture products;

11. research and Development records;

12. annual product reviews;

13. supplier lists;

14. labeling and product manuals;

15. manuals and technical information provided to employees, Customers, distributors, suppliers, agents, licensees, including manufacturing, equipment and engineering manuals and drawings;

16. repair and performance records related to the Manufacturing Equipment being acquired by the Acquirer for the two (2) year period immediately preceding the Divestiture Date;

17. records related to the protective workplace safety standards related to the Manufacturing Equipment being acquired by the Acquirer for the two (2) year period immediately preceding the Divestiture Date;

18. audits of manufacturing methods for the Divestiture Products conducted by any Agency, end-use Customer, or any Standards and Certification Organization; and

19. all other information related to the manufacturing process.

RR. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of each Divestiture Product in the Geographic Territory as of the Divestiture Date, including all quality system documentation used for Customer presentations, advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, sales reports, sales funnel or process information, and sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, and statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter, or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials to be provided to distributors and/or end-use Customer (*e.g.* specification sheets, application/use instructions, and technical specifications), Website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to each Divestiture Product.

SS. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Decision and Order or Paragraph III of the Order to Maintain Assets.

TT. "NOA Patent" means U.S. Patent No. 6,818,609, including 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.

UU. "Oil Product(s)" means any product that has a lubricant base of any of the following: petroleum and petroleum derivatives (including mineral oils), natural oils, animal fats and other derivatives, vegetable oils, or synthetic ester oils.

VV. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

WW. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

XX. "Orders" means this Decision and Order and the related Order to Maintain Assets.

YY. "Ownership Interest" means any voting securities, non-voting securities, share capital, non-corporate equity interest, notes convertible into any voting or non-voting securities, contractual power to designate a director of an entity, equity, or other interest in an entity or its assets.

ZZ. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), 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.

AAA. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.

BBB. "Pickle Oil(s)" means all Oil Products manufactured, Developed, in Development, marketed, or sold to protect the surface of sheet steel during or after the steel has undergone the pickling process (*i.e.*, the surface treatment process that usually uses an acidic solution to remove impurities, such as stains, inorganic contaminants, rust or scale from sheet steel).

CCC. "Pickle Oil Product Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to Pickle Oils, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Pickle Oils which includes the following Trademarks and tradenames: Rolkleen®.

DDD. "Product Approval(s)" means all approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Divestiture required by:

1. any Customer; and/or

2. any Agency, Standards and Certification Organization, engineering firm, chemical firm, or procurement firm, as applicable.

EEE. "Product Contracts" means all contracts or agreements between a Respondent and a Third Party:

1. that make specific reference to a Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, that Divestiture Product from a Respondent;

2. pursuant to which a Respondent had or has as of the Divestiture Date the ability to independently purchase the raw materials, inputs, ingredients, or component(s), or had planned to purchase the raw materials, inputs, ingredients, or component(s) from any Third Party, for use in connection with the manufacture of a Divestiture Product;

3. pursuant to which a Third Party manufactures or plans to manufacture a Divestiture Product in order to provide it to a Respondent;

4. pursuant to which a Third Party manufactures or plans to manufacture an input, ingredient or component of a Divestiture Product in order to provide it to a Respondent;

5. pursuant to which a Third Party markets, sells, or distributes a Divestiture Product;

6. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process, including the mixing or packaging of a Divestiture Product;

7. pursuant to which a Third Party provides the Manufacturing Technology related to a Divestiture Product to a Respondent;

8. pursuant to which a Third Party is licensed by a Respondent to use the Manufacturing Technology related to the Divestiture Product;

9. constituting confidentiality agreements related to a Divestiture Product;

10. involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Divestiture Product;

11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Divestiture Product to a Respondent, including consultation arrangements; and/or

12. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Divestiture Product;

13. pursuant to which a Respondent licenses Software related to the Business of the Divestiture Products;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

FFF. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by a Respondent within ninety (90) days prior to the execution date of any Divestiture Agreement); and

2. with respect to each such employee, the following information:

   a. direct contact information for the employee, including telephone number;

   b. the date of hire and effective service date;

   c. job title or position held;

   d. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

   e. the base salary or current wages;

f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

g. employment status (*i.e.,* active or on leave or disability; full-time or part-time);

h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

GGG. "Product Intellectual Property" means all of the following intellectual property that is used in the Business of any Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date:

1. Patents;

2. Copyrights;

3. Software;

4. Trademarks;

5. Trade Dress;

6. Trade Secrets, know-how, techniques, data, inventions, practices, methods, formulations, and other confidential or proprietary technical, business, research, Development information; and

7. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

provided, however, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Quaker", "Houghton", or "Gulf Houghton" or the related corporate logos thereof, as well as the mark "Houghto Roll"; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Quaker, Houghton, or Gulf Houghton can be identified or defined.

HHH. "Proposed Acquirer" means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become an acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order.

III. "Quality and Safety Reports" means:

1. descriptions of material events and matters concerning safety related to a Divestiture Product;

2. reports to the Environmental Protection Agency related to a Divestiture Product;

3. summary of product complaints from end-use customers related to a Divestiture Product;

4. product recall reports filed with any Agency or any Standards and Certification Organization related to a Divestiture Product, and all reports, studies, and other documents related to such recalls;

5. investigation reports and other documents related to any out-of-specification results found in a Divestiture Product;

6. reports related to a Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues;

7. reports of vendors of the inputs used to produce a Divestiture Product that relate to the specifications and testing of the production of a Divestiture Product;

8. analytical methods development records related to a Divestiture Product; and

9. manufacturing records related to a Divestiture Product.

JJJ. "Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research or Development of a Divestiture Product (unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) including engineers, technical specialists, or chemists involved in new product development, chemical composition or formulation, design of Software that is used in the Development, manufacture, or use of the Divestiture Product, and Product Approvals within the three (3) year period immediately prior to the Divestiture Date.

KKK. "Research and Development Reports" means all research and Development records relating to the Divestiture Products including:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know-how related to the Divestiture Products;

2. all correspondence with any Agency or Standards and Certification Organizations relating to applications for Product Approvals;

3. all correspondence with Customers relating to Product Approvals;

4. all underlying information, data filings, reports, correspondence or other materials used to obtain or apply for any of the Product Approvals, including, all data submitted to and all correspondence with Customers or any other Person;

5. annual and periodic reports related to the Product Approvals;

6. product labeling or documents provided to Customers; and

7. product usage, product application (*i.e.*, how the product is applied to metal), product installation/dispersal instructions, and technical specifications.

LLL. "Retained Product(s)" means any product(s) other than a Divestiture Product.

MMM. "Rolling" means the process of passing metal stock through one or more pair of mill rollers in order to reduce the thickness of the metal sheet or slab and to make the thickness uniform, or to form a new structure.

NNN. "Sales and Marketing Employees" means all employees of a Respondent who have participated in the sales, marketing, or on-site mill technical support of a Divestiture Product to customers within the two (2) year period immediately prior to the Divestiture Date.

OOO. "Software" means computer programs related to the Business of Respondents, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases, and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that "Software" does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a

manner material to the use or function thereof (other than user preference settings).

PPP. "Standards and Certification Organization(s)" means any non-governmental Person that provides audits and certifications of management systems and/or manufacturing processes or product assessments and certifications related to the Divestiture Products (*e.g.*, ASTM International).

QQQ. "Steel Cleaner(s)" means all products that are cleaners manufactured, Developed, in Development, marketed, or sold to remove rolling lubricant residues from steel.

RRR. "Steel Cleaner Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to Steel Cleaners, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Steel Cleaners which also include the following:

1. The following Trademarks or tradenames: Rolkleen®; Mill Clean®; Strip-Kleen®; Cerfa-Kleen®; and,

2. all rights related to Steel Cleaners granted to Houghton and/or Gulf Houghton pursuant to the Steel Cleaner Henkel License.

SSS. "Steel Cleaner Henkel License" means the *License Agreement* by and between Henkel Corporation and Houghton Technical Corp dated as of March 31, 2014. This license is attached as Annex A to the *Partial Assignment and Assumption Agreement* by and among Houghton Technical Corp., Total Marketing Services, and Henkel US Operations Corporation. The *Partial Assignment and Assumption Agreement* is attached as Exhibit G to the *Asset Purchase Agreement* by and among Quaker Chemical Corporation, Global Houghton Ltd., and Total Marketing Services, dated as of March 25, 2019 in Non-Public Appendix I attached to this Order.

TTT. "Steel Cold Rolling Oil(s)" means all Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the steel in the Cold Rolling Process of the steel. "Steel Cold Rolling Oils" include all such Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the steel in the Cold Rolling Process of the steel at any width or gauge sheet and for any further processing (*e.g.*, tinplating or coating with another substance, *e.g.*, zinc, aluminum, or paint) and for any end-use (*e.g.*, can bodies, can ends, and other closures for food and beverages, household appliances, such as washers and dryers, automobile or truck parts, or building and construction products).

UUU. "Steel Cold Rolling Oil Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to each of the Steel Cold Rolling Oils, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Steel Cold Rolling Oils which also include the following Trademarks or tradenames: Fenella®; Tempershield®; Rollshield®; Rollub®; and Steelshield.

VVV. "Supply Cost" means the actual cost of materials, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation where those costs are incurred by the Respondents.

WWW. "Technical Support" means all capabilities to provide customer-specific technical expertise, modification of products, customizing of products, testing of products, product performance advice, equipment assessment, on-site product assistance, monitoring of inventory levels and product orders/deliveries, and general product issue-solving and trouble-shooting.

XXX. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

1. designating employees of a Respondent knowledgeable about the Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Manufacturing Technology (including all related intellectual property) to the Acquirer; and

4. to the extent the Persons with the relevant knowledge remain employees of a Respondent (*e.g.*, are not hired by the Acquirer), providing, in a timely manner, assistance and advice to enable the Acquirer to:

a. manufacture the specified Divestiture Product and any ingredients, *e.g.*, synthetic ester oils, or components of the Divestiture Product that have been or are being made by a Respondent in the quality and quantities achieved by that Respondent;

b. obtain any Product Approvals necessary for the Acquirer to manufacture, distribute, market, and sell each Divestiture Product in commercial quantities and to meet the requirements of all Product Approvals for such Divestiture Product; and

c. receive, integrate, and use all such Manufacturing Technology and all such intellectual property related to each Divestiture Product.

YYY. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

ZZZ. "Total" means Total S.A., a corporation (*société anonyme*) with its principal executive offices located at 2, place Jean Millier, La Défense 6, 92400 Courbevoie, France, and any Person controlled by or under common control of Total S.A., including Total Marketing Services S.A.

AAAA. "Trade Dress" means the current trade dress of a Divestiture Product, including packaging and the lettering of the product trade name or brand name.

BBBB. "Trade Secret(s)" means information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who can obtain economic value from its disclosure or use (*e.g.,* competitors); and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

CCCC. "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, and the goodwill symbolized thereby and associated therewith, for a product.

DDDD. "Transition Services" means the provision of Technical Support by the Respondents.

EEEE. "United States of America" means the United States of America, and its territories, districts, commonwealths and possessions.

FFFF. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all Copyrights in such Website(s), to the extent owned by a Respondent; *provided, however,* "Website" shall not include the following: (1)

content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Divestiture Product Assets and grant the Divestiture Product License, absolutely and in good faith, to Total pursuant to, and in accordance with, the Divestiture Agreements.

B. If Respondents divest the Divestiture Product Assets to Total prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that:

1. Total is not an acceptable purchaser of any of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Total, in whole or in part, as directed by the Commission, and shall divest the Divestiture Product Assets within one hundred eighty (180) days after the Order Date, 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;

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Product Assets to Total (including entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

D. Prior to the Divestiture Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Divestiture Product Assets to the Acquirer, and to permit the Acquirer to continue the Business of the Divestiture Products;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

E. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Manufacturing Technology (including all related intellectual property); and

2. all rights to all Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to use or to acquire from the Third Party the Manufacturing Technology (including all related intellectual property). Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology. Not later than ten (10) days after the Divestiture Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

F. After the Divestiture Date, Respondents shall not, in the Geographic Territory:

1. use any of the Trademarks related to Divestiture Products or any mark confusingly similar to the Trademarks as a trademark, tradename, or service mark *except* (i) as may be necessary to sell stocks of Divestiture Products in existence as of the Acquisition Date that are not being acquired by the Acquirer or to comply with the Contract Manufacture requirements of this Order, or (ii) as permitted under any license entered into by Respondents pursuant to Paragraph II.N;

2. attempt to register the Trademarks;

3. attempt to register any mark confusingly similar to the Trademarks;

4. challenge or interfere with an Acquirer's use and registration of the Trademarks; or

5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Trademarks against Third Parties.

G. After the Divestiture Date, Respondents shall not, in the Geographic Territory, market or sell to, or manufacture for, any Person other than the Acquirer any Aluminum Hot Rolling Oils, Steel Cold Rolling Oils, Compatible Hydraulic Fluids-Aluminum, Pickle Oils, or Steel Cleaners that are the same formulation or substantially the same formulation as the Divestiture Products *except* that for a transition period beginning immediately after the Divestiture Date, Respondents may manufacture such products within the Geographic Territory solely for delivery to, and use at, customer locations outside the Geographic Territory and only in circumstances wherein Houghton manufactured such products within the Geographic Territory and supplied such products to these customer locations outside the Geographic Territory as of the Divestiture Date. Such transition period:

1. is conditioned on (i) Respondents providing a notification to the Acquirer and the Monitor on a quarterly basis that includes, for each delivery of the product to the customer, the customer's name, volume(s) of the product(s), and delivery location, and (ii) Respondents notifying these customers in writing that the products supplied under these circumstances may not be used within, or imported into, the Geographic Territory;

2. shall terminate on the earlier of (i) two years after the Divestiture Date, or (ii) the date the Respondents complete their requirements to Contract Manufacture pursuant to this Order; and

3. may only be extended with the prior approval of the Commission *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

H. This Order does not restrict the Respondents' use of the formulations of the Divestiture Products to make, have made, use, sell, offer for sale, any product outside of the Geographic Territory, but only if such product is made and delivered outside the Geographic Territory and is only for use by the purchasers of such product outside the Geographic Territory and not for import into the Geographic Territory.

I. Respondents shall treat all formulations of the Divestiture Products as Trade Secret information owned by the Acquirer and shall institute all such procedures as are necessary and appropriate to protect this Trade Secret information.

J. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to

defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s), if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) for the purposes of marketing, sale, or offer for sale within the Geographic Territory of such Divestiture Product(s); or (ii) the import, export from one country within the Geographic Territory to another country within the Geographic Territory, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) into, from, or within the Geographic Territory.

K. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Acquirer, its licensees, or its Customers under any Patent that was pending or issued on or before the Acquisition Date if such suit would directly limit or impair the Acquirer's freedom to manufacture any Divestiture Product anywhere in the world, or to distribute, market, sell, or offer for sale any Divestiture Product within the Geographic Territory.

L. For any patent infringement suit filed prior to the Divestiture Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Divestiture Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired for the purposes of marketing, sale, or offer for sale within the Geographic Territory of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) into, from, or within the Geographic Territory, that Respondent shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to that Divestiture Product.

M. Subject to the prior approval of the Commission, Respondents may enter into a license from the Acquirer to make, have made, use, sell, offer for sale, any product that practices any claim of the NOA Patent, but such license shall:

1. be limited to:

   a. products to be offered for sale or sold by the Respondents within or outside the Geographic Territory that are within the following fields-of-use: (i) copper rod, copper wire, or other copper metalworking; (ii) brass rod, brass wire, or other brass metalworking; and (iii) aluminum rod or aluminum wire; or

   b. products to be offered for sale or sold by the Respondents outside the Geographic Territory for delivery outside the Geographic Territory and not for import into, or use within, the Geographic Territory;

2. be non-exclusive;

3. require that any sublicense by the Respondents be subject to the prior approval of the Acquirer;

4. not be modified or amended without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

N. Subject to the prior approval of the Commission, and solely for the purposes of products that are either (i) to be offered for sale or sold by the Respondents outside the Geographic Territory or (ii) to be offered for sale or sold by the Respondents within the Geographic Territory that are not a Divestiture Product and do not compete with a Divestiture Product, the Respondents may enter into a license from the Acquirer for a period of up to two (2) years after the Order Date to use certain Trademarks or tradenames divested to the Acquirer pursuant to this Order. Such agreement may not be modified or amended without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. Any Divestiture Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Divestiture Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement, or in any agreement related to any of the Divestiture Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. No Respondent shall modify or amend any of the terms of any Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Divestiture Agreement(s), any modification or amendment of any Divestiture Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

IV. Contract Manufacturing by Respondents

IT IS FURTHER ORDERED that Respondents shall:

A. Contract Manufacture and deliver, or cause to be manufactured and delivered, to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products requested by the Acquirer at no greater than Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of the Acquirer) to: (i) obtain all of the relevant Product Approvals necessary to manufacture the Contract Manufacture Product(s), (ii) manufacture such products in commercial quantities independently of Respondents, and (iii) secure sources of supply of the specialized ingredients and necessary components from Persons other than Respondents;

B. Make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondents pursuant to a Divestiture Agreement meet the relevant Product Approvals;

C. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Divestiture Agreement by that Respondent to meet the relevant Product Approvals. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the supplying Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order;

provided further, however, that this obligation shall not require such Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the supplying Respondent to the Acquirer in an agreement to Contract Manufacture;

D. Give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of products for Respondents' own use or sale;

E. Agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;

F. During the term of any agreement to Contract Manufacture, upon written request of the Acquirer or the Monitor, make available to the Acquirer and the Monitor all records that relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Divestiture Date;

G. For each Contract Manufacturer Product for which Respondents purchase the ingredient(s) or components(s) from a Third Party, provide the Acquirer with the actual price paid by Respondents for each ingredient(s) or component(s), respectively, used to manufacture that Contract Manufacture Product;

H. For each Contract Manufacturer Product for which the Respondents are the source of the ingredient(s) or component(s), charge the Acquirer a price no greater than the Respondents' actual cost for such ingredient(s) or component(s) and shall exclude any intracompany transfer profit in calculating the total price for the final finished Contract Manufacture Product to the Acquirer;

I. During the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

J. Provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Contract Manufacture;

K. Not be entitled to terminate any agreement to Contract Manufacture due to an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

L. Notify the Commission at least sixty (60) days prior to terminating any agreement with an Acquirer to Contract Manufacture for any reason, and shall submit at the same time a copy of such notice to the Monitor; and

M. During the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with the Product Approvals, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

N. The foregoing requirements for Respondents to Contract Manufacture shall remain in effect with respect to each Contract Manufacture Product until the earliest of:

1. the date the Acquirer notifies Commission staff in writing that it (or the Manufacturing Designee(s) of the Acquirer) has been qualified by all Customers to manufacture such Contract Manufacture Product for sale in the Geographic Territory and is able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with the quality achieved by the Respondents, independently of Respondents; or

2. the date the Commission otherwise directs that these requirements to Contract Manufacture are no longer in effect.

V. Transition Services

IT IS FURTHER ORDERED that Respondents shall:

A. Upon written request of the Acquirer, provide Transition Services to the Acquirer in a timely manner and under reasonable terms and conditions at no greater than Direct Cost for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture and sell commercial quantities of the finished Divestiture Products independently of Respondents;

B. Designate employees of Respondents knowledgeable about the Technical Support to advise and provide such services to the Acquirer;

C. During the term of any agreement with the Acquirer to provide Transition Services and pursuant to such agreement and this Order:

1. take all actions as are reasonably necessary to ensure that the provision of Transition Services to the Acquirer are uninterrupted;

2. not limit damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of such agreement;

3. not be entitled to terminate such agreement due to the Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of its creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

4. permit the Acquirer to terminate such agreement at any time upon commercially reasonable notice and without cost or penalty; and

5. upon the Acquirer's request, file with the Commission a written request to extend the time period for any such agreement.

VI. Employees

IT IS FURTHER ORDERED that Respondents shall:

A. For a period of two (2) years after the Divestiture Date, provide the Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)";

B. Not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

provided, however, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide, or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during the Divestiture Product Core Employee Access Period, and (iii) restrict access to the information to such of the Acquirer's or

Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

C. During the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Divestiture Product Core Employees and remove any impediments within the control of a Respondent that may deter these employees from accepting employment with the Acquirer, including any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with a Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, a Respondent shall not make any counteroffer to any Divestiture Product Core Employee who has received a written offer of employment from the Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer to that employee;

D. Until the Divestiture Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, market and/or sell the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product Businesses and to ensure successful execution of the pre-Acquisition plans for the Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Divestiture Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require, nor shall be construed to require, a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

E. For a period of one (1) year after the Divestiture Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer; or (ii) hire any Divestiture Product Employee;

provided, however, this Order does not prohibit a Respondent from hiring any former Divestiture Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with that Respondent,

as long as that employee was not solicited in violation of the nonsolicitation requirements contained within this Order;

provided further, *however*, this Order allows a Respondent to do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

F. From the Divestiture Date until the date that is two (2) years after the Divestiture Date, Respondents shall not:

1. market or sell any Retained Products that compete with any Divestiture Product using the services of any Essential Employee;

2. permit any Essential Employee to participate, directly or indirectly, in the direction, planning, management, or advisement of the Respondents' Business related to the Retained Products that compete with any Divestiture Product; or

3. permit any Essential Employee to provide, disclose, or otherwise make available, directly or indirectly, any current or historical marketing or sales plans, negotiation histories with customers, product Development, or other Confidential Business Information related to any Divestiture Product to any employee of the Respondents that has any responsibilities related to the marketing, management, or sales of any Retained Product that compete with a Divestiture Products.

G. Respondents shall not enforce, or seek to enforce, any restrictions on the work that any Divestiture Product Core Employee is permitted to do as an employee of the Acquirer.

H. Respondents shall provide each Essential Employee who (i) accepts an offer of employment with the Acquirer either on or before the Divestiture Date or within six (6) months after the Divestiture Date, and (ii) who remains with the Acquirer for a period of (1) year, a financial incentive equal to amount specified in Non-Public Appendix III. The Respondents shall pay such financial incentives one (1) year after the commencement of the employee's employment by the Acquirer. On or before the Divestiture Date, Respondents shall notify each Essential Employee of the provisions of this Paragraph. Respondents shall give the above-described notification to each Essential Employee by e-mail with return receipt requested and keep a file of those receipts for two (2) years after the Divestiture Date. Each Respondent shall provide a copy of the notification to the Acquirer.

VII. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Manufacturing Technology related to each Divestiture Product to the Acquirer Respondents shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Business associated with that Divestiture Product;

2. minimize any risk of loss of competitive potential for that Divestiture Product Business;

3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product Business;

4. ensure the assets related to each Divestiture Product Business are provided to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval processes related to that Divestiture Product Business;

5. ensure the completeness of the transfer and delivery of the Manufacturing Technology; and

B. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Product Businesses.

VIII. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. transfer and deliver to the Acquirer, at Respondents' expense, all Confidential Business Information:

   a. in good faith;

   b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

2. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Business of each Divestiture Product that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

   b. Respondents' obligations to the Acquirer under the terms of any related Divestiture Agreement; or

   c. applicable Law;

4. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person *except*:

   a. the Acquirer;

   b. other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information;

   c. the Commission; or

   d. the Monitor; and

   except to the extent necessary to comply with applicable Law;

5. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees directly involved in providing Contract Manufacturing or Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Manufacturing Technology to the Acquirer and only for the purposes of providing such products, assistance, and information to the Acquirer;

6. institute procedures and requirements to ensure that the employees providing Contract Manufacturing or Transition Services or who are engaged in the transfer and delivery of the Manufacturing Technology:

a. do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and

b. do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. take all action necessary and appropriate to prevent access to, and the disclosure or use of the Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols and system and network controls and restrictions;

b. to the extent practicable, maintaining Confidential Business Information separate from other data or information of the Respondents; and

c. ensuring by other reasonable and appropriate means that the Confidential Business Information is not share with Respondents' personnel engaged in the provision of the same or substantially the same type as the Divestiture Product Businesses;

8. upon the request of the Acquirer, destroy any copies of Confidential Business Information (other than electronic copies of Confidential Business Information created as a result of automatic back-up procedures) within thirty (30) days of such request *except* as otherwise agreed to between the Respondent(s) and the Acquirer or to the extent necessary to comply with applicable Law.

B. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, that each employee that has had responsibilities related to the Development, marketing, or sales of the Divestiture Products within the one (1) year period prior to the Divestiture Date and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that perform the same or similar functions as the Divestiture Products, in each case who have or may have had access to Confidential Business Information (including the specific formulations of the Divestiture Products), and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other

employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

C. Not later than thirty (30) days after the Divestiture Date, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Divestiture Date. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States of America and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer (other than electronic copies created as a result of automatic back-up procedures) or access original documents provided to an Acquirer, *except* under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. to assure such Respondent's compliance with any Divestiture Agreement, this Order, any Law (including any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however,* that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the

Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

IX. Monitor

IT IS FURTHER ORDERED that:

A. James B. Mynaugh shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all the rights, powers, and authorities necessary to monitor each Respondent's compliance with the Orders.

C. Respondents 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 each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, 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 Orders and in consultation with the Commission or its staff.

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent Third Party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until Respondents complete the following in a manner as required by this Order:

a. the transfer and delivery of all of the Divestiture Product Assets to the Acquirer;

b. the transfer and delivery of all the Manufacturing Technology to the Acquirer;

c. the transfer and delivery of all Confidential Business Information to the Acquirer;

d. the provision of all Transition Services to the Acquirer; and

e. the Acquirer or its Manufacturing Designee is able to manufacture the Divestiture Products in the same quality as the Respondents and in commercial volumes, independently of the Respondents.

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission extends this period.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including its obligations related to the relevant assets.

E. Each Respondent 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 that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents 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, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports or communications submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after Order Date and every ninety (90) days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders.

I. Respondents 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, that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission, among other things, may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent Quaker, which consent shall not be unreasonably withheld. If Respondent Quaker has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) day after notice by the staff of the Commission to Respondent Quaker of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor;

2. not later than ten (10) days after the appointment of the Monitor, Respondent Quaker shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the Orders in a manner consistent with the purposes of the Orders.

L. 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.

M. The Monitor may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

X. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee

("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets 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, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent 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 a Respondent of the identity of any proposed Divestiture Trustee, Respondents 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, 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 divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, 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 assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the 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 one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) 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(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable 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(s) 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 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 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 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 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, 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, 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; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

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,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. 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 related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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.

G. 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 divestiture(s) required by this Order.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Within five (5) days of the Divestiture Date, Respondents shall submit to the Commission a letter certifying the date on which the divestiture occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have completed all of the following:

1. the transfer and delivery of all Divestiture Product Assets to the Acquirer;

2. transfer and delivery of all of the Manufacturing Technology to an Acquirer;

3. the provision of Transition Services; and

4. the provision of Contract Manufacture of the Divestiture Products, all in a manner that fully satisfies the requirements of this Order;

Respondents shall submit to the Commission and, at the same time, to the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the requirements of the Orders ("Compliance Reports").

D. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether the Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of their efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, actions, or recommendations related to:

   a. the transfer and delivery of all Divestiture Product Assets to the Acquirer;

   b. transfer and delivery of all of the Manufacturing Technology to the Acquirer;

   c. the provision of Transition Services to the Acquirer; and

   d. the provision of Contract Manufacture of the Divestiture Products to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

E. One (1) year after the Order Date, annually for the nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

F. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

XII. Change in Respondents

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

A. any proposed dissolution of: Quaker Chemical Corporation; Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf;

B. any proposed acquisition, merger, or consolidation of: Quaker Chemical Corporation, Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf; or

C. any other change in a Respondent including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XIII. 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 a Respondent made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of that Respondent; and

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on the Respondents by this Order is:

A. to ensure the continued use of such assets for the purposes of the Business of Divestiture Products within the Geographic Territory;

B. to create a viable and effective competitor that is independent of Respondents in the Business of the Divestiture Products within the Geographic Territory; and

C. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on September 9, 2029.

By the Commission.

NON-PUBLIC APPENDIX I

VI. ACQUISITION AGREEMENT

[Cover Page]

NON-PUBLIC APPENDIX II

AGREEMENTS RELATED TO THE DIVESTITURE

[Cover Page]

NON-PUBLIC APPENDIX III

ESSENTIAL EMPLOYEES

[Cover Page]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Quaker Chemical Corporation ("Quaker"), Global Houghton LTD. ("Houghton"), Gulf Houghton Lubricants LTD., and AMAS Holding SPF (collectively, the "Respondents"). The Consent Agreement would remedy the anticompetitive effects that likely would result from Quaker's proposed acquisition of Houghton ("Transaction").

Absent a remedy, the Transaction would threaten to harm competition in the manufacture and sale of: (1) aluminum hot rolling oils ("AHRO") and associated technical

support in North America; and (2) steel cold rolling oils ("SCRO") and associated technical support in North America. In particular, the Commission's Complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the asset purchase agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the manufacture and sale of AHRO and SCRO in an area no greater than North America.

The Consent Agreement addresses the Commission's concerns by, among other things, requiring Quaker to divest Houghton's North American AHRO and SCRO product lines to Total S.A. ("Total"), a multination oil and gas company headquartered in France. Quaker must also divest the intellectual property associated with Houghton's AHRO and SCRO, and adjacent products including steel cleaners and AHRO compatible hydraulic fluids.

The Commission has placed the proposed Consent Agreement 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 and any comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

I. The Respondents

Respondent Quaker, a publicly traded company, is a global supplier of specialty process chemicals, lubricants, greases, and other metal processing products. Headquartered in Conshohocken, Pennsylvania, Quaker's 2018 revenues were $868 million.

Respondent Houghton is a global supplier of advanced metalworking fluids and services.

It serves the automotive, aerospace, metals, mining, machinery, and beverage industries. Houghton is headquartered in Valley Forge, Pennsylvania.

II. The Proposed Acquisition

The Commission's Complaint alleges that a relevant product market in which to analyze the Transaction is the manufacture and sale of AHRO and associated technical support services. AHRO is a mixture of water, oil, and additives, custom-formulated to lubricate each individual rolling mill. AHRO is necessary to allow manufacturers to operate hot rolling mills for aluminum sheet production. There is no substitute product for AHRO; lubricants for rolling other metals or for other rolling processes will not work for aluminum hot rolling.

The associated technical support services are appropriately included in this product market, as AHRO suppliers provide these services as an integral component of the physical product. There is no separate charge for these services. Technical support services begin with the formulation of the oil and continue throughout the life of the supply relationship, including necessary modifications to the formulation and contamination monitoring in both the trial phase and during active production. Technical support services from the AHRO

supplier are essential to the ongoing performance of the mill, and there is no substitute for these services as provided in conjunction with AHRO.

The Commission's Complaint also alleges that an area no greater than North America is a relevant geographic market in which to analyze the effects of the Transaction. U.S. AHRO customers do not obtain supply from outside North America. Rolling oil suppliers typically supply their customers by truck and station technical support personnel at or near their customers' mills to ensure timely supply and rapid service. At the mill, customers blend the oil with the mill's own water supply to create the final emulsion. Given the large volumes of rolling oil required to run a mill, and the need for timely re-supply, shipping AHRO from outside North America would be cost- and supply-prohibitive.

The relevant market for AHRO and associated technical support services in North America is highly concentrated. Quaker and Houghton are the only two companies that commercially supply AHRO in North America. Thus, post-transaction, Quaker will be the monopoly AHRO supply option for third parties in North America.

Timely, sufficient entry is unlikely to alleviate any potential competitive harm in the market for AHRO and associated technical support services. Consistent with the Commission's allegations in the 2010 AEA Investors/ Houghton ("Houghton/D.A. Stuart") complaint (Docket No. C-4297), entry is difficult in this market. Formulating AHRO and providing technical support services require specialized knowledge that is not widely available. Even the few AHRO customers with in-house supply capabilities are unable to supply fully their own mills given the shortage of qualified scientists to develop and real-time modify rolling oil formulations and support their use in mill operations. Large, well-established customers of AHRO are unaware of potential entrants that could enter the market and supply AHRO.

Customer acceptance is also a significant entry barrier. Customers are reluctant to switch AHRO suppliers because AHRO is so critical to aluminum sheet rolling. Aluminum manufacturers place great weight on the AHRO suppliers' experience and reputation. They likely would be unwilling to chance a supplier that lacks the parties' established reputations and decades of experience given the risk of catastrophic effects should the supplier's product or support capabilities fall short. There are significant time commitments and costs associated with switching to a new AHRO supplier. Given that AHRO is a relatively small cost component in the production of aluminum coil, it is unlikely that a small significant sustained price increase would justify a lengthy trial process for a new entrant without a proven track record.

The Commission's Complaint also alleges that a relevant product market in which to analyze the Transaction is the manufacture and sale of SCRO and associated technical support. SCRO includes sheet cold rolling oils, pickle oils, and tin plate rolling oils ("TPRO"). Steel manufacturers use SCRO to reduce friction and prevent metal-to-metal contact between surfaces of the mill' s rollers and the steel during the cold rolling process for steel sheet of any width or gauge, for any further processing (e.g., tinplating or coating with another substance, e.g., zinc, aluminum, or paint), and for any end-use (e.g., can bodies, can ends, and other closures for food and beverages, household appliances, such as washers and dryers, automobile

or truck parts, or building and construction products). Like other rolling oils, SCRO is a mixture of water, oil, and additives for lubrication and corrosion protection. SCRO producers customize the product for each individual rolling mill, and there are no substitutes for SCRO. Lubricants designed for other mills, metals, or rolling processes could damage mill equipment and render the processed steel unusable.

As with AHRO, SCRO suppliers provide essential technical support services as part of the supply of the lubricant (i.e., without a separate charge). The provision of these technical services is an essential component of the SCRO supply relationship.

As with AHRO, North America is the relevant geographic market for SCRO. Staffs investigation did not reveal evidence that any mill in the United States received SCRO products and services from suppliers outside North America.

Steel manufacturers in the United States primarily use SCRO made with animal fat in their mills. Because animal fat will congeal under typical tanker truck conditions, SCRO suppliers must deliver it via heated tanker trucks. This heating requirement adds to transportation costs, making imports of animal fat-based SCRO cost-prohibitive.

The animal fat-based composition of SCRO used in the United States also limits customers' choices for supply. Steel mills in the United States typically are older and have relatively smaller tanks that require frequent drainage. As a result, it is not economical for U.S. steel mills to use vegetable oil based (commonly referred to as synthetic oil) that is more advanced but higher cost. European steel mills, which are generally newer and have larger tanks, use this synthetic SCRO. Given the greater cost of synthetic SCRO and the costs of shipping, U.S. steel manufacturers are unlikely to tum to overseas SCRO suppliers in response to a small significant sustained price increase.

As in the market for AHRO, Quaker and Houghton are the two dominant suppliers of SCRO and associated technical support services in North America. Although fringe competitors participate in this market, to the extent that customers need both SCRO and related support and technical services combined, the merger may present as an effective merger-to-monopoly.

III. Effects of the Transaction

The proposed transaction would be a merger to monopoly in the market for AHRO and associated technical support services. Staffs investigation has revealed no evidence to suggest that the likely competitive effects of this combination are meaningfully different from those of the Houghton/D.A. Stuart transaction remedied by the Commission in 2010. In addition, customers worry that the proposed transaction would consolidate all AHRO technical expertise within one company. Today, Quaker and Houghton compete on their technical support service capabilities, including their availability, responsiveness, and expertise in anticipating, preventing, diagnosing, and addressing problems related to their lubricants in order to ensure smooth operations and high quality aluminum sheet. The parties' support service technicians must thoroughly understand the design of each mill, the products made there, and the interaction between the rolling oil, substrate, and rollers. When problems arise today, they

create an opportunity for a competitor to challenge the incumbent supplier as the customer seeks a solution and/or a superior product as quickly as possible to get operations back on track. Post-merger, customers will have only one support team - Quaker's - to tum to in the event of operational issues, and will lose the advantage of a possible switch to encourage investment in troubleshooting.

The Transaction presents similar concerns for customers of SCRO and associated technical support services. Notwithstanding the presence of a few fringe suppliers, SCRO customers fear that the deal may result in higher prices, lower service levels, reduced innovation, and supply availability challenges. Like AHRO customers, SCRO customers face meaningful barriers to switching suppliers, including lengthy trial periods, downtime, and long waits for customer approval.

Quaker and Houghton also compete on the quality of their technical support services and expertise. Customers rely on their SCRO suppliers to troubleshoot and address operational issues as they arise. When the incumbent supplier cannot resolve problems to the customer's satisfaction, the customer may tum to a competing supplier to propose an alternative solution. Post-merger, Quaker will no longer face Houghton as a competitive threat to keep its service levels sharp; competition from fringe SCRO suppliers may not be sufficient to protect customers.

Customers have also raised concerns that the proposed merger would eliminate their only SCRO alternative in the event of supply challenges or emergencies. If a supply disruption occurs, SCRO customers must either tum to an alternative supplier or idle their mills at great expense. Steel manufacturers take comfort in the availability of multiple potential SCRO suppliers to ensure that they can access this essential input in times of shortages. The proposed transaction would eliminate the most promising alternative supply option for SCRO customers, and may deprive them of any viable alternative at all.

A prospective entrant into the SCRO market faces similar barriers to those that render entry unlikely for AHRO, including technical expertise and reputational hurdles. Entry is difficult even for a supplier that operates in other fluid-based markets.

IV. The Proposed Consent Agreement

The proposed order requires a divestiture to Total. Total's business includes oil and gas exploration, refining, and marketing as well as chemical manufacturing. Total had annual revenues in 2018 of approximately $210 billion. The divestiture to Total would replicate Houghton's competitive presence in the AHRO and SCRO markets in North America by creating a viable, effective, and independent competitor. The order requires Quaker to divest certain products, transfer key employees, and provide transition services and toll manufacturing. The term of the proposed order is ten years. The order also requires Quaker to supply the divested products to Total for a transitional period while transferring the manufacturing technology to Total.

Analysis to Aid Public Comment

To remedy harm in the market for AHRO, Quaker will divest to Total: (1) Houghton's formulations, intellectual property, including patent for non-oleic acid formula, trade secrets, including know-how for its AHRO; (2) customer contracts for North America; (3) key Houghton employees that are responsible for the commercial and technical aspects of the AHRO business; and (4) adjacent products including fire resistant hydraulic fluids.

To remedy harm in the market for SCRO, which includes sheet cold rolling oil, TPRO, and pickle oil, Quaker will divest to Total: (1) Houghton's formulations, trade secrets and intellectual property, including know-how for sheet cold rolling oils, TPRO, and pickle oil; (2) customer contracts for North America; (3) key Houghton employees that are responsible for the commercial and technical aspects of the SCRO business; and (4) SCRO and TPRO cleaners.

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

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-4684; File No. 191 0039
Complaint, August 6, 2019 – Decision, September 18, 2019

This consent order addresses the $4.2 billion acquisition by Boston Scientific Corporation of certain assets of BTG plc. 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 substantially lessening competition in the U.S. market for drug eluting beads ("DEBs"). The consent order requires BSC to divest all rights and assets related to its DEBs business, as well as its closely related bland bead business, to Varian Medical Systems.

Participants

For the *Commission*: *Jonathan W. Ripa.*

For the *Respondents*: *Michael B. Bernstein, Arnold & Porter Kaye Scholer LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Boston Scientific Corporation ("BSC"), a company subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of BTG, plc ("BTG"), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45; that such acquisition, if consummated, would violate 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; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent BSC is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its headquarters located at 300 Boston Scientific Way, Marlborough, MA, 01752-1234. BSC is engaged in the development, manufacture, sale, and distribution of medical devices used in a broad range of interventional medical specialties.

2. Respondent BSC 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, 5 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. BTG is a corporation organized, existing, and doing business under and by virtue of the laws of London, England, with its U.S. operational headquarters located at 300 Conshohocken State Road, Conshohocken, Pennsylvania. BTG is engaged in the development, manufacture, sale, and distribution of medical devices used in various interventional medicine applications.

4. BTG 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 company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. On November 20, 2018, BSC announced its intention to acquire, through its wholly-owned subsidiary Bravo Bidco Limited, all of the outstanding voting securities of BTG pursuant to a cash offer, as described in the Recommended Cash Offer for BTG plc by Bravo Bidco Limited, A New Incorporated Entity Indirectly Wholly-Owned by Boston Scientific Corporation, dated November 20, 2018, for approximately $4.2 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

6. For the purpose of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is no broader than the development, manufacture, marketing, distribution, and sale of drug eluting beads ("DEBs").

7. DEBs are microscopic beads used in transarterial chemoembolization ("TACE") procedures for treating primary and secondary liver cancers. TACE involves the use of embolic agents (typically microscopic beads) mixed with chemotherapy drugs (often doxorubicin) that are delivered to the targeted tumor in the liver via a catheter inserted into the patient's artery that leads to the tumor. When used in TACE procedures, DEBs work by blocking the flow of blood to the liver tumor, causing it to shrink over time, while simultaneously slowly releasing a chemotherapy agent that also attacks the tumor.

8. For the purpose of this Complaint, the United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant line of commerce.

V. THE STRUCTURE OF THE MARKET

9. The U.S. market for DEBs is highly concentrated. Respondents BSC and BTG are the two leading suppliers of DEBs in the United States. The only other participant in the U.S. DEB market is Merit Medical, which is substantially smaller than either BSC or BTG.

VI. ENTRY CONDITIONS

10. Entry or expansion into the relevant market would not be likely or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the product development, FDA approval, and market adoption times are lengthy. No other entry is likely to occur to deter or counteract the competitive harm likely to result from the Acquisition.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition 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. by eliminating actual, direct, and substantial competition between BSC and BTG in the market for the provision of DEBs;

b. by increasing the ability of the merged entity to unilaterally raise prices for DEBs; and

c. by reducing incentives to improve quality and innovation of DEBs.

VIII. VIOLATIONS CHARGED

12. The Acquisition described in Paragraph 5, 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 sixth day of August, 2019, issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Boston Scientific Corporation ("BSC") of the voting securities of BTG plc ("BTG"). The Commission's Bureau of Competition prepared and furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge

Respondent 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.

Respondent and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondent of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Draft Complaint or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

The Commission having thereafter considered the matter 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 in conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission makes the following jurisdictional findings and issues the following Order to Maintain Assets:

1. Respondent BSC is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 300 Boston Scientific Way, Marlborough, Massachusetts 01752.

2. The Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and this proceeding is in the public interest.

I. Definitions

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Asset Maintenance Period" means the period commencing on the date the Commission issues this Order to Maintain Assets and ending when the Decision and Order becomes final.

B. "Assets To Be Maintained" means the Divestiture Product Assets, Divestiture Product Businesses, and BSC Manufacturing Equipment.

C. "Decision and Order" means:

1. The proposed Decision and Order contained in the Consent Agreement in this matter until issuance of a final Decision and Order by the Commission; and

2. The Final Decision and Order issued by the Commission in this matter, following the issuance of a final Decision and Order by the Commission.

II. Asset Maintenance

IT IS FURTHER ORDERED that during the Asset Maintenance Period, Respondent shall operate the Assets To Be Maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, to minimize any risk of loss of competitive potential of the Assets To Be Maintained, to operate the Assets To Be Maintained in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Maintained, except for ordinary wear and tear. Respondent shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Assets To Be Maintained (other than in the manner prescribed in the Decision and Order or this Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Maintained; and

B. Conduct or cause to be conducted the Assets To Be Maintained in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Assets To Be Maintained. Included in the above obligations, Respondent shall, without limitation:

1. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;

2. Provide the Assets To Be Maintained with sufficient financial and other resources to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, and commercial activities;

3. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;

4. Provide support services at levels customarily provided by Respondent;

5. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;

6. Maintain the Business Information of the Assets To Be Maintained;

7. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:

   a. Continuing to provide each of the Divestiture Product Core Employees with all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

   b. Providing reasonable financial incentives to encourage Divestiture Product Core Employees to continue in his or her position until the Divestiture Date, and as may be necessary to facilitate the employment of such Divestiture Product Core Employees by the Acquirer following the Divestiture Date;

   c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

   d. Not transferring any of the Divestiture Product Core Employees to any of Respondent's assets or businesses that Respondent will not be divesting; and

8. Not reduce, change, or modify in any material respect, the levels of production, quality, pricing, service, or customer support typically associated with the Assets To Be Maintained, other than changes in the ordinary course of business.

Provided, however, that Respondent shall not be in violation of this Paragraph II if Respondent takes actions (i) that are explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Assets To Be Maintained and consistent with the purposes of the Decision and Order.

III. Additional Obligations

IT IS FURTHER ORDERED that**:**

A. With respect to any Confidential Business Information received or maintained by Respondent relating to the Assets To Be Maintained, Respondent shall (1) not disclose such Confidential Business Information, including to Respondent's employees; and (2) not use such Confidential Business Information for any reason or purpose; *provided, however,* that Respondent may disclose or use such Confidential Business Information in the course of:

1. Performing its obligations or as permitted under the Decision and Order or any Divestiture Agreement; or

2. Complying with financial, regulatory, or other legal obligations; obtaining legal advice; prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Assets To Be Maintained; or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondent's employees or to any other Person under Paragraph III.A. of this Order to Maintain Assets, Respondent shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondent shall enforce the terms of this Paragraph III as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph III, including implementation of access and data controls, training of their employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

IV. Purpose Clause

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) maintain and preserve the Assets To Be Maintained as a viable, marketable, competitive, and ongoing business until the divestitures required by the Decision and Order are achieved; (ii) prevent interim harm to competition pending the relevant divestiture and other relief; and (iii) promote achieving the purposes of the Decision and Order.

V. Monitor

IT IS FURTHER ORDERED that:

A. Richard Shermer shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent, and attached as Appendix F ("Monitor Agreement") and Non-Public Appendix G ("Monitor Compensation") to the Decision and Order. The Monitor is appointed to monitor Respondent's compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

B. No later than 1 day after the Acquisition Date, Respondent shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondent's compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.

C. Respondent 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's compliance with the divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, 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 orders.

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondent or of the Commission.

3. The Monitor shall serve until 15 days after the Monitor has completed his/her final report pursuant to Paragraph IX.D of the Decision and Order, or until such other time as may be determined by the Commission or its staff.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

E. Respondent 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's compliance with this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.

F. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondent 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, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph V.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.F of this Order to Maintain Assets.

H. Respondent shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets or the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondent with respect to the performance of Respondent's obligations under this Order to Maintain Assets and the Decision and Order. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondent of their obligations under the orders. The Monitor shall submit a final report to the Commission within 30 days following the satisfaction by Respondent of all its obligations under Paragraphs II and IV of the Decision and Order, unless otherwise directed by the Commission or its staff.

I. Respondent may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. 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, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.

2. Not later than 10 days after the appointment of the substitute Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.

L. 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 this Order to Maintain Assets.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

VI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of:

a. The Acquisition Date, no later than 5 days after the Acquisition Date; and

b. The Divestiture Date, no later than 5 days after the Divestiture Date.

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent shall file verified written reports ("compliance reports") in accordance with the following:

1. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondent shall submit to the Commission verified compliance reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets and the Decision and Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with this Order to Maintain Assets and the Decision and Order. Conclusory statements that Respondent has complied with its obligations under this Order to Maintain Assets and the Decision and Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondent has implemented or plans to implement to ensure that Respondent has complied or will comply with each paragraph of this Order to Maintain Assets and the Decision and Order, and such supporting materials shall be retained and produced later if needed.

2. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor.

   Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondent pursuant to the Decision and Order.

VII. Change in Respondent

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Boston Scientific Corporation;

B. Any proposed acquisition, merger, or consolidation of Boston Scientific Corporation; or

C. Any other change in Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII. Access

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 5 days' notice to the Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

IX. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

A.3 business 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.3 days after the Decision and Order becomes final.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Boston Scientific Corporation ("BSC") of the voting securities of BTG plc ("BTG"). The Commission's Bureau of Competition prepared and

furnished to Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondent 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.

Respondent and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders") containing (1) an admission by Respondent of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Agreement Containing Consent Orders and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Rule 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent BSC is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 300 Boston Scientific Way, Marlborough, Massachusetts 01752.

2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

ORDER

I. Definitions

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

A. "BSC" or "Respondent" means Boston Scientific Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Boston Scientific Corporation, including Bravo Bidco Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means: (i) Varian or (ii) any other Person approved by the Commission to acquire the Divestiture Product Assets pursuant to this Order.

D. "Acquisition" means the proposed acquisition by Respondent of all the voting securities of BTG plc as described in the Recommended Cash Offer for BTG plc by Bravo Bidco Limited, A New Incorporated Entity Indirectly Wholly-Owned by Boston Scientific Corporation, dated November 20, 2018.

E. "Acquisition Date" means the date the Acquisition is consummated.

F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approvals(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Divestiture Product. The term "Agency" includes the United States Food and Drug Administration ("FDA").

G. "Bland Beads" means embolic beads or microspheres that are used in transarterial embolization procedures.

H. "Bland Beads Business" means the Business conducted by BSC related to Bland Beads that was acquired from CeloNova Biosciences, Inc. and its affiliates on December 30, 2015, and as conducted and maintained by BSC since being acquired, including without limitation all improvements and activities relating thereto as of the Divestiture Date.

I. "BSC Manufacturing Equipment" means all fixtures, equipment (including technical equipment and computers), and machinery that is being used or has been used at any time by BSC to manufacture, sterilize, package, or sell Bland Beads and DEBs, and as listed in Non-Public Appendix C.

J. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, exportation, advertisement, or sale of a product.

K. "Business Information" means all information, books and records, documents, files, correspondence, manuals, computer printouts, databases, and other documents, including all hard copies and electronic records wherever stored, including without limitation, client and customer lists, referral sources, research and development reports, production reports, service and warranty records, maintenance logs, equipment logs, operating guides and manuals, documents relating to policies and procedures, documents relating to Development and quality control, documents relating to disruptions in supply and inputs, financial and accounting records and documents, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists,

customer contracts, employee lists and contracts, salaries and benefits information, physician lists and contracts, supplier lists and contracts, and, subject to legal requirements, copies of all personnel files. For clarity, Business Information includes Respondent's rights and control over information and material provided to any other Person.

L. "Confidential Business Information" means any non-public Business Information owned by, or in the possession or control of, Respondent, that is related to the Divestiture Product Assets. The Term "Confidential Business Information" excludes the following:

1. Information relating to Respondent's general business strategies or practices that does not discuss with particularity the Divestiture Products;

2. Information exclusively related to any Excluded Assets;

3. Information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition laws.

M. "Contract" means any agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), including pricing letters, consignment, tender, and group purchasing contracts, whether or not legally binding with third parties.

N. "DEBs" means drug-eluting beads or drug-eluting microspheres that are used in transarterial chemoembolization procedures.

O. "DEBs Business" means the Business conducted by BSC related to DEBs that was acquired from CeloNova Biosciences, Inc. and its affiliates on December 30, 2015, and as conducted and maintained by BSC since being acquired, including without limitation all improvements and activities relating thereto as of the Divestiture Date.

P. "Development" or "Develop" means all research and development activities, including the following: design; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; mechanical properties testing; performance testing; safety testing; conducting Device Studies for the purpose of obtaining or achieving 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 Divestiture Product (including any government price or reimbursement approvals).

Q. "Device Study(ies)" means a controlled study of the quality, safety, efficacy, precision, or accuracy of a Divestiture Product, and includes such studies as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval.

R. "Direct Cost" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transition Services. "Direct Cost" to the Acquirer for its use of any of Respondent's employees' labor shall not exceed the then-current wage rate for each employee, including benefits.

S. "Divestiture Agreement(s)" means the following:

1. Asset Purchase Agreement by and among Boston Scientific Corporation and Varian Medical Systems, Inc., dated as of July 1, 2019; and all amendments, exhibits, attachments, ancillary agreements (including the Transition Services Agreement, Transition Manufacturing Agreement, Assignment and Assumption Agreement, Bill of Sale, and Intellectual Property Assignment Agreement), and schedules thereto, attached to the Order as Non-Public Appendix A; and

2. Any other agreement between Respondent and the Acquirer (or between a Divestiture Trustee and the Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

T. "Divestiture Date" means the date on which Respondent (or a Divestiture Trustee appointed pursuant to Paragraph X of this Order) closes on the divestiture of the Divestiture Product Assets as required by Paragraph II of this Order.

U. "Divestiture Product(s)" means the Bland Beads and DEBs manufactured, Developed, marketed, sold, owned, or controlled by Respondent as part of the Bland Beads Business and DEBs Business, respectively.

V. "Divestiture Product Assets" means all legal or equitable rights, title, and interests in and to all tangible and intangible assets, wherever located, relating to Respondent's Bland Beads Business and DEBs Business (including assets removed and not replaced after the announcement of the Acquisition), including:

1. Business Information;

2. Product Intellectual Property;

3. Product Approvals;

4. Device Studies;

5. At the Acquirer's option and after conclusion of the Transition Manufacturing Agreement attached to the Order as Non-Public Appendix A, the BSC Manufacturing Equipment;

6. Marketing Materials;

7. The content related exclusively to a Divestiture Product that is displayed on any website that is not dedicated exclusively to the Divestiture Product;

8. At the option of the Acquirer, all Contracts; *provided, however*, that Replacement Contracts may be substituted for Shared Contracts;

9. For each Divestiture Product:

   a. a list of all customers for each Divestiture Product and a listing of the net sales (in either units or dollars) of that Divestiture Product to such customers during the one (1) year period immediately prior to the Divestiture Date, stated on either an annual, quarterly, or monthly basis, including the name of each customer's employee(s) who is or has been responsible for the purchase of the product on behalf of the customer and that employee's business contact information;

   b. a list for each Divestiture Product containing the following: (i) the net price (*i.e.*, the final price per unit charged by Respondent net of all customer-level discounts, rebates, or promotions) as of the Divestiture Date; (ii) the net price charged by Respondent at the end of each quarter during the one (1) year period immediately prior to the Divestiture Date; and (iii) any supply outages during the one (1) year period immediately prior to the Divestiture Date; and

   c. a list of all backorders as of the Divestiture Date.

10. at the option of the Acquirer, all Bland Beads or DEBs inventory in existence as of the Divestiture Date;

11. the quantity and delivery terms in all unfilled customer purchase orders for each Divestiture Product as of the Divestiture Date, to be provided to the Acquirer not later than 5 days after the Divestiture Date; and

12. all of Respondent's books, records, and files directly related to the foregoing;

provided, however, that "Divestiture Product Assets" shall not include: (i) documents relating to Respondent's general business strategies or

practices relating to the conduct of Respondent's Business outside of the Divestiture Products, where such documents do not discuss with particularity a Divestiture Product; and (ii) information that is exclusively related to the Excluded Assets;

provided further, however, that in cases in which documents or other materials included in the Divestiture Product Assets contain information: (i) that relates both to a Divestiture Product and to Excluded Assets or Businesses of Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Divestiture Product; or (ii) for which Respondent has a legal obligation to retain the original copies, Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, Respondent shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that Respondent provides the Acquirer with the above-described information without requiring Respondent completely to divest information that, in content, also relates to Excluded Assets.

W. "Divestiture Product Business(es)" means the Business related to the Divestiture Product(s).

X. "Divestiture Product Core Employees" means:

1. Respondent's employees listed on Non-Public Appendix D; and

2. Respondent's employees who dedicated at least 25 percent of his/her time supporting, supervising, or working on behalf of the Divestiture Product Businesses, at any time one (1) year prior to the Divestiture Date.

Y. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph X of this Order.

Z. "Employee Information" means, for each Divestiture Product Core Employee, a profile prepared by Respondent summarizing the employment history of each employee and including, as requested by the Acquirer and to the extent permitted by applicable law:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Employment status (i.e., active or on leave or disability; full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

AA. "Excluded Assets" means any product(s) and Businesses other than a Divestiture Product and Divestiture Product Business, including those assets identified in Non-Public Appendix B to this Order.

BB. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of each Divestiture Product as of the Divestiture Date, including all quality system documentation used for customer presentations, advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, sales reports, sales funnel or process information, and sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials to be provided to distributors and/or end-use customer (*e.g.* specification sheets, application/use instructions and technical specifications), Website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to each Divestiture Product.

CC. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Decision and Order or Paragraph V of the Order to Maintain Assets.

DD. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

EE. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

FF. "Orders" means this Decision and Order and the related Order to Maintain Assets.

GG. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for

certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (except where this Order specifies a different time), 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.

HH. "Patent Application '303" means U.S. Patent Application No. 16/033,303, including all provisionals, continuations, 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.

II. "Person" means any individual, partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association or organization, or other business entity, and any subsidiaries, divisions, groups, or affiliates thereof.

JJ. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Divestiture Product worldwide.

KK. "Product Intellectual Property" means intellectual property of any kind, including Patents, patent applications, mask works, trademarks, service marks, copyrights, Trade Dress, commercial names, internet websites, internet domain names, inventions, discoveries, process technology, engineering technology, product technology, product rights, Trade Secrets, and proprietary information.

LL. "Replacement Contracts" means (i) Contracts entered into by the Acquirer with a Third Party, or a portion of a Shared Contract assigned to the Acquirer by the Respondent, in advance of the Divestiture Date that replace Shared Contracts with a separate Contract for the Divestiture Product Businesses; or (ii) arrangements between Respondent and Acquirer that provide the Divestiture Product Businesses with no less favorable terms, services, and economic benefits as it would have had under the Shared Contracts.

MM. "Shared Contracts" means Contracts that relate to both the Divestiture Product Businesses and other businesses retained by Respondents.

NN. "Supply Cost" means the actual cost of materials and direct labor net of overhead and any intracompany transfer profits plus the actual cost of shipping and transportation where these costs are incurred by Respondent.

OO. "Technical Support" means all capabilities to provide customer-specific technical expertise, modification of products, customizing of products, testing of products, product performance advice, equipment assessment, on-site product assistance, monitoring of inventory levels and product orders/deliveries, and general product issue-solving and trouble-shooting.

PP. "Third Party(ies)" means any non-governmental Person other than Respondent or the Acquirer of particular assets or rights pursuant to this Order.

QQ. "Trade Dress" means the current trade dress of a Divestiture Product, including packaging and the lettering of the product trade name or brand name.

RR. "Trade Secret(s)" means information, including know-how, techniques, data, inventions, practices, formulations, patterns, compilations, programs, devices, methods, techniques, or process, that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who can obtain economic value from its disclosure or use (e.g., competitors); and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

SS. "Transitional Product Supply" means Respondent's provision of supply of Bland Beads, DEBs, and/or any component or input thereof (including supplies of raw material), to the Acquirer.

TT. "Transition Services" means Technical Support, services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Bland Beads Business and the DEBs Business, including, but not limited to, accounting and finance, human resources (employee benefits, payroll, etc.), information technology and systems, logistics (purchasing, distribution, warehousing, supply chain management, etc.), manufacturing (technology, technology transfer, operating permits and licenses, regulatory compliance, quality control, manufacturing processes and troubleshooting, etc.), research and Development, and sales and marketing (including customer service, supply chain management, and customer transfer logistics, etc.).

UU. "Varian" means Varian Medical Systems, Inc., with its principal executive offices located at 3100 Hansen Way, Palo Alto, CA 94304, and any subsidiaries of Varian Medical Systems, Inc., including Scion Medical Technologies.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondent shall divest the Divestiture Product Assets, absolutely and in good faith, to the Acquirer pursuant to, and in accordance with, the Divestiture Agreements.

Provided, however, that Respondent may receive an exclusive (except as to Acquirer and its affiliates, suppliers, manufacturers, contractors, distributors, consultants, or representatives for the purpose of providing products and services in connection with the Acquirer's business, or otherwise acting on behalf of and at the direction of Acquirer or its affiliates (and not for any such supplier's, manufacturer's, contractor's, distributor's, consultant's or representative's, as applicable, independent benefit)), royalty-free, fully paid-up license back from the Acquirer for Patent Application '303, divested pursuant to Paragraph II.A. of this Order, for fields of use that do not include DEBs, Bland Beads, or any drug-eluting or bland embolizing bead products, including, but not limited to, the field of use of DEBs, Bland Beads or bland embolizing bead products acquired by BSC or its affiliates pursuant to the Acquisition.

B. If Respondent has divested the Divestiture Product Assets to the Acquirer prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. The Acquirer is not acceptable as the acquirer of the Divestiture Product Assets, then Respondent shall immediately rescind the Divestiture Agreements, and shall divest the Divestiture Product Assets no later than 180 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Divestiture Product Assets to the Acquirer was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Product Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondent shall deliver the Business Information and Product Intellectual Property related to the Divestiture Products to the Acquirer as soon as practicable after the Divestiture Date in a manner that ensures their completeness, accuracy, and usefulness, and meets the reasonable requirements of the Acquirer.

D. Prior to the Divestiture Date, Respondent shall provide the Acquirer with the opportunity to review all Contracts included in the Divestiture Product Assets for the purposes of the Acquirer's determination whether to assume such Contracts.

E. Prior to the Divestiture Date, Respondent shall secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of the Divestiture Product Assets; *provided, however,* that Respondent may satisfy this requirement by certifying that the Acquirer has executed appropriate agreements directly with each of the relevant Persons.

F. No later than 15 days after the Divestiture Date, Respondent shall send written notification to each Third Party that purchases the Divestiture Products as part of a Shared Contract, and who does not already have a Replacement Contract with the Acquirer, that Pursuant to an FTC Order, Respondents have divested the Divestiture Products to the Acquirer, and provide the following information to that Third Party:

1. The Acquirer's contact information to discuss the on-going supply of the Divestiture Products;

2. The Monitor's contact information;

3. There will be no changes to the supply of the Divestiture Products and the terms of the current Contract between Respondent and the Third Party will continue until a Replacement Contract is entered into with the Acquirer; and

4. That under the FTC Order, the Divestiture Products will continue to be manufactured by the Respondent during a transition period.

Provided, however, that any such notification to Third Parties must be reviewed and approved by the Monitor before being provided to any Third Party. *Provided, further*, that Respondent must provide a list of all Third Parties that received such notification in the Respondent's first Compliance Report.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be deemed incorporated into this Order and made a part hereof, and any failure by Respondent to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that Respondent cannot fully comply with both, Respondent shall comply with this Order.

B. Respondent shall not modify, replace, or extend the terms of the Divestiture Agreements after the Commission issues this Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Divestiture Agreement(s), any modification or amendment of any Divestiture Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondent has transferred all Business Information included in the Divestiture Product Assets, Respondent shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondent has not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondent shall provide the Acquirer with Transition Services sufficient (i) to efficiently transfer the Divestiture Product Assets to the Acquirer and (ii) to operate the Divestiture Product Assets and the Divestiture Product Businesses in a manner equivalent in all material respects to the manner in which BSC operated the Divestiture Product Assets and the Divestiture Product Businesses prior to the Acquisition. Respondent shall provide Transition Services:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. Including all assistance necessary to prosecute Patent Application '303, including such assistance necessary after Patent Application '303 is approved;

3. At the price agreed upon in a Divestiture Agreement, or if no agreed upon price is set forth or part of a Divestiture Agreement, at Direct Cost;

4. For a period sufficient to meet the requirements of this paragraph, including and until Acquirer purchases and installs equipment that replicates the BSC Manufacturing Equipment such that it produces, sterilizes, and packages Bland Beads and DEBs in a manner that fulfills the Acquirer's worldwide demand, and until Acquirer obtains all relevant Product Approvals worldwide necessary to manufacture and sell commercial quantities of the finished Divestiture Products independently of Respondent, which shall be 30 months after the Divestiture Date. *Provided however*, that upon the Acquirer's request, Respondent must file with the Commission a written request to extend the time period; and

5. Respondent shall designate employees of Respondent knowledgeable about the Technical Support to advise and provide such services to the Acquirer, including employees knowledgeable about Patent Application '303.

C. Respondent shall provide Transitional Product Supply pursuant to a Divestiture Agreement that has been approved by the Commission, including the following:

1. Make representations and warranties to the Acquirer that the Divestiture Products supplied by Respondent pursuant to the Transition Manufacturing Agreement meet the relevant Product Approvals;

2. For Divestiture Products to be marketed or sold worldwide, agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Divestiture Products supplied to the Acquirer pursuant to a Divestiture Agreement by Respondent to meet the relevant Product Approvals. This obligation may be made contingent upon the Acquirer giving Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

   Provided, however, that Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with Respondent's responsibilities to supply the Divestiture Products in the manner required by this Order;

   Provided further, however, that this obligation shall not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer in an agreement to supply Divestiture Products;

3. During the term of the Transition Manufacturing Agreement, upon written request of the Acquirer, make available to the Acquirer all records that relate directly to the manufacture of the Divestiture Products that are generated or created after the Divestiture Date;

4. For each Divestiture Product for which Respondent purchases the components(s) or material(s) from a Third Party, provide the Acquirer with the actual price paid by Respondent for components and materials used to manufacture that Divestiture Product; and

5. During the term of the Transition Manufacturing Agreement, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Divestiture Products; and

6. During the term of the Transition Manufacturing Agreement, upon written request and with reasonable notice, Respondent BSC shall allow employees of the Acquirer access to the:

   a. BSC facilities and machines that manufacture, sterilize, or package Divestiture Products, and

b. areas where finished Divestiture Products are stored and distributed.

Provided, however, Respondent may restrict access to the machines sterilizing or packaging the Divestiture Products during such time, if any, as those machines are being used solely to sterilize or package other products.

D. During the term of any agreement with the Acquirer to provide Transition Services or Transitional Product Supply, and pursuant to such agreements and this Order, Respondent shall:

1. take all actions as are reasonably necessary to ensure that the provision of Transition Services and Transitional Product Supply to the Acquirer are uninterrupted;

2. not limit damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of such agreements;

3. not be entitled to terminate such agreement due to the Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of its creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law;

4. not cease providing Transition Services or Transitional Product Supply due to breach by the Acquirer of a Divestiture Agreement;

5. permit the Acquirer to terminate such agreements at any time upon commercially reasonable notice and without cost or penalty; and

6. upon the Acquirer's request, file with the Commission a written request to extend the time period for any such agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Respondent shall cooperate with and assist the Acquirer of the Divestiture Product Assets to identify, evaluate independently, offer employment to, and hire the Divestiture Product Core Employees, with such cooperation and assistance including at least the following:

1. Not later than 5 business days after a request from the Acquirer, Respondent shall, to the extent permitted by applicable law:

a. Provide to the Acquirer a list of all Divestiture Product Core Employees and provide Employee Information for each; and

b. Allow the Acquirer a reasonable opportunity to interview any Divestiture Product Core Employees.

2. Within 10 days after a request from the Acquirer, Respondent shall provide an opportunity for the Acquirer to:

a. Meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any of the Divestiture Product Core Employees; and

b. Make offers of employment to any of the Divestiture Product Employees.

3. Respondent shall not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Divestiture Product Core Employees, not offer any incentive to Divestiture Product Core Employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Divestiture Product Core Employees by the Acquirer;

4. Respondent shall remove any impediments within the control of Respondent that may deter any Divestiture Product Core Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondent that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to any Divestiture Product Core Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee;

5. Respondent shall provide Divestiture Product Core Employees with sufficient financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Divestiture Product Core Employees by the Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and reasonable additional incentives as may be necessary.

B. For a period of 2 years after the Divestiture Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer with any

amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer; or (ii) hire any Divestiture Product Employee;

provided, however, Respondent may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as that employee was not solicited in violation of the non-solicitation requirements contained herein;

provided further, *however*, that Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent.

VI. Asset Maintenance

IT IS FURTHER ORDERED that:

A. From the date Respondent signs the Agreement Containing Consent Orders until such time as Respondent divests the Divestiture Product Assets to Acquirer, Respondent shall:

1. Operate the Divestiture Product Assets in the regular and ordinary course of business and in accordance with past practices and in a manner consistent with applicable laws and regulation;

2. Prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Product Assets;

3. Not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in a manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Product Businesses; and

4. Minimize any risk of loss of competitive potential for the Divestiture Product Businesses.

B. From the date Respondent signs the Agreement Containing Consent Orders until such time as Acquirer purchases and installs equipment that replicates the BSC Manufacturing Equipment such that it produces, sterilizes, and packages the Divestiture Products in a manner that fulfills the Acquirer's worldwide demand, and until Acquirer obtains all relevant Product Approvals worldwide, Respondent:

1. Shall take actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the BSC Manufacturing Equipment related to the Divestiture Product Businesses;

2. Shall take actions as are necessary to operate the BSC Manufacturing Equipment in the regular and ordinary course of business and in accordance with past practices and in a manner consistent with applicable laws and regulation; and

3. Shall not take any actions to reduce the availability of the services of the current officers, employees, and agents of Respondent BSC required to operate and maintain the BSC Manufacturing Equipment, except for terminations for cause.

C. The purposes of this Paragraph VI is to: (1) preserve the Divestiture Product Assets as a viable, competitive, and ongoing business until the assets are transferred to Acquirer and the BSC Manufacturing Equipment is either transferred or replicated by the Acquirer; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

VII. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. Transfer and deliver to the Acquirer, at Respondent's expense, all Confidential Business Information (a) in good faith; (b) in a timely manner, i.e., as soon as practicable, avoiding any delays in transmission of the respective information; and (c) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

2. Pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Business of each Divestiture Product that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. Not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following: (a) the requirements of the Orders; (b) Respondent's obligations to the Acquirer under the terms of any Divestiture Agreements; or (c) applicable law;

4. Not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except: (a) the Acquirer; (b) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information; (c) the Commission; or (d) the Monitor; and except to the extent necessary to comply with applicable law;

5. Not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Business that is being retained by Respondent, other than those employees directly involved in providing Transitional Product Supply or Transition Services to the Acquirer or who are engaged in the transfer and delivery of Business Information to the Acquirer and only for the purposes of providing such products, assistance, and information to the Acquirer. *Provided further*, that all such employees with Confidential Business Information relating to the Divestiture Product Assets shall sign a non-disclosure agreement;

6. Institute procedures and requirements to ensure that the employees providing Transitional Product Supply and Transition Services or who are engaged in the transfer and delivery of Business Information:

   a. Do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business information in contravention of the Orders; and

   b. Do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose;

7. Upon the request of the Acquirer, destroy any copies of Confidential Business Information (other than electronic copies of Confidential Business Information created as a result of automatic back-up procedures) within 30 days of such request *except* as otherwise agreed to between Respondent and the Acquirer or to the extent necessary to comply with applicable law; and

8. Take all action necessary and appropriate to prevent access to, and the disclosure or use of, the Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions; and

b. Ensuring by other reasonable and appropriate means that the Confidential Business Information is not shared with Respondent's personnel engaged in the provision of the same or substantially the same type of Business as the Divestiture Products.

B. Not later than 30 days after the Divestiture Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Divestiture Date. Respondent shall provide a copy of the notification to the Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States of America and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.

VIII. Additional Obligations

IT IS FURTHER ORDERED that:

A. Respondent shall not join, file, prosecute, or maintain any suit, in law or equity, against the Acquirer, its licensees, or its customers under any Patent that was pending or issued on or before the Acquisition Date if such suit would directly limit or impair the Acquirer's freedom to manufacture, distribute, market, sell, or offer for sale any Divestiture Product anywhere in the world.

B. Upon reasonable written notice and request from the Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Person related to the Product Intellectual Property related to any of the Divestiture Product(s), if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) for the purposes of marketing, sale, or offer for sale of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s).

C. For any patent infringement suit filed prior to the Divestiture Date in which Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that Respondent has prepared or is preparing to defend against as of the Divestiture Date, and where such a suit

would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired for the purposes of marketing, sale, or offer for sale of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s), Respondent shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. Waive conflicts of interest, if any, to allow Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of Respondent's outside counsel related to that Divestiture Product.

IX. Monitor

IT IS FURTHER ORDERED that:

A. Richard Shermer shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent and attached as Appendix E ("Monitor Agreement") and Non-Public Appendix F ("Monitor Compensation"). The Monitor is appointed to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. No later than one day after the Acquisition Date, Respondent shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.

C. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of Respondent or of the Commission;

2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information

as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondent, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondent shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondent 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,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

D. The Monitor shall report in writing to the Commission (i) every 30 days after the Acquisition Date for a period of one year, (ii) every 90 days thereafter until Respondent has completed all obligations required by Paragraph II. of this Order (including a final report when Respondent has completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.

E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld:

1. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondent of the identity of any

substitute Monitor, then Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondent shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph IX.

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 this Order

X. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the divestiture and other obligations as required by Paragraphs II through VIII of this Order, the Commission may appoint a Divestiture Trustee to divest the Divestiture Product Assets and perform Respondent's other obligations in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent 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, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent 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, and to take such other action as may be required to divest the Divestiture Product Assets.

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the 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 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, or in the case of a court-appointed Divestiture Trustee, by the court.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph X 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 Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to the Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee

receives bona fide offers from more than one acquiring entity, 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 from among those approved by the Commission; *provided further*, *however,* that Respondent shall select such entity within 5 days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, 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, 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 Respondent, 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 shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph X.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph X.E.5. of this Order.

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 Respondent and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph X.

H. The Divestiture Trustee appointed pursuant to this Order may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.

I. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or actions required by this Order.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit the complete Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondent shall submit interim compliance reports 30 days after the Order is issued, and every 90 days thereafter until Respondent has fully complied with Paragraph IV.C.

2. Respondent shall submit annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

3. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is complying with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:

   a. A full description of the substance and timing of all measures Respondent has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of the Order; and

   b. A detailed description of all substantive contacts, negotiations, actions, or recommendations related to:

      i. The transfer and delivery of all Divestiture Product Assets to the Acquirer;

      ii. The provision of Transition Services to the Acquirer; and

      iii. The provision of Transitional Product Supply of the Divestiture Products to the Acquirer.

4. Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.

5. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor.

XII. Change in Respondent

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Boston Scientific Corporation;

B. Any proposed acquisition, merger or consolidation of Boston Scientific Corporation; or

C. Any other change in Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

i. XIII. Access

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 5 days' notice to Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative of the Commission and at the expense of Respondent; and

B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on Respondent by the Order is:

A. To ensure that the Acquirer can operate the Divestiture Product Businesses in a manner equivalent in all material aspects to the manner in which Respondent BSC operated the Divestiture Product Businesses prior to the Acquisition;

B. To create a viable and effective competitor that is independent of Respondent in the Divestiture Product Businesses; and

C. To remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

Term

IT IS FURTHER ORDERED that this Order shall terminate September 18, 2029.

By the Commission.

NON-PUBLIC APPENDIX A

DIVESTITURE AGREEMENTS

[Redacted From the Public Record Version But Incorporated by Reference]

NON-PUBLIC APPENDIX B

EXCLUDED ASSETS

[Redacted From the Public Record Version But Incorporated by Reference]

NON-PUBLIC APPENDIX C

BSC MANUFACTURING EQUIPMENT

[Redacted From the Public Record Version But Incorporated by Reference]

NON-PUBLIC APPENDIX D

DIVESTITURE PRODUCT CORE EMPLOYEES

[Redacted From the Public Record Version But Incorporated by Reference]

APPENDIX E

MONITOR AGREEMENT

Execution Version

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement") entered into on July 8, 2019 between R. Shermer and Company (the "Monitor"), and Boston Scientific Corporation ("BSC" or "Respondent") provides as follows:

WHEREAS the United States Federal Trade Commission (the "FTC") has accepted or will shortly accept for public comment an Agreement Containing Consent Orders, containing a proposed Decision and Order and Order to Maintain Assets (collectively, the "Orders"), which, among other things, (i) would require the divestiture of the Divestiture Product Assets relating to BSC's Bland Beads Business and DEBs Business, as defined in the Decision and Order, to Varian Medical Systems, Inc. and (ii) contemplates the appointment of a Monitor to monitor Respondent's compliance with its obligations under the Orders;

WHEREAS the FTC may appoint Richard Shermer, President, R. Shermer and Company as Monitor pursuant to the Orders;

WHEREAS the Orders further provide that Respondent shall execute an agreement, subject to the prior approval of the FTC, that confers all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of the Orders; and

WHEREAS the parties to this Monitor Agreement intend to be legally bound, subject only to the FTC's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in the Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

A. Monitor's Responsibilities. The Monitor shall be responsible for monitoring Respondent's compliance with its obligations as set forth in the Orders and the Remedial Agreements ("Monitor's Responsibilities"). In so doing, the Monitor shall act in consultation with the Commission or its staff, and **shall serve as an independent third party and not as an employee or agent of the Respondent or the Commission.** The Monitor shall have all rights, duties, powers and authorities required by the Orders, and nothing in the Monitor Agreement shall change, amend, modify or otherwise limit those rights, duties, powers, and authorities.

B. Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to the personnel, books and records of Respondent kept in the ordinary course of business, facilities, technical information related to Respondent's compliance with its obligations under the Orders and any Remedial Agreements, and such other relevant information as the Monitor may reasonably request.

Respondent shall cooperate with any reasonable request of the Monitor. The 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 the Monitor's responsibilities under the Orders.

C. Compliance Reports. Respondent shall provide the Monitor with copies of all compliance reports filed with the FTC 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 FTC.

D. Additional Personnel. Respondent agrees that, to the extent authorized by the Orders, the Monitor shall have the authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's Responsibilities.

E. Monitor's Obligations. The Monitor shall:

1. Carry out the Monitor's Responsibilities, including submission of periodic reports to the FTC or its staff concerning performance by Respondent of its obligations under the Orders, and any additional written reports as may be requested by the FTC or its staff;

2. Maintain the confidentiality of all non-public information, including Confidential Business Information, provided to the Monitor by Respondent, the FTC-approved Acquirer(s), any supplier or customer of the Respondent, the FTC, or FTC staff in connection with the Monitor's Responsibilities ("Confidential Information"). Such Confidential Information shall be used only for the purpose of discharging the Monitor's obligations pursuant to this Monitor Agreement and not for any other purposes, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may disclose Confidential Information only to:

   a. Persons employed by or working with the Monitor under this Monitor Agreement and who have executed a confidentiality agreement consistent with the provisions of this Agreement;

   b. Persons employed by Respondent that are entitled to have access to such Confidential Information;

   c. FTC staff that are working on this matter; or

   d. Persons employed by the FTC-approved Acquirer that are entitled to have access to such Confidential Information.

3. Maintain a record and inform the FTC or its staff of all persons to whom Confidential Information related to this Monitor Agreement has been disclosed;

4. Require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement 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 Monitor

Agreement;

5. Maintain the confidentiality for a period of five (5) years after the termination of this Monitor Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose Confidential Information relating thereto except as required by law. In the event the Monitor is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which the Monitor is not a party, Respondent shall reimburse the Monitor at standard billing rates for all professional time and expenses, including reasonable attorneys' fees, incurred in preparing for and responding to requests for documents and providing testimony;

6. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with FTC staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the FTC staff, as directed by the FTC staff. In response to a request by Respondent to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform FTC staff of such request and, if the FTC staff does not object, shall comply with the Respondent's request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor.

For the purpose of this Monitor Agreement, information shall not be considered confidential or proprietary to the extent it is or becomes part of the public domain (other than as a result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, the Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or the Respondent, when such source was not known to the recipient after the due inquiry to be restricted from making such disclosure to such recipient.

F. Monitor Payment. Respondent shall pay Monitor in accordance with the fee schedule attached as Confidential Appendix A for all reasonable and documented time spent in the performance of the Monitor's duties under this Agreement and the Orders. In addition, Respondent shall pay: (i) all documented out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all documented reasonable fees of, and disbursements reasonably incurred by, any consultants, accountants, attorneys, and other representatives and assistants appointed by Monitor pursuant to Paragraph D. Monitor shall provide Respondent with monthly invoices for time and expenses that include details by timekeeper, time, and activity, and an explanation of all matters for which Monitor submits an invoice to Respondent. At its own expense, Respondent may retain an independent auditor to verify such invoices. Respondent shall pay such invoices within thirty (30) days of receipt. Monitor and Respondent shall submit any disputes about invoices to the Commission staff for assistance in resolving such disputes. 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.

G. Access to Workspace and Office Equipment. To the extent available, Respondent will provide Monitor with temporary workspace and access to office equipment owned or used by Respondent at sites Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondent's safety and security regulations, instructions and procedures while at Respondent's sites.

H. Monitor's Indemnification and Limitation of Liability. Respondent shall indemnify and hold harmless R. Shermer and Company against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's Responsibilities, 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 liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Monitor. In addition, the parties shall not be liable to each other for any consequential, incidental, special or punitive damages, nor shall the Monitor be liable for direct compensatory damages in excess of the fees actually received by the Monitor for the performance of services hereunder.

I. Conflicts of Interest. If the Monitor becomes aware during the term of this Monitor Agreement that the Monitor has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of the Monitor's Responsibilities, the Monitor shall immediately inform the Respondent and FTC staff of any such conflict. The Monitor may accept other retentions during the term of this Monitor Agreement and thereafter, provided that, during the pendency of this Monitor Agreement, the Monitor agrees not to accept any other engagement which would result in the Monitor working in a position directly adverse to the FTC, the Respondent, or the FTC-approved Acquirer(s) in any substantially related matter.

J. Standard of Care. In the performance of the Monitor's Responsibilities, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of the person's own business affairs.

K. Term. This Monitor Agreement shall terminate no later than: (i) the date set forth in the relevant provisions of the Orders; (ii) the date on which the FTC appoints a substitute monitor pursuant to the Orders; or (iii) the date Respondent notifies the Monitor that the Respondent has received a notification from FTC staff that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders.

L. Termination. In the event that FTC staff notifies Respondent that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders, Respondent shall be entitled to immediately terminate this Monitor Agreement.

M. Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the State of Delaware, including all matters of construction, validity and performance. The Orders shall govern this Monitor Agreement and any provisions herein which conflict or are inconsistent with

Execution Version

them may be declared null and void by the FTC and any provision not in conflict shall survive and remain a part of this Monitor Agreement.

N. Disclosure of Information. Nothing in this Monitor Agreement shall require Respondent to disclose any material information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law.

O. Assignment. This Monitor Agreement may not be assigned or otherwise transferred by Respondent or the Monitor without the consent of the Respondent, the Monitor, and the approval of the FTC. Any such assignment or transfer may only be made in a manner consistent with the terms of the Orders.

P. Modification. No amendment, modification, termination, or waiver of any provision of this Monitor Agreement shall be effective unless made in writing, signed by all parties, and approved by the FTC. Any such amendment, modification, termination, or waiver may only be made in manner consistent with the terms of the Orders.

Q. Approval by the FTC. This Monitor Agreement shall have no force or effect with respect to the Orders until approved by the FTC.

R. Entire Agreement. This Monitor Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreement and understandings between the parties, written or oral, with respect to the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first written above.

MONITOR

R. Shermer & Company

Richard Shermer
President

RESPONDENT

Boston Scientific Corporation

Vance Brown
Vice President
Chief Corporate Counsel

NON-PUBLIC APPENDIX F

MONITOR COMPENSATION

[Redacted From the Public Record Version But Incorporated by Reference]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Boston Scientific Corporation ("BSC") designed to remedy the anticompetitive effects resulting from BSC's proposed acquisition of BTG plc ("BTG"). The proposed Decision and Order ("Order") contained in the Consent Agreement requires BSC to divest all rights and assets related to its drug eluting bead ("DEB") business, as well as its closely related bland bead business, to Varian Medical Systems ("Varian").

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

Under the terms of the Co-Operation Agreement dated November 20, 2018, BSC will acquire BTG in exchange for cash consideration of $4.2 billion (the "Acquisition"). 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 substantially lessening competition in the U.S. market for DEBs. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

THE PARTIES

BSC, headquartered in Marlborough, Massachusetts, is a global supplier of medical devices that are used in a broad range of interventional medical specialties. BSC currently offers its products through seven core business segments: Interventional Cardiology, Cardiac Rhythm Management, Endoscopy, Peripheral Interventions, Urology and Pelvic Health, Neuromodulation, and Electrophysiology. The Peripheral Interventions segment—which includes BSCs DEB business—focuses on products that treat an array of diseases, including arterial diseases, vascular diseases, as well as various cancers.

BTG is headquartered in London, England, with operational headquarters in Conshohocken, Pennsylvania. The company develops, manufacturers, and sells products used in various interventional medicine applications, and it also has a portfolio of specialty pharmaceutical products.

THE RELEVANT PRODUCT AND STRUCTURE OF THE MARKET

DEBs are microscopic beads used in transarterial chemoembolization ("TACE") procedures for treating primary and secondary liver cancers. TACE involves the use of embolic agents (typically microscopic beads) mixed with chemotherapy drugs (often doxorubicin) that are delivered to the targeted tumor in the liver via a catheter inserted into the patient's artery that leads to the tumor. When used in TACE procedures, DEBs work by blocking the flow of blood to the liver tumor, causing it to shrink over time, while simultaneously slowly releasing a chemotherapy agent that also attacks the tumor.

BTG and BSC are the two leading suppliers of DEBs in the United States and are each other's closest competitors. The only other participant in the U.S. DEB market is Merit Medical ("Merit"), which is substantially smaller than either BSC or BTG.

THE RELEVANT GEOGRAPHIC MARKET

The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition. DEBs are medical devices that are regulated by the U.S. Food and Drug Administration ("FDA"). As such, DEBs sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

COMPETITIVE EFFECTS OF THE ACQUISITION

The proposed Acquisition would likely result in substantial competitive harm to consumers in the market for DEBs. The parties are two of only three significant suppliers of DEBs in the United States. Eliminating the head-to-head competition between BSC and BTG in this highly concentrated market would allow the combined firm to exercise market power unilaterally, resulting in higher prices, reduced innovation, and less choice for consumers.

ENTRY CONDITIONS

Entry in the relevant market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. New entry would require significant investment of time and money for product research and development, regulatory approval by the FDA, developing clinical history supporting the long-term efficacy of the product, and establishing a U.S. sales and service infrastructure. Such development efforts are difficult, time-consuming, and expensive, and often fail to result in a competitive product reaching the market.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring BSC to divest its DEB business and closely related bland bead business to Varian. A sale of BSC's DEB business without its bland business could undermine the divestiture's effectiveness. The two products share key intellectual property, and BSC manufactures bland beads on the same production line as DEBs. Thus, including the bland bead business in the divestiture package will ensure that Varian has outright ownership of all necessary intellectual property and allow it to manufacture DEBs at a cost and output level comparable to that of BSC. BSC must divest all assets and rights to research, develop, manufacture, market, and sell the BSC DEB and bland bead products, including all related intellectual property and other confidential business information, manufacturing technology, existing inventory, and all related agreements to manufacture and distribute the products. Additionally, to ensure that the divestiture is successful and maintain continuity of supply, the proposed Order requires BSC to supply Varian with DEBs and bland beads for a limited time while Varian establishes its own manufacturing capability. The provisions of the Consent Agreement ensure that Varian becomes an independent, viable, and effective competitor in the U.S. market in order to maintain the competition that currently exists.

Headquartered in Palo Alto, California, Varian operates globally and develops, manufactures, and markets a variety of medical devices and software for treating cancer and other medical conditions. Varian's existing interventional oncology business includes products that are highly complementary to the divestiture assets. Varian has the expertise, U.S. sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition.

BSC must accomplish the divestitures no later than ten days after consummating the proposed Acquisition. If the Commission determines that Varian is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires BSC to unwind the sale of rights and assets to Varian and then divest the affected products to a Commission-approved acquirer within six months of the date the Order becomes final. To ensure compliance with the Order, the Commission has agreed to appoint a Monitor to ensure that BSC complies with all of its obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of the DEB and bland bead rights and assets to Varian. The proposed Order further allows the Commission to appoint a trustee in the event that BSC fails to divest the products as required.

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

Complaint

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC.,
AND
STEWART INFORMATION SERVICES CORPORATION

ORDER DISMISSING AND COMPLAINT IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9385; File No. 181 0127
Complaint, September 5, 2019 – Decision, September 24, 2019

This case addresses the $1.2 billion acquisition by Fidelity National Financial, Inc. of certain assets of Stewart Information Services Corporation. The complaint alleges that he proposed Transaction will violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the market for title insurance for large commercial customers in the United States. Complaint Counsel and Respondents jointly moved to dismiss the complaint in the above-captioned because Respondents terminated their Asset Purchase Agreement and withdrew the Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition.

Participants

For the *Commission*: *Shane Bryan, Keitha Clopper, Eric Cochran, Steven Couper, Steven Keely, Marc Schneider, Christina Shackelford,* and *Terry Thomas.*

For the *Respondents*: *John Scribner, Weil, Gotshal & Manges LLP; Debbie Feinstein, Arnold & Porter Kaye Scholer LLP; Arthur Burke, Davis Polk & Wardwell LLP;* and *Timothy J. Muris, Sidley Austin LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Fidelity National Financial, Inc. ("Fidelity") and Stewart Information Services Corporation ("Stewart") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

NATURE OF THE CASE

1. Respondents Fidelity and Stewart are two of the four largest title insurance underwriters in the United States. Title insurance protects customers and lenders in real estate transactions from defects in the property's title. Title insurance policies issue in nearly every

real estate transaction in the United States. A title insurance underwriter bears the risk underlying each one of those policies.

2. Four underwriters dominate the U.S. title insurance industry. The industry recognizes these players as the "Big 4": Fidelity, Stewart, First American Title Insurance Company ("First American"), and Old Republic National Title Insurance Company ("Old Republic"). On a national level, the Big 4 account for more than 85 percent of all title insurance sales. The individual shares of the Big 4 vary by state. A merged Fidelity-Stewart would account for more than 43 percent of national sales on its own. No underwriter outside of the Big 4 exceeds 3.5 percent of the sales nationwide.

3. Fidelity's proposed merger with Stewart (the "Merger") is the latest in a series of transactions that have consolidated the title insurance industry, and would reduce the Big 4 to a Big 3. This increase in concentration is likely to result in anticompetitive harm. As the former Chairman of Stewart's Board of Directors observed in 2016, "The industry has shrunk considerably to just 4 companies with double digit market power. Further consolidation at the top 2 companies could lead to a duopoly . . .."

4. The Big 4 are the only underwriters that meaningfully compete to provide title insurance for large commercial transactions. For purposes of this Complaint, large commercial transactions are commercial real estate transactions involving title insurance liability amounts greater than $20 million. Despite motivated efforts, smaller underwriters have been unable to establish themselves as viable competitors for these large commercial transactions. Post-Merger, these transactions will be vulnerable to anticompetitive effects. Competitive harm is also possible for transactions below this liability threshold.

5. The Merger also will increase concentration and reduce competition in relevant markets for title information services. Title information services refers to the provision of access to information contained in title plants—detailed information about the chain of title to individual properties, indexed to facilitate efficient title searches for underwriting purposes. Title information services are important as a standalone product and as a critical input to the provision of title insurance. Fidelity and Stewart provide title information services via title plants they own, jointly or individually. In at least fourteen relevant geographic markets, three or fewer providers of title information services will remain post-Merger and the Merger likely would result in increased prices or reduced quality for title information services.

6. Fidelity is the largest of the Big 4 underwriters. Fidelity has gained this position in large part through a series of acquisitions. In 1996, Fidelity became the fourth-largest underwriter by acquiring Nations Title. In 2000, Fidelity became the nation's largest underwriter by purchasing Chicago Title. In 2008, Fidelity became even larger by purchasing LandAmerica's title insurance brands out of bankruptcy. In at least 27 states and the District of Columbia, Fidelity holds in excess of 40% of the large commercial title insurance market and has the greatest share of large commercial transactions in 28 states and the District of Columbia.

7. Stewart is also a member of the Big 4. Stewart has earned a reputation among market participants for being more creative and flexible in providing title insurance—to the

benefit of its customers—and for selling title insurance at lower prices than the other Big 4 underwriters.

8. The Merger is likely to lessen substantially competition in the provision of title insurance to large commercial customers. After the Merger, the market for title insurance underwriting for large commercial transactions will be highly concentrated in every U.S. state and the District of Columbia, with a Herfindahl-Hirschman Index ("HHI") greater than 2,500.

9. In at least 42 states and the District of Columbia, the merger is presumptively unlawful, as the Merger will result in a highly concentrated market and an increase in the HHI concentration measure of more than 200 points. For example, in Alaska, Idaho, Maryland, New Mexico, and Virginia, the Merger results in increases of more than 1,000 points and a final HHI of more than 4,000 points. Under the thresholds established by the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("HMG"), these states will experience an increase in concentration giving rise to a presumption of enhanced market power.

10. Reducing the Big 4—the "only real players on the commercial side," per one key Fidelity executive—to the Big 3 threatens significant harm to customers purchasing title insurance for large commercial transactions. By merging with one of its closest rivals, Fidelity will eliminate an important competitor, entrenching and likely increasing the effectiveness of the existing oligopoly, and eliminating valuable head-to-head competition where it remains today.

11. Stewart has shown a greater willingness to undercut the other Big 4 underwriters on price, or offer more favorable coverage terms, in order to win business. Even within this four-firm "oligopoly," Fidelity has been forced to reduce its prices in response to Stewart. Stewart also finds creative ways to mitigate or assume risk in order to compete for business and has been willing to provide coverage where Fidelity and others in the Big 4 have declined to do so unless the customers can meet additional burdensome conditions. Where the current oligopoly has already softened competition, Stewart's approach has prompted others in the Big 4 to adjust their own competitive strategies to the benefit of customers.

12. New entry or expansion by existing market participants would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. There are significant barriers to entry into markets for the provision of title insurance for large commercial transactions and the provision of title information services, including securing state licensure, necessary capital, a national geographic footprint, and proven experience in handling large commercial transactions. These barriers make entry or expansion difficult, and incapable of constraining the merged entity. High entry barriers also make timely and sufficient entry unlikely in the relevant markets for title information services.

13. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Merger.

JURISDICTION

14. Respondents are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. The Merger constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

RESPONDENTS

16. Fidelity is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 601 Riverside Avenue, Jacksonville, Florida 32204. Fidelity is the country's largest title insurance company. It underwrites title insurance under several brands, including Fidelity National Title Insurance Company, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Alamo Title Insurance, and National Title Insurance of New York, Inc. Fidelity issues policies in all 50 states and the District of Columbia. Through a subsidiary, Fidelity also owns title plant assets throughout the United States. In 2018, Fidelity's revenues totaled $7.594 billion, of which $7.526 billion derived from title premiums, escrow, title information services, and other fees related to the provision of title insurance.

17. Stewart is a for-profit, publicly traded corporation existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1360 Post Oak Blvd., Suite 100, Houston, Texas 77056. In the United States, Stewart provides title insurance and related services through its subsidiaries, Stewart Title Guaranty Company and Stewart Title Insurance Company. Stewart issues policies in all 50 states and the District of Columbia. Stewart and its affiliates own title plant assets throughout the United States. In 2018, Stewart's revenues totaled $1.907 billion, of which $1.837 billion came from its title-related business services, including title information services.

THE ACQUISITION

18. Pursuant to a merger agreement dated March 18, 2018 ("Merger Agreement"), Fidelity seeks to acquire Stewart for 50 percent cash and 50 percent Fidelity common stock, in a transaction valued at $1.2 billion. Respondents' combined revenues from title-related business services exceed $9.3 billion.

INDUSTRY BACKGROUND

19. Title insurance is an insurance product that protects the policyholder from financial loss resulting from third-party claims or liens on the insured property. The owner or buyer of real estate typically purchases title insurance in conjunction with a variety of other services essential to closing a real estate transaction, and pays a one-time premium at closing.

20. There are two types of title insurance policies. A title insurance policy that protects the owner of a property is called an owner's policy; a title insurance policy that protects the mortgage lender is called a lender's policy. Typically, the owner or buyer of real estate purchases both the owner's policy and the lender's policy.

21. The vast majority of real estate transactions in the United States result in the issuance of a title insurance policy, whether the underlying property is residential or commercial in character. Residential properties include single-family homes, individual condominium units, multi-unit residential buildings with up to four units, and individual vacant residential lots. Commercial properties include everything else, including larger multi-family residential properties, such as apartment buildings.

22. Underwriters deliver title insurance through direct operations and agency operations. In direct operations, underwriters issue title insurance directly to property buyers and lenders. In agency operations, an independent title agent issues the title insurance policy on behalf of an underwriter—known as "writing on the underwriter's paper." The underwriter on whose paper the policy is written bears the risk underlying the policy. Agents often maintain relationships with multiple underwriters, enabling them to choose which underwriter's paper to use for each individual transaction.

23. A customer typically places an order for a title insurance policy at or near the start of a real estate transaction. After receiving an order, the underwriter or its agent conducts a title search to identify potential title defects or other encumbrances on the property, such as liens, easements, usage restrictions, and transfer restrictions.

24. In many parts of the country, underwriters and their agents rely on title plants when conducting the title search. If there is no title plant for a specific county, title searchers must turn to less efficient options such as public institutions (*e.g.*, county recorder and assessor offices).

25. Once the title search is complete, the underwriter or title agent issues a title commitment listing any defects found during the title search that will be excluded or excepted from the final insurance policy unless cured before closing.

26. Customers prefer title insurance policies with fewer exceptions. As the real estate transaction progresses, the customer may seek to convince an underwriter that an excepted risk should be covered by the title insurance policy. In such situations, the underwriter may have to spend additional resources working with the customer to understand the peculiarities of the specific transaction.

27. Alternatively, an underwriter may be willing to accept additional risk for a fee by allowing the customer to purchase an endorsement that provides coverage for a specified issue. Underwriters may vary in the conditions they impose on the insured before agreeing to issue a given endorsement.

28. An escrow officer or closer—often an employee of the underwriter or its agent—conducts the closing in most real estate transactions. Upon closing, the escrow officer transfers the funds from the buyer to the seller. At this time, the buyer pays the title insurance premium. The underwriter then issues the final title insurance policy, either directly to the customer or through an agent.

29. When an underwriter issues the title insurance policy directly, it retains the entire title insurance premium and any additional fees (*e.g.*, fees for endorsements). When an agent issues the title insurance policy on behalf of an underwriter, the agent receives the entire premium and additional fees. The agent then must remit a contractually established or negotiated portion of this revenue to the underwriter. The division between the agent's retained revenue and the amount remitted to the underwriter is referred to as the "split."

30. Each state and the District of Columbia independently regulates the provision of title insurance. State regulators impose various restrictions on title insurance providers, including licensing rules and regulations governing title insurance premiums and related fees.

31. In general, state regulation of title insurance premiums falls into one of three categories:

a. Promulgated Rate: In three states (New Mexico, Florida, and Texas), certain aspects of price and insurance coverages are set by the state. However, in no promulgated-rate state is every aspect of price, quality, and service determined by the state. For example, state regulations in New Mexico and Florida permit underwriters to file a rate below the promulgated rate for approval by the state regulator. Promulgated rate regimes do not establish requirements on many important non-price aspects of title insurance underwriting, including the level of service or the particular underwriting standards and conditions that an underwriter may offer for any given transaction.

b. Filed Rate: In filed-rate states, title insurance underwriters file rate manuals for approval by a state regulator. The rate manual establishes the underwriter's title insurance prices for transactions within each filed-rate state. These rate filings are publicly available and accessible by competitors. Some filed-rate states permit competing underwriters to file rates collectively through a rating bureau rather than requiring each underwriter to submit an individual rate filing. In these rating bureau states, underwriters may elect to file separate rates with lower prices if they so choose, subject to state regulatory approval of the individual rate filing.

c. Negotiable Rate: In negotiable-rate states, title insurance underwriters determine their prices or coverage on a transaction-by-transaction basis. Such transaction-by-transaction negotiation also occurs for large commercial transactions in many filed-rate states where state regulations

permit underwriters to include negotiability provisions in their filed rates. Respondents' rate filings in many states allow them to negotiate rates for transactions over a particular liability threshold. Thus, in these states, underwriters may negotiate on a transaction-by-transaction basis for many or all large commercial transactions.

RELEVANT PRODUCT MARKETS

Title Insurance Underwriting for Large Commercial Transactions

32. Title insurance underwriting for large commercial transactions is a relevant product market. The industry recognizes that large commercial transactions have distinct requirements from other commercial transactions and that the set of available suppliers for these transactions is limited. Each of the Big 4 has a dedicated commercial division that focuses specifically on servicing these transactions. While the industry is not always consistent in what constitutes a large commercial transaction, for purposes of this complaint, a large commercial transaction is a transaction resulting in a policy with a liability amount in excess of $20 million.

33. There is no substitute for title insurance. Most real estate transactions in the United States involve financing from a lender, and most lenders require title insurance. Owners and lenders cannot switch to any other product for the purpose of ensuring marketable title, priority of liens, and the ability to sell the loan on the secondary market.

34. Commercial real estate transactions involve the sale or financing of non-residential real property—essentially, any properties other than single-family homes, individual condominium units, and multi-family residential buildings with four or fewer units. In commercial transactions, property buyers or their counsel typically choose the title insurance underwriter subject to lender approval.

35. Each large commercial transaction requires an individual title insurance order with transaction-specific negotiation over a variety of terms. The negotiated terms may include price, scope of coverage, service levels, and ancillary fees and services. This transaction-by-transaction negotiation occurs regardless of whether a customer solicits multiple bids for a given large commercial transaction. These individual negotiations allow suppliers to tailor specific price and non-price terms for each large commercial transaction.

36. Underwriters receive information about the nature of the property and the liability amount as part of the title insurance order. As a result, underwriters can distinguish large commercial transactions from other transactions.

37. Property owners and lenders seeking title insurance for large commercial transactions cannot use arbitrage to defeat a price increase. Each title insurance policy, though it shares a common form and many similar terms with other policies, is a unique product resulting from significant research into title defects for a specific property (or set of properties). Title insurance policies guarantee the transfer of title in the underwritten transaction only; a new policy must issue for subsequent transactions involving the same property.

38. Large commercial transactions are susceptible to harm due to a number of distinct requirements, or strong customer preferences, that limit the underwriter options for these transactions to the Big 4. In order to provide title insurance for large commercial transactions, underwriters must meet several key requirements, including, but not limited to:

a. Financial strength: Customers purchasing title insurance for large commercial transactions require an underwriter that has sufficient surplus to make the policyholder whole in the event of a catastrophic title defect. Most states, and many policyholders, limit the liability an underwriter may assume based on the underwriter's balance sheet.

b. Commercial expertise: For large commercial transactions, customers have a strong preference for underwriters with significant, demonstrated expertise who can handle any possible issue that may arise. Likewise, customers prefer to have defects identified and adequately resolved prior to closing, rather than having to file a claim after suffering financial loss because of an inexperienced underwriter.

c. National footprint: Customers with large commercial transactions often engage in frequent transactions across the United States. These customers strongly prefer to develop a relationship with an underwriter with a national footprint, allowing them to turn to a single point of contact to coordinate procurement of title insurance wherever they may need it. A single point of contact results in a more efficient title procurement process for customers, as the underwriter can develop familiarity with the customer's business and real estate processes, and can also provide pricing, coverage, and service benefits.

Title Information Services

39. Title information services refers to providing access to title plant information, whether by direct access to title plants via ownership or subscription, or indirect access to information contained in title plants (*e.g.*, search services). Typically, title plants are specific to a single county because the information contained in most title plants comes from county records. In some metropolitan areas, however, a single title plant may cover multiple counties.

40. Title information services customers require property information covering the county in which the property at issue is located, and title information services providers usually provide access to title plants on a county-by-county basis. Title information services customers cannot substitute title information services products that do not cover the relevant county for ones that do.

41. Relevant product markets for title information services include, but are not limited to, title information services covering the following counties or county-equivalents:

a. Santa Cruz County, Arizona;

b. Marin County, California;

c. Monterey and Santa Cruz Counties, California;

d. San Mateo County, California;

e. Sonoma County, California;

f. Fremont County, Colorado;

g. Gunnison County, Colorado;

h. Cook County, Illinois;

i. Cascade County, Montana;

j. Bernalillo, Sandoval, and Valencia Counties, New Mexico;

k. Clackamas, Multnomah, and Washington Counties, Oregon;

l. Harris County, Texas;

m. Hays County, Texas; and

n. Cowlitz County, Washington.

42. There is no substitute for the provision of title information services covering these counties or county-equivalent areas. In each case, county recorders and other public sources for information pertaining to real estate are insufficient substitutes for title plants because of the reduction in accuracy or increase in cost associated with using public records in place of a title plant.

RELEVANT GEOGRAPHIC MARKETS

A. Title Insurance Underwriting for Large Commercial Transactions

43. Each U.S. state and the District of Columbia constitutes a separate geographic market for title insurance underwriting for large commercial transactions. For purposes of this complaint, the relevant geographic markets are the 42 individual states and the District of Columbia where the merger is presumptively anticompetitive, and the three states in which the merger potentially raises significant competitive concerns. A full list of these states can be found in Appendix A.

44. Most large commercial transactions occur within a single state. A customer seeking to purchase title insurance for a property in a specific state or territory must purchase title insurance from a title insurance underwriter (or the title insurance underwriter's agent) who is licensed to sell title insurance in that state. Each state imposes and enforces its own distinct

set of licensing and operational requirements, including risk limits, price regulation, and coverage rules. In the event of a price increase for title insurance in an individual state, customers cannot turn to an underwriter that is licensed in a different state or territory.

45. In addition, the impact of certain defects of title varies based upon state law. As a result, it is not practicable for a customer seeking title insurance in one state to turn to a title insurer who lacks expertise in that state to purchase title insurance.

46. Large commercial transactions that involve the simultaneous issuance of separate title insurance policies in multiple states still require an underwriter capable of issuing separate policies in every separate state involved. An underwriter cannot underwrite the entire transaction unless it is able to issue policies in each individual state, and the underwriter must still comply with each state's individual pricing requirements when preparing the portfolio of policies.

47. To the extent that such multi-state transactions are analyzed in a geographic market that is larger than individual states, the harm caused by the Merger would be magnified by the broader market. Only the Big 4 have the personnel, scope of operations, broad and deep licensure, and financial surplus necessary to service most such multi-state transactions.

Title Information Services

48. The relevant geographic markets for title information services may be as narrow as the individual counties covered by the relevant title plants or may be as broad as the entire world. Title information services are provided digitally in many counties, such that customers may turn to a supplier located anywhere in the world provided the supplier's title plant offers the appropriate geographic coverage. Where title plants are maintained in analog form, however, customers must be able to access the relevant information efficiently for manual review; thus, they require local providers.

MARKET PARTICIPANTS

49. The Big 4 are the only practical alternatives for the vast majority of customers for title insurance for large commercial transactions. Marketplace outcomes reflect these drastic differences between the Big 4 and all other underwriters. From 2015 to 2018, the Big 4 underwrote transactions accounting for approximately 98 percent of all title insurance revenues for large commercial transactions nationwide. Over the same time period, the Big 4 accounted for at least 98 percent of title insurance revenues for large commercial transactions in 45 of the 50 individual states, as well as the District of Columbia.

50. The Big 4 are the only practical alternatives for customers with large commercial transactions because they are the only underwriters with sufficient financial strength to bear the risk associated with such transactions.

51. The primary measure of a title insurance underwriter's financial strength is its surplus. Surplus refers to the pool of assets each underwriter dedicates to cover potential claims above its statutorily-required reserves. Surplus is a key determinant of the maximum amount of

liability that an underwriter may insure in any particular transaction, typically referred to as the underwriter's "single risk limit." States, underwriters themselves, and sometimes customers impose single risk limits on each underwriter.

52. Surplus levels are "critical to winning business" in the commercial segment, according to a Stewart strategic planning document. Each of the Big 4 has a surplus greater than $500 million. Fidelity has the largest with $1.79 billion in surplus. Stewart is third-largest with $631 million in surplus. Outside the Big 4, only one underwriter exceeds $100 million in surplus; the rest are below $65 million. Consistent with these surplus amounts, the Big 4 have considerably larger single risk limits than other title insurance underwriters.

53. In order to insure a transaction that exceeds its single risk limit, the insurer must use coinsurance or reinsurance. With reinsurance, a lead underwriter cedes risk above a specified threshold to a reinsurer, which charges the underwriter an additional premium. Customers for large commercial transactions often prefer not to purchase title insurance from a smaller insurer that is dependent on reinsurance to cover potential claims. Reinsurance adds to the complexity and risk of the transaction by adding an extra layer of insurance, which may complicate the customer's ability to recover in the event of a claim. Moreover, the reinsurance premium adds additional cost that may ultimately pass through to the customer or render a bidder uncompetitive against a larger insurer that is less dependent upon reinsurance.

54. With coinsurance, multiple underwriters enter into direct relationships with the policyholder and each underwriter becomes liable for an agreed upon portion of the risk. Customers for large commercial transactions often prefer not to purchase a coinsured title insurance product because the product may have more administrative complications, a higher price, or both.

55. In addition, lenders often require their borrowers to use the Big 4 for title insurance for their large commercial transactions.

56. Market participants in the relevant markets for title information services vary by the county of coverage but include title insurance underwriters, title agents, and data companies.

MARKET CONCENTRATION AND THE MERGER'S PRESUMPTIVE ILLEGALITY

A. Title Insurance Underwriting for Large Commercial Transactions

57. Post-Merger, the combined entity would have a large share in most states and the District of Columbia. In many states, Fidelity and Stewart's combined market share for large commercial transactions is greater than 50 percent; in most states, the combined market share is greater than 40 percent. The Merger would greatly increase concentration in already highly concentrated markets and is presumptively unlawful.

58. The HMG and courts use HHIs to measure concentration. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-merger. The HMG presume a transaction is likely to create or enhance market power—and is

presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points. In at least 42 states and the District of Columbia, the Merger leads to concentration levels and changes in concentration that make the Merger presumptively unlawful.

59. In three states, the HHI increases by between 100 and 200 points and results in a highly concentrated market. Under the HMG, a merger that results in an increase of this level potentially raises significant competitive concerns and warrants scrutiny. In five states, the market is already highly concentrated and the merger will not result in an HHI increase of 100 or above.

60. In most state-level markets, the Merger also will result in a large increase in concentration. For example, in Alaska, Idaho, Maryland, New Mexico, and Virginia, the Merger results in a final HHI of more than 4,000 points and increases of more than 1,000 points. This change is concentration is four times the level that leads with a presumption of illegality. In Arizona, Arkansas, California, the District of Columbia, Florida, Illinois, Maine, Massachusetts, and North Carolina, the Merger results in a final HHI of more than 4,000 points and increases of more than 200 points. In Georgia, Mississippi, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, and Texas, the Merger results in a final HHI of more than 3,500 points and increases of more than 650 points. In each of these markets, among others, the Merger is presumptively unlawful.

61. In at least 30 states and the District of Columbia, the parties are two of the three largest title insurers for large commercial transactions.

Title Information Services

62. The Merger is presumptively unlawful in no fewer than fourteen relevant title information services markets. Each of these markets will be highly concentrated after the Merger and will experience a large increase in concentration.

63. Post-Merger, three or fewer independent title plant providers will remain for title information services covering at least the following six counties:

a. Fremont County, Colorado;

b. Gunnison County, Colorado;

c. Cook County, Illinois;

d. Santa Cruz County, Arizona;

e. Cascade County, Montana; and

f. Cowlitz County, Washington.

64. In eight other markets, by acquiring Stewart, Fidelity will gain control of at least 50 percent of the ownership interests in certain joint title plants offering title information services. This ownership stake will confer to Fidelity control over joint plant operations, allowing Fidelity to increase prices for, or diminish access to, the information contained in these title plants. For example, the Merger will reduce the number of relevant owners, and grant Fidelity an increased share in excess of 50 percent, of the joint title plant that provides title information services covering Bernalillo, Sandoval, and Valencia Counties, New Mexico. No other provider offers comparable title information services in these counties.

ANTICOMPETITIVE EFFECTS

A. Anticompetitive Harm in Markets for Title Insurance Underwriting for Large Commercial Transactions

65. The Merger likely will result in anticompetitive harm to customers seeking title insurance for large commercial transactions in 45 states and the District of Columbia. The forms this harm may take, as well as the mechanisms by which it is likely to occur, vary by state and state regulatory regime.

66. The Merger will eliminate significant head-to-head competition between Fidelity and Stewart for individual large commercial transactions. Today, this competition between Respondents benefits purchasers of title insurance. In addition, the elimination of Stewart as an independent competitor will increase the ability and incentive of the remaining underwriters to pursue tacitly a more cooperative strategy to the detriment of customers with large commercial transactions.

67. Absent competition from an independent Stewart, Fidelity will not need to compete as aggressively on price, coverage, underwriting requirements, or service as it does today. Respondents are close competitors for many large commercial transactions. In at least 31 U.S. states and the District of Columbia, it combines two of the top three competitors in the market. Fidelity and Stewart compete to establish and maintain their relationships with large commercial customers through dedicated corporate divisions focused on commercial business. When customers seek bids for large commercial transactions, they often request bids from both Fidelity and Stewart, two of only four available underwriting options.

68. Current competition between Respondents provides price and non-price benefits in many large commercial transactions across state regulatory regimes. In all states, Respondents compete directly on important non-price factors such as service and the scope and terms of coverage. In states where underwriters can negotiate prices on a transaction-by-transaction basis, customers leverage Respondents against one another to receive better pricing and more favorable coverage terms. For example, in Virginia, where rates are negotiable for large commercial transactions, a Fidelity executive observed, "Stewart Title [is] dropping their prices to grab market share in a shrinking CRE market. Looks like we will need to do the same." In promulgated-rate states, Respondents compete with one another on price where permissible by maximizing allowable discounts among other things.

69. In states where underwriters file their rates with state regulators, the presence of Stewart as a competitor puts downward pressure on prices and enhances competition on non-price factors such as service and the scope and terms of coverage.

a. In a recommendation to raise rates in Connecticut, a Stewart executive noted that "a rate increase by Stewart would make it more likely that the Fidelity companies would ultimately find it necessary to also increase their rates."

b. In a discussion of rate setting strategy in Michigan, Stewart noted that it had been able to grow business due to its lower rates, but that it should "close that pricing gap" between it and Fidelity and First American by raising its rates, and set its rates slightly below them to retain "Stewart's pricing advantage" in order to retain current business and still grow commercial revenue.

c. Reacting to the announcement of a new entrant filing a discounted rate to undercut the New York rating bureau rate, a Fidelity executive observed: "The only way this is a problem is if some peckerhead (an actual player in the market) overreacts and files a cut rate." The executive later clarified that an "actual player in the market" meant Stewart or Old Republic. No such reaction by either Big 4 company occurred, and the discounting entrant has since ceased operations.

70. In states where rates are filed, Fidelity and other underwriters analyze the rates of each of the Big 4 with the primary goal of ensuring that their rates are similar to each other's.

71. Among the Big 4, Stewart has shown itself willing to prioritize its own short-term gains. Each transaction differs, but as a general matter and consistent with its industry reputation, Stewart is willing to, among other things:

a. offer its customers the lowest possible price in a variety of direct and indirect ways, including bidding with low prices, reducing fees for ancillary services, aggregating policies in multi-site transactions in creative and customer-friendly ways, and deferring costs in promulgated rates states;

b. invest its own time and resources (in the form of employee hours) in finding ways to insure certain risks, require less mitigation of a particular risk, or determine that for a particular customer a particular risk is not material; and

c. require its customers to secure fewer mineral rights waivers than other underwriters prior to providing mineral rights endorsements.

72. Stewart's attempts to win customers lead to reduced costs for the customer or a better product (*e.g.*, more complete coverage) without an equivalent increase in price. Stewart's actions in this regard have led others in the Big 4 to reconsider their price and quality offerings.

73. Stewart's behavior in this regard is consistent with pressure that Stewart has faced from activist shareholders to increase profitability. As one Stewart executive recognized, Stewart's "investors are going to want to know how we plan to change the dynamic," and Stewart needed "to be disruptive and innovative, a 'me too' or 'status quo' strategy is not the impact play we can count on."

74. Post-Merger, Fidelity will impose on Stewart the same uniform pricing rules and underwriting standards that it maintains for the other brands within the Fidelity family. Even though Fidelity may maintain the Stewart brand, Fidelity will prevent Stewart from competing with Fidelity on price and non-price aspects of competition in the manner that Stewart does today. Fidelity executives' ordinary course statements during the pendency of the Merger confirm that post-Merger, Stewart no longer will provide the same competitive pressure on price and non-price factors:

a. After reporting Stewart's lower prices on a transaction in Massachusetts, a Fidelity executive wrote to his manager, "I trust that when Stewart joins the family, they too will get some pricing constraints." Fidelity's East Coast Division Manager Ed Burton, who supervises the company's National Commercial Pricing Director, reassured this executive: "They will."

b. Donald Cole, Fidelity's Chief Corporate Underwriter, observed that Stewart "better enjoy the stupidity while [it] can" with respect to its flexible underwriting approach on a transaction in Alaska.

c. Donald Cole also expressed doubt that Fidelity should match Stewart's lower rates for a transaction in Alabama, noting that "if the deal goes through we will control the rates Stewart files."

Anticompetitive Harm in Markets for Title Information Services

75. The Merger also is likely to cause anticompetitive effects by combining Respondents' title information services assets.

76. As a result of the Merger, Fidelity will have greater incentive and ability to increase prices or reduce access to its combined title plants covering no fewer than fourteen counties or county-equivalent areas. In each such area, the Merger reduces the number of remaining competitively significant players to three or fewer. Post-Merger, Fidelity would be able to increase prices or reduce access to title information services either unilaterally or in coordination with competing providers.

77. Respondents' title plant assets are close substitutes in at least six counties throughout the United States. The Merger eliminates significant direct, head-to-head competition between Fidelity and Stewart for title information services covering these counties.

78. In at least eight counties or county-equivalent areas, Respondents own overlapping interests in joint title plants that, when combined, will result in Fidelity controlling a majority stake in the plant. In these counties, the Merger will increase the incentive and ability of the joint plant owners to raise prices or reduce output for title information services. For example, in Bernalillo, Sandoval, and Valencia Counties, New Mexico, Fidelity will increase its ownership stake to control the majority of a single joint plant offering subscription access to third-party title companies. Post-Merger, at most three joint owners will remain in the plant. With control of Stewart's ownership share, Fidelity will need the agreement of one additional joint plant owner to increase subscription fees.

LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

79. No other firm is likely to replace the loss of competition from the Merger. Respondents cannot show, post-Merger, that any firm is likely to replace the competition provided by Stewart.

80. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger. A firm seeking to enter or expand in the market for title insurance underwriting for large commercial transactions would face significant barriers to entry.

81. Past failed efforts to enter and expand confirm that no insurer will be able to replicate Stewart's competitive significance. No entrant or failed entrant has come close to achieving the scale and competitive significance of the Big 4 for at least the past decade.

82. A firm looking to enter or expand into a particular state or territory must satisfy regulatory requirements in order to underwrite title insurance. It can take years for a new underwriter to acquire the necessary state licenses, especially since some states require an underwriter to be "seasoned"—that is, to operate profitably in other states—for several years prior to licensure. New entry to these states therefore would not be timely. Even assuming entry would occur, this delay would allow the anticompetitive effects of the transaction to accrue for several years.

83. Once licensed, an insurer must still clear significant additional hurdles to become operational in each state. In order to replicate Stewart's operational presence, a new entrant would need to establish a national network of commercial services offices, local direct offices, and agency operations in every state and the District of Columbia.

84. In addition, to participate in the relevant underwriting markets, an entrant must procure title information services. Title information services are essential to underwriting title

insurance. Some states explicitly require title plant access or ownership as a condition of licensure. For example, Oregon requires title companies to own a title plant in every county in which they sell title insurance. The costs and time required to construct title plants or otherwise procure access to title information services can be significant. The Merger's likely effects in markets for title information services may increase this barrier to entry where Respondents own overlapping title plant assets.

85. In order to replicate Stewart's competitive significance in the relevant markets, an insurer must do more than clear these barriers in a single state—they must clear them in substantially all states. Thus, an additional barrier to entry facing a firm looking to enter or expand is the need to have a national footprint and the ability to provide a single point-of-contact who can access that footprint.

86. Even if an underwriter could establish or expand its operations and licenses to replicate Stewart in a timely manner, additional barriers to entry remain, including capital requirements. An underwriter's surplus determines its ability to compete for large commercial transactions; no other underwriter comes close to Stewart's surplus outside of the Big 4.

87. It is extremely unlikely that any fringe competitor or new entrant would be able to develop surplus on par with Stewart. Outside of the Big 4, the next largest underwriters in terms of surplus are approximately one-sixth and one-tenth the size of Stewart. Growing surplus through business operations would take considerable time, and securing cash from investors is unlikely, given the relatively low rate of return that one would expect from an investment in a title insurer.

88. Demonstrated expertise underwriting large commercial transactions is also a barrier to entry. Customers prefer using those underwriters that have the indisputable expertise to underwrite (and address any arising claims) in a timely manner. Given the amount of money at issue in large commercial transactions, customers place increased importance on the underwriter's expertise. The Big 4 have a strong incumbency advantage from their historical experience underwriting large commercial transactions. It is highly unlikely, therefore, that any entry in the near term could be sufficient to prevent the anticompetitive effects flowing from the Merger.

89. In order to enter or expand, an underwriter must recruit and hire competent and experienced salespeople, underwriters, and title officers. Hiring enough employees to enter or expand on a sufficient scale to constrain the merged firm would take a significant amount of time and effort, particularly in light of non-competition agreements and retention bonuses that the Big 4 have employed with respect to their key personnel.

90. A firm seeking to enter or expand in the market for title information services also would face significant barriers to entry associated with constructing a title plant. An entrant would need to collect, compile, and index historical property records for each property located in a geographic area. This process is time-consuming and expensive. As a result, entry or expansion in title information services is unlikely and would be neither timely nor sufficient to replace the competition lost as a result of the Merger.

Efficiencies

91. Respondents cannot demonstrate cognizable merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Merger's likely significant anticompetitive effects.

VIOLATION

Count I – Illegal Agreement

92. The allegations of Paragraphs 1 through 91 above are incorporated by reference as though fully set forth.

93. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II – Illegal Acquisition

94. The allegations of Paragraphs 1 through 93 above are incorporated by reference as though fully set forth.

95. The Merger, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the fourth day of February, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission headquarters offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the

complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, in Washington, D.C. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Fidelity and Stewart were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between Fidelity and Stewart that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Fidelity and Stewart provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Stewart as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Acting Secretary and its official seal to be hereto affixed, at Washington, D.C., this fifth day of September 2019.

By the Commission, Chairman Simons recused and Commissioner Wilson dissenting.

APPENDIX A

States in Which the Merger is Presumptively Unlawful

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Georgia
Idaho
Illinois
Indiana
Kansas
Kentucky
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Virginia
West Virginia
Wyoming

States in Which the Merger Warrants Scrutiny

Louisiana
Washington
Wisconsin

ORDER DISMISSING COMPLAINT

On September 6, 2019, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believ e that Respondents Fidelity Nation l Financial, Inc. ("Fidelity") and Stewart Information Services Corporation ("Stewart") (collectively, "Respondents") executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C.

§ 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act. Complaint Counsel and Respondents have now filed a Joint Motion To Dismiss Complaint, which states that Respondents have terminated their agreement and that Fidelity has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition.[1]

The Commission has determined to dismiss the Complaint without prejudice, in light of Respondents' decision to abandon the proposed transaction and the withdrawal of Fidelity's Hart-Scott-Rodino Notification and Report Forms. Respondents would not be able to effectuate the proposed transaction without Fidelity filing new Hart-Scott-Rodino Notification and Report Forms. The most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint therefore have been accomplished without the need for further administrative litigation.[2]

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission, Chairman Simons recused.

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1 *See* Joint Motion To Dismiss Complaint (September 18, 2019), *at* 1 and Attachment.

2 *See, e.g., In the Matter of DrafiKings, Inc. and FanDuei Limited,* Docket No. 9375, Order Dismissing Complaint (July 14, 2017); *In the Matter of Advocate Health Care Network, Advocate Health and Hospitals Corporation, and NorthShore University HealthSystem , Docket No. 9369,* Order Dismissing Complaint (Mar. 20, 2017); *In the Matter of The Penn State Hershey Medical Center and PinnacleHealth System, Docket No. 9368,* Order Dismissing Complaint (Oct. 23, 2016); *In the Matter of Superior Plus Corp. and Canexus Corporation, Docket No. 9371,* Order Dismissing Complaint (Aug. 2, 2016); *In the Matter of Staples Inc. and Office Depot, Inc., Docket No. 9367,* Order Dismissing Complaint (May 18, 2016).

Complaint

IN THE MATTER OF

YOUR THERAPY SOURCE, LLC, NEERAJ JINDAL, AND SHERI YARBRAY

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4689; File No. 171 0134
Complaint, October 26, 2019 – Decision, October 26, 2019

This consent order addresses Your Therapy Source, LLC's agreement to lower rates paid to therapists and inviting other therapist staffing companies to lower rates paid to therapists. The complaint alleges that (1) Your Therapy Source, (2) Sheri Yarbray, the owner of Your Therapy Source, and (3) Neeraj Jindal, the former owner of Integrity Home Therapy agreed, and invited others to agree, to lower the rates paid to therapists for treating patients of home health agencies in the Dallas/Fort Worth, Texas area. The consent order prohibits Respondents from entering into or organizing agreements with any person to lower, fix, maintain, or stabilize the compensation that a Respondent or such person pays, or is willing to pay, in competing with each other for employees and independent contractors, including therapists.

Participants

For the *Commission*: *Armine Black* and *Robert S. Canterman.*

For the *Respondents*: *William E. Berlin, Hall, Render, Killian, Heath & Lyman, P.C., Daniel Kotchen, Kotchen & Low, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, hereinafter sometimes collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges in that respect as follows:

I. Nature of the Case

1. This matter concerns competing therapist staffing companies agreeing, and inviting other therapist staffing companies to agree, on rates paid to therapists for treating home health agency patients in the Dallas/Fort Worth, Texas area. Respondents' conduct harmed competition among therapist staffing companies to contract with therapists at competitive rates.

II. Respondents

2. Your Therapy Source, LLC ("Your Therapy Source") is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal address at 8624 Mid Cities Boulevard, Suite 200, North Richland Hills, Texas 76182. Your Therapy Source is a therapist staffing company operating in the Dallas/Fort Worth, Texas area.

3. At all times relevant to this Complaint, Neeraj Jindal owned Fit 4 Life Therapy, LLC, d/b/a Integrity Home Therapy ("Integrity"), a therapist staffing company operating in the Dallas/Fort Worth, Texas area. As owner, Mr. Jindal was responsible for Integrity's business and financial operations. Mr. Jindal sold Integrity in August, 2017, to a new owner who had no prior affiliation with Integrity or involvement in the conduct alleged in this Complaint. Mr. Jindal's principal address is 1901 Long Prairie Road, Suite 220-75, Flower Mound, Texas 75022.

4. Sheri Yarbray owns Your Therapy Source and has served as the Chief Executive Officer since she founded the company over ten years ago. As Chief Executive Officer, Ms. Yarbray is responsible for Your Therapy Sources' business and financial operations. Ms. Yarbray's principal address is 8624 Mid Cities Boulevard, Suite 200, North Richland Hills, Texas 76182.

III. Jurisdiction

5. Respondents are "persons" or a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Respondents' business practices and conduct, including the practices and conduct alleged herein, are in commerce or affect commerce, as Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44, defines "commerce."

IV. Overview of Therapist Staffing Companies

7. Therapist staffing companies contract with home health agencies to provide therapists, including physical therapists, physical therapist assistants, occupational therapists, occupational therapist assistants, and speech therapists, to treat home health agency patients (hereinafter sometimes collectively referred to as "therapists").

8. Home health agencies pay therapist staffing companies a negotiated rate referred to as a "bill rate" to provide therapists to treat home health agency patients. The bill rate is the primary source of revenue for therapist staffing companies.

9. Therapist staffing companies contract with or employ therapists to provide services to home health agency patients. Therapists provide an initial patient evaluation and then may treat—or supervise a therapist assistant to treat—the patient during a patient visit. Therapist staffing companies pay therapists a rate per patient visit or per patient evaluation referred to as a

"pay rate." Pay rates usually are the primary expense of therapist staffing companies. A therapist staffing company maximizes its profits when bill rates are high and pay rates are low.

10. Therapist staffing companies compete with each other for contracting with or employing therapists. Therapists may contract with multiple therapist staffing companies and choose among them based on pay rate, volume of patient referrals, and location of patients.

V. Anticompetitive Conduct

A. Respondents agreed to lower pay rates for therapists

11. Respondents exchanged Integrity's and Your Therapy Source's pay rate information with each other and jointly agreed to lower therapist pay rates to the same level. Respondents agreed to coordinate with each other on pay rates in an attempt to prevent therapists from switching to competing therapist staffing companies paying higher rates.

12. In March 2017, a home health agency contracting with Integrity informed Integrity that it planned to lower Integrity's bill rate for therapists effective April 1, 2017. The new bill rate was substantially lower than the bill rate the home health agency was currently paying Integrity.

13. Mr. Jindal was concerned that the difference between the bill rates and pay rates for therapists would leave Integrity with shrinking profits.

14. Mr. Jindal wanted to know the pay rates of his competitors and whether his competitors also were facing lower bill rates. He asked a physical therapist contracting with Integrity to contact Your Therapy Source as Integrity's agent to find out what Your Therapy Source was paying its therapists, whether home health agencies had lowered Your Therapy Source's bill rates, and whether Your Therapy Source intended to lower its pay rates.

15. In response to Mr. Jindal's request, Integrity's physical therapist, acting as an agent for Integrity, sent a text message on March 10, 2017, to Sheri Yarbray, the owner of Your Therapy Source, asking whether she had considered lowering pay rates for physical therapist assistants. Based on pay rate information he received from Mr. Jindal, Integrity's physical therapist disclosed in his text message to Ms. Yarbray the lower pay rate per patient visit that Integrity was planning to pay physical therapist assistants.

16. In her text message replying to Integrity's agent, Ms. Yarbray wrote, "Yes I agree[.] I'll do it with u." Ms. Yarbray also informed Integrity's agent that, in addition to pay rates for physical therapist assistants, she also wanted to lower pay rates for physical therapists and included Your Therapy Source's therapist pay rates in her text message.

17. Integrity's agent replied that if all therapist staffing companies were "on the same page, there [wouldn't] be a bunch of flip-flopping," meaning therapists would not just leave one therapist staffing company to contract with others paying higher rates. In her reply text message, Ms. Yarbray wrote, "I agree but we need to get everybody to do it[.]"

18. On March 10, 2017, shortly after exchanging text messages with Ms. Yarbray, Integrity's agent informed Mr. Jindal that Your Therapy Source was willing to lower pay rates.

19. On March 17, 2017, Integrity's agent followed up with Ms. Yarbray in another text message. He told Ms. Yarbray that Integrity was decreasing physical therapist and physical therapist assistant pay rates with Integrity's next scheduled date to pay therapists.

20. In her reply, Ms. Yarbray told Integrity's agent "I can join in where did you go," and disclosed Your Therapy Sources' current pay rates. Integrity's agent then sent a text message to Ms. Yarbray with the pay rates Integrity was planning to pay physical therapists and physical therapist assistants. In response, Ms. Yarbray wrote "Ok we are going to lower [physical therapist rates] to your numbers."

21. Two days later, on March 19, 2017, Mr. Jindal notified a number of physical therapists, physical therapist assistants, and occupational therapists contracting with Integrity that he was lowering their pay rates.

22. On April 6, 2017, after a home health agency notified Your Therapy Source that it planned to lower bill rates, Ms. Yarbray sent a text message to Integrity's agent telling him, "We have to drop rates everywhere."

B. Respondents invited other therapist staffing companies to collude on pay rates for therapists

23. Respondents communicated invitations to collude on pay rates to other competing therapist staffing companies in the Dallas/Fort Worth area.

24. On March 10, 2017, the same day Integrity's agent told Mr. Jindal that Ms. Yarbray agreed to lower pay rates, Mr. Jindal sent separate text messages containing almost identical language to four other competing therapist staffing companies. Mr. Jindal informed the other therapist staffing companies that he was "reaching out to [his] counterparts about lowering PTA [physical therapist assistant] rates" and told them the rate per patient visit that Integrity was planning to pay physical therapist assistants. Mr. Jindal also asked them about their "thoughts" on "collectively [lowering physical therapist assistant rates] together."

25. In his text messages, Mr. Jindal also told two of the four therapist staffing companies that he had Your Therapy Source "on board" to lower rates. He informed the other two therapist staffing companies that he had Your Therapy Source plus one other therapist staffing company "on board."

26. Sometime in March or early April, 2017, the same home health agency that lowered Integrity's bill rates notified Your Therapy Source that it was planning to lower Your Therapy Source's bill rates.

27. After receiving the notice from the home health agency, Ms. Yarbray sent a text message on April 6, 2017, to the owner of another competing therapist staffing company in the

Dallas/Fort Worth area asking the owner what he thought about lowering pay rates. In her text message, Ms. Yarbray wrote that other therapist staffing companies were reaching out to her regarding "rate drops" and disclosed the dollar amounts of the "rate drops" in her text message.

VI. Respondents' Conduct Is Not Legally Justified

28. Respondents' conduct described above has not been, and is not, reasonably related to any efficiency-enhancing justification.

VII. Anticompetitive Effects

29. Respondents' actions described in paragraphs 11 through 27 have had the purpose and effect of unreasonably restraining trade and suppressing competition among therapist staffing companies to contract with therapists to treat home health agency patients in the following ways, among others:

a. unreasonably restraining competition to offer competitive pay rates to therapists;

b. fixing or decreasing pay rates for therapists; and

c. depriving therapists the benefits of competition among therapist staffing companies.

VIII. Violation Charged

30. The acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of October, 2019, issues its Complaint against Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray.

By the Commission, Commissioner Chopra dissenting and Commissioner Wilson not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Order" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Act, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Your Therapy Source, LLC is a limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its principal address is 8624 Mid Cities Blvd., Suite 200, North Richard Hills, Texas 76182.

2. Respondent Neeraj Jindal, an individual, owned Fit for Life Therapy, LLC, d/b/a Integrity Home Therapy ("Integrity") from 2013 until he sold Integrity in August 2017. His principal address is located at 1901 Long Prairie Road, Suite 220-75, Flower Mound, Texas 75022.

3. Respondent Sheri Yarbray, an individual, owns Respondent Your Therapy Source, and has been its Chief Executive Officer for more than 10 years. Her principal address is 8624 Mid Cities Blvd., Suite 200, North Richard Hills, Texas 76182.

4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and this proceeding is in the public interest.

ORDER

I.

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

A. "Respondent Jindal" means Neeraj Jindal.

B. "Respondent Yarbray" means Sheri Yarbray.

C. "Respondent Your Therapy Source" means Your Therapy Source, LLC, its directors, officers, employees, agents, representatives, successors, and assigns, including Respondent Yarbray; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Your Therapy Source, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Compensation" means wages, salaries, benefits, payment terms, or Pay Rates.

F. "Home Health Agency" means any Person that contracts with one or more Therapist Staffing Competitors to provide Therapist services to home health patients.

G. "Pay Rate" means the payment Respondents or Therapist Staffing Competitors make to a Therapist to treat patients.

H. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a government body.

I. "Therapist" means a physical therapist, physical therapist assistant, occupational therapist, occupational therapist assistant, or speech therapist.

J. "Therapist Staffing" means the provision of Therapists to treat patients through contractual arrangements by and between Therapist Staffing Competitors and Therapists.

K. "Therapist Staffing Competitor" means any Person engaged in the business of Therapist Staffing.

II.

IT IS FURTHER ORDERED that in connection with establishing the Compensation of any employee or independent contractor, including Therapists, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. §44,

Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, or enforcing any agreement or understanding, express or implied, between or among a Respondent and any Person to lower, fix, maintain, or stabilize the Compensation that a Respondent or such Person pays, or is willing to pay, in competing with each other for employees or independent contractors, including Therapists;

B. Exchanging or facilitating, in any manner, the exchange or transfer of information between or among a Respondent and any Person concerning Compensation that a Respondent or such Person pays, or is willing to pay, in competing with each other for employees or independent contractors, including Therapists;

C. Inviting, encouraging, offering, soliciting, pressuring, suggesting, advising, recommending, or inducing any Person to engage in any agreement, understanding, or other action prohibited by Paragraphs II.A. and II.B.; and

D. Attempting to engage in any action prohibited by Paragraphs II.A. and II.B.

Provided, however, that nothing in this Paragraph II. shall prohibit a Respondent and a Home Health Agency from agreeing upon the rate that the Home Health Agency pays the Respondent for the provision of Therapists to treat Home Health Agency patients.

III.

IT IS FURTHER ORDERED that Respondent Your Therapy Source shall:

A. Within 30 days after the date on which this Order is issued, provide to each of Your Therapy Source's officers, partners, directors, and employees a copy of this Order and the Complaint;

B. For a period of 3 years from the date this Order is issued, provide a copy of this Order and the Complaint to any person who becomes an officer, partner, director, or employee of Your Therapy Source, and provide such copies within 30 days of the commencement of such Person's employment or term as an officer, partner, director, or employee; and

C. Retain documents and records sufficient to record Your Therapy Source's compliance with its obligations under Paragraph III. of this Order.

IV.

IT IS FURTHER ORDERED that each Respondent shall submit verified written reports ("compliance reports") in accordance with the following:

A. Each Respondent shall submit:

1. an interim compliance report 60 days after the Order is issued;

2. an annual compliance report one year after the date this Order is issued, and annually for the next 3 years on the anniversary of that date; and

3. additional compliance reports as the Commission or its staff may request.

B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order.

C. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746. Respondent Jindal and Respondent Yarbray shall each verify his or her compliance report. Each compliance report by Respondent Your Therapy Source shall be verified by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

D. For purposes of this paragraph, Respondent Your Therapy Source and Respondent Yarbray may submit a joint compliance report.

V.

IT IS FURTHER ORDERED that Respondent Your Therapy Source shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Your Therapy Source, LLC;

B. Any proposed acquisition, merger, or consolidation of Your Therapy Source, LLC; and

C. Any other change in Respondent Your Therapy Source including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that for 3 years from the date this Order becomes final, each Respondent shall notify the Commission of any change in his, her, or its respective principal address within 20 days of such change in address.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent;

B. To interview officers, directors, or employees of Respondent Your Therapy Source, who may have counsel present, regarding such matters; and

C. To interview each Respondent Jindal and Respondent Yarbray, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on October 26, 2039.

By the Commission, Commissioner Chopra dissenting and Commissioner Wilson not participating.

STATEMENT OF THE FEDERAL TRADE COMMISSION CONCERNING THE COMMISSION'S CONSENT ORDER

Three years ago, the Federal Trade Commission and the Department of Justice's Antitrust Division jointly issued guidance for human resource ("HR") professionals and others who are involved in hiring and compensation decisions. We created that guidance to educate and inform HR professionals and others involved in hiring and compensation decisions about how the antitrust laws apply in the context of employment. Just as it was true then, it is still true now that the Commission is committed to ensuring that workers receive the benefits of a competitive market for their services. As the 2016 guidance explains:

> Free and open markets are the foundation of a vibrant economy. Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.[1]

The outcome in this case affirms that commitment.

The Commission has voted to finalize the consent order, and send responses to commenters in the matter of Your Therapy Source, LLC ("Your Therapy Source"), Neeraj Jindal, and Sheri Yarbray.[2] As alleged in the complaint,[3] Your Therapy Source, LLC ("Your Therapy Source"), a provider of therapist staffing services to home health agencies in Texas, Sheri Yarbray as the owner of Your Therapy Source, and Neeraj Jindal as the owner of Integrity Home Therapy entered into an agreement to lower wages to their contracted therapists and invited four other competitors to collude on these rates. The Commission alleged that their agreement was per se illegal and harmed competition.

The Commission appreciates the level of public interest that it has received in this matter.[4] It reaffirms the importance of our efforts to pursue wage-fixing cases. Issues raised by the public comments are addressed below.

Monopsony Power

The Commission takes very seriously the potential for monopsony power among employers to affect workers' wages and mobility. Monopsony power requires a showing that employers (or an employer) have significant market power in the market for labor, giving them the ability to set wages below competitive levels. In this case, there was no evidence that credibly suggested the existence of monopsony power. At the time of our investigation, respondents were small business owners of two therapist staffing companies, and operated in the Dallas/Fort Worth area where there are many other therapist staffing companies that did not participate in the agreement.

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1 U.S. Dep't of Justice & Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* at 2 (Oct. 20, 2016), https://www ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

2 This statement reflects the views of Chairman Simons and Commissioners Phillips and Slaughter.

3 *See* Compl., *In re Your Therapy Source et al.* (July 31, 2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

4 *See* Public Comments, Fed. Trade Comm'n, *In re Your Therapy Source et al.*, https://www ftc.gov/policy/public-comments/2018/08/initiative-769.

Monetary Penalties

The law gives the Commission the authority to issue an order requiring a respondent to stop engaging in anticompetitive conduct, but the law does not provide the Commission with the authority to impose punitive civil penalties in antitrust conduct cases like this one. After a respondent is under order, the Commission may seek civil penalties for violations of the order. To monitor compliance, the Decision and Order requires respondents to submit written compliance reports and permits the Commission to access respondents' records and to conduct interviews with them. Should respondents violate the Decision and Order, the Commission will consider all appropriate penalties and other steps to enforce the Decision and Order.

The Commission may and does seek equitable monetary remedies — including disgorgement and restitution — to compensate victims for losses resulting from unlawful conduct. As detailed in the Complaint, Respondents in this case entered into a per se illegal agreement to fix wages. The facts showed that this per se illegal agreement harmed the competitive process because, by its nature, it involved competitors agreeing to substitute their collective decisions for the normal workings of the marketplace. However, the evidence in this case did not provide support for seeking equitable monetary remedies. That is, our investigation did not yield evidence that any reductions in pay rates were the result of the unlawful conduct. Noteworthy here is the fact that the FTC staff launched an investigation very quickly after learning of Integrity's owner's invitation to collude, which may explain the lack of such evidence. We will continue to investigate this type of behavior and will not hesitate to seek equitable monetary remedies in cases where such remedies are appropriate.

Notice

Based on the facts, we do not believe an order should include a requirement to provide notice of the Commission's action to the individual therapists here. Because the facts found in the investigation did not indicate that any therapists' wages were reduced as a result of the illegal agreement, individual notice would not be likely to facilitate recovery in private civil litigation. However, the Commission will take steps to ensure that this order and the facts of this case are disseminated as widely as possible in order to educate staffing firms, home healthcare workers, and small businesses about the illegality of wage fixing and to emphasize that the FTC will be a vigilant cop on the beat.

Admissions of Liability

When the circumstances of a given case merit doing so, the Commission will consider seeking admissions of fact or law. In this case, we did not obtain such an admission. As the Washington Center for Equitable Growth and the American Antitrust Institute noted in their public comments, requiring admissions of liability could result in fewer settlements and more litigation surrounding otherwise effective remedies, which would result in the enforcement of fewer matters due to resource constraints.[5] The Washington Center for Equitable Growth

5 *See* Michael Kades & Raksha Kopparam, Washington Center for Equitable Growth, Pub. Cmt. No. 00104, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2018), https://www.ftc.gov/system/files/documents/public_comments/

believes that the Commission should seek admissions of liability when they are "necessary to prevent recidivism or deter others from engaging in similar behavior,"[6] yet the American Antitrust Institute notes that "[f]oregoing admission of key facts or liability seems like a comparatively small price to pay for the gain in scarce agency time and resources."[7] The amount of resources required to litigate a case cannot be overstated. When deciding whether to settle a case, we have to seriously consider whether the outcome of a protracted litigation will provide material benefits beyond the remedy obtained through a negotiated settlement.

Criminal Referrals

The Commission does not have criminal jurisdiction. Instead, where an investigation uncovers facts that could give rise to criminal liability, the Commission routinely refers matters to the Department of Justice and state law enforcement agencies for potential criminal prosecution. Once we make a referral, the other agency makes the ultimate determination as to whether or not to proceed. No inference can or should be made as to whether we referred this matter for criminal prosecution based on the Commission's action in this case.

Conclusion

After careful consideration of each comment, we have concluded not to modify the order. The remedy that we have accepted is carefully tailored to match the facts and circumstances of this case. The remedy prohibits the parties from colluding with competitors on wages paid to their employees or independent contractors, and bars them from entering into agreements to lower, fix, maintain, or stabilize the therapists' or other independent contractors' wages. The remedy also bars the parties from inviting competitors to enter into such agreements or exchanging information with competitors related to compensation of employees and independent contractors.

The Commission vigorously enforces the antitrust laws with respect to large and small companies alike. Going forward, we will continue to aggressively investigate any instances in which companies collude or attempt to collude to fix wages. Likewise, we will continue to seek relief commensurate with the facts and circumstances of each case, including, where appropriate, disgorgement, notice, and admissions.

2018/08/00104-155424.pdf; American Antitrust Institute, Pub. Cmt. No. 00106, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2019), https://www ftc.gov/system/files/documents/public_comments/2018/08/00106-155423.pdf.

6 Cmt. of Washington Center for Equitable Growth at 2.

7 Cmt. of American Antitrust Institute at 14.

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Today, the Commission votes to finalize the proposed order *In re Your Therapy Source, et al.* I carefully read the thoughtful and constructive comments submitted in this case, paying particular attention to the calls for the FTC to revisit the proposed order to better achieve its enforcement objectives. After considering the arguments raised and the specific facts in the record, I vote today to finalize this order. Rather than renegotiate the settlement, the Commission's resources would be best used to investigate and prosecute additional cases of anticompetitive conduct that harms workers. However, I urge our enforcement partners with criminal jurisdiction to pursue a criminal investigation of the individuals involved in this case.

Agreements to fix the wages of employees or contractors, such as the one alleged in this matter, are *per se* illegal under the antitrust laws and give rise to criminal as well as civil liability.[1] As a general matter, I think criminal sanctions are the most effective remedy in these cases. The FTC's enforcement authority is limited to the civil realm.[2]

Like many commenters, I favor pursuing remedies that most effectively provide compensation and deterrence, as well as facilitate private enforcement—including disgorgement, notice, and an admission of liability.[3] If any of those terms had been included in this order when it was originally negotiated, I would have supported it. However, because staff investigated the conduct so quickly, there was no evidence tying the unlawful agreement to wage reductions. Without such evidence, the Commission and private litigants are unlikely to recover damages in court, which in turn diminishes the value of pursuing notice or admissions. While this circumstance should not dictate the scope of appropriate remedies for the Commission to pursue at the start of a settlement negotiation in the future, I cannot ignore them in evaluating whether it would be the best use of limited Commission resources to re-open a settlement that was negotiated largely before the Commissioners participating today arrived at the FTC.[4]

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1 *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* at 2–3 (Oct. 20, 2016), https://www ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

2 As noted in the Statement of the Commission, "where an investigation uncovers facts that could give rise to criminal liability, the Commission routinely refers matters to the Department of Justice and state law enforcement agencies for potential criminal prosecution. Once we make a referral, the other agency makes the ultimate determination as to whether or not to proceed criminally. No inference can or should be made as to whether we referred this matter for criminal prosecution based on the Commission's action in this case."

3 *See, e.g.*, Marshall Steinbaum et al., Pub. Cmt. No. 00003, *In re Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray* at 2 (Aug. 8, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00003-147707.pdf ("[T]he FTC should seek remedies that make the injured workers whole and deter future wage fixing by employers."); Sanjukta Paul et al., Pub. Cmt. No. 00107, *In re Your Therapy Source et al.* at 1 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00107-155426.pdf.

4 The case began and was developed before the Commissioners participating in this vote arrived at the FTC and before staff could reasonably have been expected to anticipate our particular priorities and views on enforcement. While I share Commissioner Chopra's general view about the negotiating posture that the Commission should adopt in settlement discussions, I will apply these principles to cases going forward.

Concurring Statement

I echo commenters' calls for dedicating more of the Commission's limited resources to investigating and bringing more cases in which the anticompetitive harms fall on workers,[5] especially as the trend toward gig employment accelerates. Although monopsony issues were not evident in this case, I agree with the commenters that monopsony power in the healthcare industry (and more broadly) should be a high priority for the agency.[6] It is important that we consider the entire market ecosystem—including the role of downstream consolidation on upstream labor markets—in determining where to focus enforcement efforts. We should prioritize enforcement against the market participants who wield the most market power, especially "larger and relatively more powerful buyers of services that result in upstream wage suppression,"[7] as one comment suggested.

Finally, I note that wage-fixing cases such as this one are not and should not be the only way the Commission addresses harms imposed on workers. For example, I am deeply troubled by the pervasive use of non-compete clauses in employer-employee contracts, and I support calls for the Commission to consider banning such conduct by rule.[8] The Commission should also consider whether no-poach provisions in franchise agreements that limit competition and worker mobility should be banned.

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5 *See, e.g.*, Cmt. of Marshall Steinbaum et al. at 1 ("The FTC's action represents a positive development toward greater enforcement of competition laws on behalf of workers. Given the pervasiveness of anticompetitive behavior by employers in the labor market, we applaud this action and look forward to further enforcement actions against labor market monopsony."); Cmt. of American Antitrust Institute at 1 ("AAI applauds the Commission for challenging an alleged naked horizontal agreement, and invitations to collude, among therapist staffing companies to reduce therapist pay rates.").

6 *See, e.g.*, American Antitrust Institute, Pub. Cmt. No. 00106, *In re Your Therapy Source et al.* at 2 (Aug. 30, 2019), https://www ftc.gov/system/files/documents/public_comments/2018/08/00106-155423.pdf ("[I]t is particularly important to deter *per se* antitrust violations that harm buyer competition among employers to hire and retain workers . . . in the healthcare industry, where consolidation throughout the supply chain (among insurers, pharmacy benefit managers, group purchasing organizations, retail pharmacies, and generic and branded drug manufacturers, for example) has opened the door to all manner of strategic anticompetitive behavior."); Michael Kades & Raksha Kopparam, Washington Center for Equitable Growth, Pub. Cmt. No. 00104, *In re Your Therapy Source et al.* at 2 (Aug. 30, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00104-155424.pdf ("The Federal Trade Commission is right to focus on stopping anticompetitive activity in an industry in which monopsony power is prevalent."); Cmt. of Marshall Steinbaum et al. at 2 ("More broadly, the FTC should use this case as an opportunity to study how economic concentration and market power at different levels of a supply chain affect workers… Growing evidence shows that downstream concentration is projected upstream through supply chains and operates to the detriment of workers. The commission should recognize the ability of powerful buyers to hold down prices paid to their (often dependent) suppliers and use its enforcement authority to address that buyer-side power.").

7 Cmt. of Sanjukta Paul et al. at 1.

8 *See* Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (Mar. 15, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- When an investigation uncovers clear evidence of wrongdoing with no major dispute of fact or law, Commissioners should avoid entering into weak, no-consequences settlements that fail to hold a bad actor accountable nor provide meaningful deterrence in the marketplace.

- Commissioners must reject the false choice between settling for nothing and litigating. Even in clear-cut matters, the Commission sometimes approaches settlement negotiations without seeking any meaningful relief or consequences. There should be a strong presumption against no-consequences settlements in these matters.

- In addition to monetary remedies, the FTC should consider seeking a broader set of remedies, such as a finding or admission of liability, formal notification to third parties, and debarments or bans in cases of clear misconduct where the law and evidence is clear.

Avoiding Weak Settlements

Catching individuals and firms in the act of fixing prices and wages is extremely difficult. Given the harm that this collusion can inflict on families, the labor force, and our economy, it warrants serious consequences, including criminal sanctions.[1]

In very rare instances, it may be warranted for the Federal Trade Commission to resolve a matter without meaningful consequences, by entering into a settlement that simply requires a company or individual to stop breaking the law and to submit paperwork to the agency. This matter is not one of those instances. In this matter, the Commission is resolving an attempted theft of wages through a no-consequences settlement. "By neither imposing monetary penalties nor empowering the injured workers to seek legal redress, the FTC effectively signals to employers that the legal consequences for colluding against workers are likely to be minor," noted one response to the proposed settlement.[2] Our approach must change.

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1 As I noted in a recent submission to the Department of Justice's initiative on competition in labor markets, the Department of Justice is better suited to address illegal collusion on wages and compensation, given its ability to pursue remedies under its civil and criminal authorities. In the rare instances where the Federal Trade Commission must act alone, it is particularly important that the remedy go beyond a no-consequences settlement. *See* Comment of Comm'r Rohit Chopra, In the Matter of Dep't of Just. Initiative on Competition in Labor Markets (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf.

2 Comment of Marshall Steinbaum, Heidi Shierholz, and Sandeep Vaheesan, In the Matter of Your Therapy Source, LLC; Neraj Jindal; and Sheri Yarbay, FTC File No. 171-0134 at 1 (Aug. 3, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00003-147707.pdf.

Settlements are important. They can help the public resolve an issue more quickly and with fewer resources. But when there is overwhelming evidence of wrongdoing, it is dangerous for government agencies to enter into weak settlements that give a violator a free pass. In settlement negotiations, the Commission may not obtain all of the relief it seeks. But when we fail to make any substantive demands at all, we guarantee that our settlements will fail to hold bad actors accountable. We need to reject the false choice between settling for nothing and litigating. Instead, we can make thoughtful demands based on rigorous analysis that lead to accountability and deterrence.

In this matter, the FTC's investigation uncovered text messages and other unambiguous evidence that revealed a conspiracy to fix wages, a per se violation of antitrust laws that can even carry criminal sanctions. Despite these facts, the settlement carries virtually no consequences.

The vast majority of enforcement actions taken by the Commission are unanimous. Over the last year, the Commission has failed to reach a unanimous decision in only a handful of consumer protection and competition conduct cases. Where I have disagreed, it is typically because the Commission essentially demanded nothing in settlement negotiations beyond paperwork requirements and a promise not to violate the law again. Since these no-consequences settlements fail to deter bad actors, they should only be used in narrow circumstances.

Calibrating Consequences

The Commission should generally presume that no-consequence settlements that simply order a Respondent to cease and desist are not in the public interest. Advocates for wrongdoers sometimes argue that violations should not carry meaningful consequences when there is no known "harm." This logic is flawed, particularly for misconduct that has a low probability of detection and high likelihood of harm. For example, by this logic, society would never punish dangerous drivers unless they actually injured someone. In commerce, lawbreaking firms also gain a competitive advantage over firms that follow the law. Just because a harm is difficult to quantify does not mean it is nonexistent. In matters of unambiguous violations of law, the absence of known harm might help us calibrate consequences, but not exclude them altogether.

Rather than opening settlement negotiations with essentially no demand at all, below are some potential non-monetary consequences[3] that the Commission could seek to advance the agency's law enforcement and compliance mission.

Debarments and Bans. The Commission routinely seeks debarments and bans against individual defendants, especially against those engaged in egregious conduct. The agency even maintains a public database of individuals banned from debt collection.[4] Former FTC

3 Monetary relief is an important way for the Commission to advance goals of accountability for wrongdoing. In cases where we do not seek monetary relief, it is particularly important that we are thoughtful about other remedies to avoid a no-consequences settlement.

4 *Companies and People Banned From Debt Relief*, https://www.ftc.gov/enforcement/cases-proceedings/banned-mortgage-relief-debt-relief-companies-people, Fed. Trade Comm'n (last visited Oct. 16, 2019); *see also Banned*

Commissioner Joshua Wright and former Assistant Attorney General of the Antitrust Division Douglas Ginsburg have argued that individual debarments can often be appropriate in price-fixing matters, given the low probability of detection.[5]

Notice to Affected Parties. When a wrongdoer formally notifies potential victims, customers and clients, employees, creditors, and counterparties, this facilitates transparency and follow-on actions for third parties to remedy or mitigate actual and potential harms, especially for harms that may not have been uncovered or unaddressed in an investigation.

In this settlement, the Commission includes standard language requiring the firm to notify its officers, directors, and employees about the Commission's order, but not the independent contractors targeted by the misconduct, nor the paying clients seeking these services. In a comment, Rep. David Cicilline and Sen. Cory Booker question this logic, noting that the Commission requires the violators to essentially notify themselves.[6] Even if the Commission's investigation did not uncover specific evidence that the conspiracy led to suppressed wages in this instance, notice to current and former contractors will help uncover if there were other instances of illegal price-fixing. Without notice, clients of these staffing agencies will also be left in the dark about the violations and may unknowingly be continuing to do business with bad actors, subjecting them to reputational damage and other risks.

Findings or Admissions of Liability. As I noted in *Patriot Puck*, a recent no-consequences settlement, findings and admissions can reduce the likelihood that a flagrant violator can lie about their past conduct.[7] Findings or admissions of facts and liability can also advance the interests of those seeking to vindicate their rights through private litigation.

Conclusion

The conduct in question in this matter raises questions of criminal liability. Ideally, it would be resolved by an entity with both criminal and civil enforcement authority. But, when the FTC takes action, it should avoid a no-consequences settlement, especially for matters with virtually no litigation risk. The FTC is typically far harsher with small firms than with large firms, so this outcome may send a signal to those engaging in widespread wage-fixing that their illegal conduct will be worth the risk.

Debt Collectors, https://www ftc.gov/enforcement/cases-proceedings/banned-debt-collectors , Fed. Trade Comm'n (last visited Oct. 16, 2019).

5 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 Competition Pol'y Int'l 3-39 (2010), https://cpip.gmu.edu/wp- content/uploads/sites/27/2016/10/Session-7_Antitrust-Sactions.pdf.

6 Comment of Sen. Cory A. Booker & Rep. David N. Cicilline, In the Matter of Your Therapy Source, LLC, Neraj Jindal, and Sheri Yarbay, FTC File No. 171-0134 at 2 (Aug. 30, 2019), https://www.ftc.gov/system/files/documents/public_comments/2018/08/00105- 155425.pdf.

7 Statement of Comm'r Chopra In the Matter of Patriot Puck, Comm'n File No. 1823113 (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514801/patriot_puck_chopra_dissenting_statement_4-17-19.pdf.

Dissenting Statement

The 2016 Antitrust Guidance for Human Resources Professionals set expectations for greater and more effective enforcement when it comes to wage-fixing and other antitrust violations in labor markets.[8] But enforcers have taken few actions to reinforce this message. Today's no-consequences settlement finalized by the FTC is a step in the wrong direction. This must change.

Given the evidence, the public comments, and public interest considerations, the Commission should not finalize this no-consequences settlement. For these reasons, I dissent.

8 Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Overview

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order with Your Therapy Source, LLC, ("Your Therapy Source"), the owner of Your Therapy Source, and the former owner of Integrity Home Therapy (collectively "Respondents"). The agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by agreeing to lower rates paid to therapists and inviting other therapist staffing companies to lower rates paid to therapists.

The proposed consent order 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 order along with the comments received, and decide whether it should withdraw from the consent agreement, modify it, or make final the proposed consent order.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the proposed consent order or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. The Complaint

The proposed complaint charges that (1) Your Therapy Source, (2) Sheri Yarbray, the owner of Your Therapy Source, and (3) Neeraj Jindal, the former owner of Integrity Home Therapy agreed, and invited others to agree, to lower the rates paid to therapists for treating patients of home health agencies in the Dallas/Fort Worth, Texas area.

Your Therapy Source and Integrity Home Therapy are therapist staffing companies that provide therapists, including physical therapists, physical therapist assistants, occupational therapists, occupational therapist assistants, and speech therapists (collectively "therapists") to treat patients pursuant to contracts with home health agencies. Home health agencies pay therapist staffing companies a negotiated rate referred to as a "bill rate." Staffing companies generally contract with therapists on a non-exclusive basis and pay them a rate per patient evaluation and per patient visit referred to as a "pay rate." Therapist staffing companies compete with each other for therapists. Therapists may contract with more than one staffing company and generally choose among them based on pay rate, volume of patient referrals, and location of patients.

The complaint alleges that Respondents exchanged Integrity's and Your Therapy Source's therapist pay rate information with each other and agreed to jointly lower therapist pay rates to the same level. The complaint also alleges that Respondents invited other therapist

staffing companies to collude on pay rates. Finally, the complaint alleges that Respondents' conduct was not reasonably related to any efficiency-enhancing justification.

III. The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal conduct alleged in the complaint. The key provisions make it a violation of the proposed consent order for Respondents to collude with competitors on compensation paid to their employees or independent contractors. The proposed consent order does not name Integrity Home Therapy as a respondent because Mr. Jindal sold Integrity Home Therapy in August 2017 to a new owner who had no involvement with the conduct alleged in the complaint.

Paragraph II.A of the proposed consent order prohibits Respondents from entering into or organizing agreements with any person to lower, fix, maintain, or stabilize the compensation that a Respondent or such person pays, or is willing to pay, in competing with each other for employees and independent contractors, including therapists.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A, including barring the exchange of information related to compensation (Paragraph II.B) and barring attempts to engage in prohibited conduct or invitations to others to do so (Paragraphs II.C and II.D).

Paragraph III requires Your Therapy Source to send a copy of the complaint and consent order to its officers, partners, directors, and employees, and retain records sufficient to show Your Therapy Source's compliance with this requirement.

Paragraphs IV, V, VI, and VII impose various obligations on Respondents to report or provide access to information to the Commission to facilitate monitoring of compliance with the consent order.

Finally, paragraph VIII provides that the consent order will expire in 20 years.

Opinion of the Commission

IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.

OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9378; File No. 171 0231

Complaint, December 20, 2017 – Initial Decision, May 6, 2019 – Order, November 1, 2019

This case addresses Otto Bock HealthCare North America, Inc. and Otto Bock HealthCare GmbH's [redacted] million acquisition of FIH Group Holdings, LLC ("Freedom"), a non-reportable deal consummated on September 22, 2017. The complaint, 167 F.T.C. 537, alleges that Otto Bock HealthCare North America, Inc. violated section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly lessening competition in the market for microprocessor prosthetic knees ("MPKs"). In his Initial Decision, 167 F.T.C. 552 *et seq*., the Administrative Law Judge found that the evidence proves that the Acquisition may substantially lessen competition in the relevant market for the sale of MPKs to prosthetic clinics in the United States in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act, *Id.* at 767; and ordered Otto Bock to divest the Freedom Assets and Business, *Id.* at 774. On July 25, 2019, the Commission heard oral arguments in this matter.

Participants

For the *Commission*: *Stephen Mohr,* and *Daniel Zach.*

For the *Respondent*: *Edward G. Biester III, Duane Morris LLP.*

OPINION OF THE COMMISSION
(PROVISIONALLY REDACTED PUBLIC VERSION)

By Commissioner Rohit Chopra:

I. INTRODUCTION

In competitive markets, even when an individual firm leads its industry in market share, its owners, managers, and employees know that they must continue to innovate if they want to maintain or grow that market share. When a market-leading firm is threatened by challengers and responds by offering new and better products and services at competitive prices, we all benefit. Alternatively, when a market leader reduces the threat from a smaller aggressive competitor through an anticompetitive acquisition, we all lose. In this case, the Commission challenged a consummated acquisition in which a market leader eliminated a primary competitive threat. As explained further below, the Commission addresses a host of issues that may be particularly salient in consummated mergers, such as whether an agreement to "hold separate" the acquired assets eliminated anticompetitive effects and whether a proposed divestiture absolved the merging parties of liability. The Commission also considers contentions that liquidity concerns would have led to the acquired firm's failure, absent the acquisition.

This matter arises from the consummated acquisition ("the Acquisition") by Respondent Otto Bock HealthCare North America, Inc. ("Respondent" or "Otto Bock") of FIH Group Holdings, LLC ("Freedom"). Prior to the Acquisition, the companies were two of the most

significant U.S. suppliers of lower-limb prosthetics used by amputees. Among other products, both firms manufacture microprocessor-equipped prosthetic knees ("MPKs"), which offer certain improvements over conventional, mechanical prosthetic knees. At the time of the Acquisition, Otto Bock and Freedom were the first and third largest manufacturers of MPKs by revenue and competed vigorously against each other on both price and innovation. The Acquisition gave Otto Bock an 80-plus percent market share in an already highly concentrated all-MPK relevant market.

The Commission challenged the Acquisition out of concern that it had harmed and would continue significantly harming amputee patient populations and prosthetic clinics by eliminating significant, beneficial, competition between Otto Bock and Freedom, and would further entrench Otto Bock's position as the dominant supplier of MPKs. The Commission's Complaint alleged that the Acquisition removed from the market a firm that had directly competed against Otto Bock and other suppliers of microprocessor prosthetic knees by offering low prices and attractive promotions to prosthetic clinic customers to win sales. The Complaint also alleges that the Acquisition would likely affect ongoing product development competition between the two firms, which provides amputees with significant improvements in the MPKs they use.

We conclude that anticompetitive effects have indeed already occurred, and that the Acquisition is likely to cause future anticompetitive effects in the form of higher prices and less innovation for amputee patients and prosthetic clinic customers. The record compiled during a full administrative trial lasting 31 days confirms that eliminating a significant competitor from the highly concentrated all-MPK market has lessened, and will continue to lessen, competition substantially. That record includes documents from Otto Bock confirming that it viewed Freedom as a direct and serious competitive threat and demonstrating that eliminating that threat was a strategic objective and an expected result of the Acquisition; testimony from prosthetic clinics that they had been able to negotiate lower prices based on competition between Otto Bock and Freedom; and testimony from Otto Bock's CEO at the time of the Acquisition that Otto Bock's incentives had changed after the acquisition.

As outlined in the Commission's Complaint, prosthetic legs are used by individuals who have had a transfemoral, or above-knee, amputation. Amputation can occur in any age group, but the prevalence is highest among people aged sixty-five years and older. Diseases such as vascular complications and cancer account for approximately 70 percent of above-knee amputations, with another 20 percent resulting from trauma such as combat injuries to soldiers. Compl. ¶ 3.

Microprocessor-controlled knees provide unique benefits to individuals who require a lower-limb prosthetic. By utilizing a continuous flow of data from electronic sensors located in the knee, MPKs regulate the movement and positioning of the knee in real time based on the user's needs. IDF 102-04.[1] MPKs can assist the user to recover from stumbles, to walk safely

1 This Opinion uses the following abbreviations for citations to the record:

Compl.: Complaint
Ans.: Answer and Affirmative Defenses of Respondent Otto Bock HealthCare North America, Inc.

on ramps or down stairs, and to walk at a variable cadence; these benefits help prevent falls. IDF 331-39, 345-53. As compared to mechanical knees (*i.e.,* knees that do not contain a microprocessor), studies have shown the use of MPKs to improve the quality of life of amputees who are medically eligible to use them. IDF 372-93.

The acquiring firm, Otto Bock, is considered a pioneer in the development and sale of MPKs and possesses the leading share of U.S. MPK sales. Otto Bock's current best-selling MPK is the C-Leg 4. In addition to MPKs, Otto Bock also sells mechanical knees and a variety of other lower-limb and upper-limb prosthetics, orthotics, mobility solutions, and medical-related services.

The acquired firm, Freedom, was founded in 2002, and is headquartered in Irvine, California. At its founding, Freedom sold a range of prosthetic foot products. The company released its first MPK, the Plié, in 2007. Freedom was also developing a new MPK, the Quattro, that was intended to improve upon Freedom's then-current product, the Plié 3. The Quattro's nickname the —"C-Leg Killer"[2]— reflected Freedom's competitive aspirations before the Acquisition.

In October 2016, Otto Bock's representatives began discussions with Freedom's CEO and Vice Chairman about acquiring Freedom. After some months elapsed, and at the conclusion of an investment bank-led process by Freedom to solicit interest from other buyers, Otto Bock was the higher bidder and Freedom accepted its offer. On September 22, 2017, Otto Bock acquired Freedom for approximately [redacted]. Upon consummation, Freedom became a wholly owned subsidiary of Otto Bock.

ID:	Initial Decision
IDF:	ALJ Findings of Fact
RAB:	Respondent's Appeal Brief
CCAB:	Complaint Counsel's Answering Brief on Appeal
RRB:	Respondent's Reply Brief on Appeal
RPTB:	Respondent's Post-Trial Brief
RPTRB:	Respondent's Post-Trial Reply Brief
RPF:	Respondent's Proposed Findings of Fact and Conclusions of Law
RRF:	Respondent's Reply to Complaint Counsel's Post-Trial Proposed Findings of Fact and Conclusions of Law
PX:	Complaint Counsel's Exhibit
RX:	Respondent's Exhibit
JX:	Joint Exhibit
Tr.:	Trial Transcript
IHT:	Investigational Hearing Transcript

2 [redacted].

Complaint Counsel began an investigation into the Acquisition in September 2017. IDF 14.[3] On December 20, 2017, the Commission issued a Complaint that challenged Respondent's acquisition of Freedom as a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

After the Complaint issued, Respondent offered to divest certain Freedom MPK assets to an identified buyer; Respondent contends that such a divestiture would prevent or eliminate any purported competitive harm from the Acquisition. RAB at 28-36. In response, Complaint Counsel assert that Respondent's proposed divestiture is "speculative," partial, and inadequate to restore competition in the relevant market. CCAB at 32-38.

After a trial on the merits, Chief Administrative Law Judge D. Michael Chappell ("the ALJ") issued an Initial Decision in which he ruled that the Acquisition of Freedom by Otto Bock may substantially lessen competition in the relevant market for the sale of MPKs to prosthetic clinics in the United States. ID at 3, 87. He further found that Respondent's proposed divestiture of certain MPK assets of Freedom is insufficient to eliminate the likely competitive harm from the Acquisition, and that the appropriate remedy is the divestiture of all assets Respondent acquired, with the possible exception of certain prosthetic foot products that are not necessary to competition in the relevant MPK market.

Based on our *de novo* review of the facts and law in this matter, we find that the Acquisition is likely to, and indeed already has, substantially lessened competition in the relevant market for MPKs in violation of Section 5 of the FTC Act and Section 7 of the Clayton Act.[4] We hold that, to fully restore the competition lost from the Acquisition, Respondent must divest Freedom's entire business with the limited exceptions granted by the ALJ. We enter an order consistent with this Opinion.

II. FACTUAL BACKGROUND

A. THE PROSTHETIC KNEE INDUSTRY

Above-the-knee amputees, also known as transfemoral amputees, and individuals born with partial lower limbs often receive lower-limb prostheses to enable them to walk. IDF 68. The prosthesis typically includes: (1) either a suspension or a sock-like liner that is rolled onto the residual limb; (2) a socket, which is a rigid or semi-rigid negative of the residual limb; (3) a knee joint; (4) a pylon that connects the knee to a foot; and (5) a foot with a shell. Schneider, Tr. 4303-04.[5] The entire apparatus may then have a cosmetic covering. *Id.* In general, there are two

3 The transaction was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the Commission did not become aware of it until after the acquisition had closed.

4 We adopt the ALJ's findings of fact to the extent not inconsistent with this Opinion.

5 Some patients may use a combination ankle joint and foot. An example is Freedom's Kinterra, a hydraulic ankle/foot system. IDF 595 n.59.

kinds of prosthetic knees: non-microprocessor (or "mechanical") and microprocessor. IDF 95. Respondent's website explains:

> Mechanical knees all use a mechanical hinge to replace your knee joint. How quickly or easily the hinge swings is often controlled by friction, some type of hydraulic system or a locking mechanism.
>
> Microprocessors, on the other hand, provide a more sophisticated method of control to a prosthetic knee. These more complex knee joints are designed to help you walk with a much more stable and efficient gait that more closely resembles a natural walking pattern.

PX08013. Clinic customers assert that MPKs provide increased safety, stability, and ability to overcome environmental barriers, among other benefits. IDF 365-67. Microprocessor knees are significantly more expensive than mechanical knees, often costing four to eleven times as much, or more. IDF 394-95, 397-99.

As a practical matter, most patients can obtain an MPK only if their insurance company will reimburse for it. Medicare's coverage guidelines, which most private insurers follow, base a patient's eligibility for an MPK on his/her mobility as defined by "K-Level." ID at 9-10. The Centers for Medicare and Medicaid Services ("CMS") established the K-Level system to describe various mobility levels, ranging from K-Level 0 (nonambulatory) to K-Level 4 (very active, *i.e.,* child, active adult, or athlete). IDF 86-90.

Medicare and most third-party payers will reimburse MPKs only for K-3 or K-4 patients. IDF 162-64. K-2 or K-1 ambulators are typically ineligible for MPKs but are covered for mechanical knees. *Id.*; Ford, Tr. 990-91.[6]

In order to obtain payment from Medicare or the insurance company for an MPK, a prosthetist must demonstrate "medical necessity." IDF 187, 190. The prosthetist must document that the patient has unmet needs that can be fulfilled by an MPK but not by a less expensive alternative, such as a mechanical knee. IDF 189.

Patients typically acquire their prosthetic knees through specialized prosthetic clinics that provide the knee pursuant to a prescription written by the patient's surgeon. IDF 75-77. The surgeon's prescription typically includes the specific goals of and justification for the device, but rarely includes a specific brand of prosthesis. IDF 137, 141. It may or may not specify a particular type of knee. IDF 137-38. Clinics do not generally stock prosthetic knees, but instead purchase them when needed for a particular patient. IDF 313. At the clinic, a certified prosthetist fits the prosthesis to the patient and provides follow-up care. IDF 81. The process for fitting a new patient with an above-the-knee prosthesis can take over 10 visits spread out over six months to a year. IDF 82.

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6 K-2 and K-1 ambulators are less functional ambulators for whom a prosthesis nonetheless would enhance mobility or quality of life. IDF 86-88.

Insurers do not separately reimburse the clinics for providing fitting services and follow-up visits. IDF 122. Rather, Medicare and most private insurance companies reimburse prosthetic clinics according to "L-Codes" for each component of the prosthesis provided (socket, liner, foot, knee, etc.). IDF 117-21. CMS has established L-Codes that represent the features and functions of each component, including the knee joint. ID 117. Some L-Codes apply only to MPKs. Other L-Codes apply only to mechanical knees. Some L-Codes apply to features that may be found on either an MPK or mechanical knee. IDF 440. Each L-Code carries an associated fee that is the same regardless of the component's actual cost to the clinic or who manufactures it. IDF 120-21. The clinic submits all of the L-Codes associated with a particular prosthesis to the insurance carrier (Medicare, private insurer, etc.), and the associated fees for each L-Code are added together and reimbursed to the clinic less the percentage that is the patient's responsibility. IDF 124-25, 127.[7] CMS sets the L-Code at a rate designed to compensate the clinic for the entire patient-care episode, including time spent by the prosthetist in seeing the patient for initial and follow up care, and any overhead. IDF 322-24. The clinic earns a margin based on the difference between the acquisition cost for the prosthetic and the L-Code reimbursement that it receives. Thus, all else equal, the lower the price of an MPK, the higher the clinic's margin. IDF 324-26.

B. THE PARTIES

1. Otto Bock

Otto Bock is a Minnesota corporation headquartered in Austin, Texas. IDF 3. It is a subsidiary of Otto Bock Germany, which has over 7,000 employees worldwide and operates in 50 countries. IDF 1-2. Among other locations in the United States, Otto Bock has manufacturing and research and development facilities in Salt Lake City, Utah, that employ between 220 and 250 people. IDF 3. Otto Bock also employs between 75 and 100 people who work in the field as sales representatives, clinical specialists, or reimbursement specialists in the United States. *Id.*

Otto Bock launched the first C-Leg in 1999. IDF 233. Industry participants have described the C-Leg as the "gold standard" in the MPK industry. [redacted]. Otto Bock also offers four other models of MPK including the Kenevo, Compact, Genium, and X3. IDF 232. Otto Bock sells its MPKs directly to clinics via its field sales force. PX05148 (Swiggum Dep.) at 38. In 2017, the year of the Acquisition, Otto Bock was on pace to sell over [redacted] MPK units for [redacted] (annualized) in the United States.[8] IDF 479-80. This equates to a [redacted] unit share and a [redacted] revenue share of a U.S. market defined to include all sales of MPKs. *Id.*; IDF 907.

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7 Many private insurers reimburse at amounts discounted off the rate set by the CMS L-Code, sometimes significantly. Oros, Tr. 4802-03 [redacted]; PX05140 (Weott Dep.) at 30-31 (commercial health plans' allowable amounts are generally 10-40% below Medicare's).

8 Partial-year sales figures reported by the sellers for 2017 have been annualized. PX06001A (Scott Morton Expert Report) at p. 83.

2. Freedom

Prior to the Acquisition, Freedom was privately-held. IDF 10. Freedom's majority shareholder was Health Evolution Partners Fund I (AIVI), LP ("HEP"), a private-equity fund. *Id.* Now a wholly-owned subsidiary of Otto Bock, Freedom employs approximately 150 people. IDF 7, 12. Over [redacted] of Freedom's revenues come from the sale of prosthetic feet. RAB at 43; Carkhuff, Tr. 603-04.

Freedom launched the original Plié MPK in 2007. IDF 255. Its current model, the Plié 3, is an "improve[d]" and [redacted] product that Freedom launched in 2014. IDF 255; PX05162 (Ruhl Dep.) at 92-93; Carkhuff, Tr. 492. The Plié 3 [redacted]. Carkhuff, Tr. 492. According to the CEO of the industry's largest clinician group, Hanger, Inc. ("Hanger"), the Plié 3 [redacted] Asar, Tr. 1415. Clinicians appreciated Plié 3's performance in stumble recovery, prevention of falls, and water resistance, among other benefits. Carkhuff, Tr. 333; IDF 565.

Like Otto Bock, Freedom sells MPKs directly to prosthetic clinics through a field sales force. At the time of trial, Freedom had 14 field sales representatives, whom it referred to formally as regional sales managers. Testerman, Tr. 1093, 1114-15. Freedom also sells MPKs to Southern Prosthetic Supply, a distributor that Hanger owns. IDF 43, 717. In 2017, Freedom was on pace to sell [redacted] Plié 3 units corresponding to over [redacted] in annualized revenue. IDF 479-480; PX00825. These sales would equate to a [redacted] unit share and a [redacted] revenue share in a U.S. market defined to include all MPKs. IDF 479-80, 907.

C. OTHER MPK SUPPLIERS

1. Össur

Össur hf ("Össur") is a prosthetics and medical device manufacturer headquartered in Reykjavik, Iceland, with its U.S. headquarters in Foothill Ranch, California. IDF 27. Össur employs between 300 and 400 people in the United States. *Id.* Its U.S. sales force consists of 50 employees who educate and assist clinicians with reimbursement and fittings. *Id.* Össur offers both non-MPKs and MPKs. *Id.* Its MPK offerings include the Rheo and Rheo XC products, which use a unique magnetorheologic technology, *i.e.*, magnetic particles suspended in oil and activated by a magnetic field, to control the level of resistance in the knee. IDF 275. In 2017, Össur was on pace to sell [redacted] MPKs in the United States corresponding to [redacted] million in annual revenue. IDF 479-80. This equates to shares of [redacted] (units) and [redacted] (revenue), respectively, in the U.S. MPK segment. *Id.*

2. Charles A. Blatchford & Sons Limited d/b/a Endolite

Charles A. Blatchford & Sons Limited, which sells products under the trade name Endolite, is a family-owned business that manufactures lower-limb prosthetic devices. IDF 30-31. Endolite sells a range of prosthetic products in the United States, including energy-storing feet, hydraulic ankles, microprocessor-controlled feet, mechanical knees, and an MPK called the

Orion. *Id.*; IDF 286. Endolite employs roughly 80 people in the United States, including 15 sales representatives and 5 clinical support specialists. IDF 31. In 2017, Endolite's U.S. MPK sales (annualized) were [redacted] units or approximately [redacted], approximating [redacted] of the MPK units sold in the U.S. and [redacted] of the revenues. IDF 479-80.

3. Other Sellers

DAW Industries ("DAW") sells prosthetic components, including MPKs, in the United States. IDF 304. DAW does not manufacture its own MPKs, but serves as a distributor of MPKs manufactured by a company called Teh Lin, located in Taiwan. IDF 305. In 2017, DAW sold [redacted] MPK units (annualized) in the U.S. corresponding to approximately [redacted] in sales. This equated to an MPK market share of [redacted] by units and [redacted] by revenue. IDF 479-80.

Nabtesco Corporation ("Nabtesco"), headquartered in Kobe, Japan, manufactures prosthetic devices including MPKs, mechanical knees, microprocessor feet, and non-microprocessor feet. IDF 292-93. Nabtesco does not manufacture any products in the United States. IDF 293. As of the Acquisition, Nabtesco sold its products in the United States through four distributors, including Proteor, Inc. ("Proteor"). IDF 294. In September 2018, Proteor became the exclusive distributor of Nabtesco's products in the United States. IDF 295; Mattear, Tr. 5547.

In 2017, Nabtesco sold [redacted] MPK units (annualized) in the U.S., corresponding to approximately [redacted] in sales. These sales equated to U.S. MPK market shares of approximately [redacted] by units and [redacted] by revenue. IDF 479-80.

D. FREEDOM'S FINANCIAL CONDITION AND EFFORTS TO REFINANCE OR SELL

Prior to Freedom's sale of its business, the company was struggling financially. Freedom experienced net losses on an annual basis, with biggest losses occurring in 2015 and 2016. IDF 765. Freedom ascribed its declining performance in 2015-16 to various internal and external factors, including durability and service issues with the Plié 3, regulatory audits that affected reimbursements for K-3 patients, and failures to keep costs in line with forecasted revenue growth. IDF 771-73. Otto Bock's 2015 launch of its C-Leg 4 also played a role, because the new C-Leg ate into sales of the Plié 3. IDF 600, 771.

In April 2016, Freedom's board of directors and its majority shareholder, HEP, hired a new CEO for Freedom, David Smith. IDF 774. Smith took a number of steps to turn Freedom around, including replacing the company's chief operating officer and head of sales; improving quality and service; enhancing the company's R&D pipeline; and restructuring the sales force. IDF 777. Freedom's turnaround plans began to bear fruit in late 2016 into 2017, and the

company began to enjoy increased revenue and EBITDA[9] during the first two quarters of 2017 until Otto Bock acquired it in September 2017. IDF 781-97.

Freedom also had substantial debt, however. In particular, as of the end of 2016, the company still owed approximately [redacted] on a [redacted] term loan that it had obtained in 2012. IDF 743, 745, 748. [redacted]. ID at 66; IDF 751.[10] During 2016 and 2017, Freedom explored various refinancing options for its debt. IDF 843-48. Freedom also explored potential sale options to companies including Otto Bock. IDF 860-61, 863. Ultimately, Freedom received two final offers for a sale of the company, one from Össur in the amount of [redacted] and one from Otto Bock for the higher sum of [redacted]. IDF 869, 871. Otto Bock acquired Freedom for approximately [redacted] on September 22, 2017. IDF 11, 872.

E. HOLD SEPARATE AGREEMENT AND RESPONDENT'S DIVESTITURE PROPOSAL

Just prior to the filing of the Commission's Complaint, on December 19, 2017, Respondent entered into a Hold Separate and Asset Maintenance Agreement (Hold Separate Agreement) with Complaint Counsel with respect to Freedom. IDF 15. The Hold Separate Agreement requires Respondent [redacted]. ID, App. D, Sections I.A-E, II.A, VI at 1-6, 8.

[redacted] IDF 37, 916, 923. [redacted] IDF 911; RX-1042 (May 29, 2018). [redacted] IDF 958; ID at 80-81. Respondent

9 Analysts use EBITDA, which refers to earnings before interest, (income) taxes, depreciation, and amortization, to focus on a particular measure of cash flow used in valuation. IDF 761.

10 [redacted] IDF 756-57.

11 [redacted]

characterizes this agreement as a proposed divestiture of "the entire Freedom MPK business." RAB at 1; *see also id.* at 28.

[redacted] IDF 960-963. [redacted] ID at 77. [redacted] RX-1042, Section 9.01(a)(iv) at 28; Oral Arg. Tr. 78-79, *in camera*.

The parties differ as to whether the Hold Separate Agreement and/or the proposed divestitures effectively prevent competitive harm. *See* Oral Arg. Tr. 11-12, 59; CCAB at 32-37.

III. PROCEDURAL HISTORY

A. PLEADINGS, MOTIONS, AND TRIAL

On December 20, 2017, the Commission issued a Complaint against Respondent alleging that the Acquisition violated Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleged that the Acquisition would harm competition in a relevant market consisting of the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States. Compl. ¶ 17. The Complaint asserted that the Acquisition was presumptively unlawful by virtue of increased concentration in the relevant market, and further that it eliminated what had been vigorous, sustained price and innovation competition between Otto Bock and Freedom. Compl. ¶¶ 35-58.

On January 10, 2018, Respondent filed an Answer in which it denied that the Acquisition harmed consumers or competition. Ans. ¶ 57. Respondent denied many of the substantive allegations of the Complaint, including the existence of a relevant market for the sale of MPKs. *Id.* at ¶ 17. Respondent asserted various affirmative defenses, including, *inter alia*, a Seventh Affirmative Defense that "Ottobock's planned divestiture of the microprocessor controlled knee business of Freedom addresses any conceivable anticompetitive effect in the one narrow segment of microprocessor controlled knees in which the Complaint alleges anticompetitive effects." Ans. at p. 30.

Complaint Counsel moved to strike Respondent's Seventh Affirmative Defense, arguing that an acquirer's subsequent plan to divest assets is not, as a matter of law, a valid defense to a transaction that has already taken place in violation of the Clayton Act. On April 18, 2018, the Commission issued a ruling that accepted Complaint Counsel's position in part, but that denied the motion to strike. Opinion and Order at 6. Specifically, the Commission held that the Seventh Affirmative Defense did not qualify as an affirmative defense because it could not completely defeat liability. *Id.* at 3-4. The Acquisition was already consummated, and any future divestiture could not eliminate the anticompetitive effects that may have occurred prior to the divestiture. *Id*. at 4.

Although the proposed divestiture could not constitute an affirmative defense, the Commission nonetheless did not strike the defense, finding instead that the claim should be treated as a denial. *Id.* at 5-6. The Commission reasoned that "a divestiture of assets could potentially be relevant to rebut a showing of likely anticompetitive effects for the period after a speculated divestiture is completed," and therefore held that "Respondent remains entitled to develop and present relevant evidence regarding the impact of such a divestiture on the existence and magnitude of likely post-divestiture competitive harms." *Id*. at 6. Furthermore, the Commission ruled, the Respondent could "develop and present relevant evidence regarding the adequacy of the planned divestiture as a remedy for any violation found." *Id*.

The trial took place from July 10, 2018 through October 4, 2018. ID at 2-3. The trial record included the testimony of 69 witnesses presented live or by deposition, and over 3,130 exhibits. ID at 4.

B. INITIAL DECISION

The ALJ issued an Initial Decision on April 29, 2019, in which he held that the Acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. ID at 3, 233. The ALJ held that the relevant market consists of the sale of MPKs to prosthetic clinics in the United States. ID at 35. He based this holding on (1) clinics' unwillingness to substitute mechanical knees for MPKs in the event of a small but significant price increase on MPKs, (2) unique characteristics of MPKs, including improved safety and performance versus mechanical knees, (3) industry recognition of an MPK-only market, (4) distinct prices for MPKs, coupled with evidence that MPK sellers set their prices solely in reference to other MPKs, and (5) economic evidence, including a critical loss analysis offered by Complaint Counsel's expert. ID at 19-35. The ALJ determined that Complaint Counsel had proved a reasonable likelihood of competitive effects in the relevant market, based on both the market share / market power presumption of *Philadelphia National Bank,* 374 U.S. 321, 363 (1963), and on Complaint Counsel's evidence of direct competition between C-Leg and Plié. ID at 36-49. The ALJ did not address Complaint Counsel's additional arguments that the Acquisition is likely to lessen competition between Otto Bock and Freedom as to future products that are currently in development. He stated that a decision on these arguments was unnecessary given his other findings. ID at 49 n.25.

The ALJ rejected Respondent's rebuttal arguments and defenses. First, he found that the evidence failed to establish that other competitors are poised to expand their sales in a way that would timely, likely, and sufficiently deter or counteract the potential anticompetitive effects. *Id.* at 51. He also rejected Respondent's assertions that any price increase by the post-acquisition firm would be constrained by the bargaining power of certain "power buyers" or by the cap on allowable insurance reimbursement rates. *Id.* at 54-60.

The ALJ found Respondent's failing company defense unpersuasive, ruling that Respondent failed to demonstrate (1) that Freedom was in imminent danger of failure and (2) that it had made a reasonable, good faith attempt to locate an alternative, less anticompetitive buyer. *Id.* at 60-74. He similarly rejected Respondent's assertion that Freedom was a "flailing

firm"—a weakened company of little competitive significance. *Id.* at 74-76. And, he rejected Respondent's argument that a proposed divestiture of Freedom's MPK assets to [redacted] would counteract any likely anticompetitive effects of the Acquisition. The ALJ found that the proposed divestiture was too speculative and did not set out all the terms necessary for him properly to evaluate whether the divestiture would replace the lost competition. *Id.* at 76-81. Finally, the ALJ rejected Respondent's argument that efficiencies to be generated by the Acquisition would outweigh its likely anticompetitive effects, as Respondent failed to show that the asserted efficiencies are merger specific, verifiable, or would benefit consumers in the relevant geographic market. *Id.* at 81-87.

As a remedy, the ALJ ordered Respondent to divest Freedom's entire business, with potential exceptions for certain prosthetic foot lines, to a buyer approved by the Commission. *Id.* at 239-45. The ALJ rejected Respondent's argument that the remedy should be limited to divestiture of Freedom's MPK assets, finding that the evidence fails to support the position that those assets can easily be separated from Freedom's business as a whole or that divestiture of just the MPK assets would be sufficient to restore competition to the relevant market. *Id.* at 89-90. Consequently, the ALJ's Order requires Otto Bock to divest the Freedom business with two potential exceptions. Under the first exception, Otto Bock *may retain* certain Freedom foot products unless the acquirer demonstrates to the Commission that such assets are necessary to achieve the purpose of the Order and the acquirer needs such assets to effectively operate the Freedom business. *Id.* at 92-93. Under the second exception, Otto Bock *must divest* certain other Freedom foot products (specifically, those foot products that Freedom previously sold in combination with its MPKs), unless the acquirer demonstrates that such assets are not necessary. *Id.* at 93.

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." 16 C.F.R. § 3.54(a) (2019). The Commission may "exercise all the powers which it could have exercised if it had made the initial decision." *Id.*; *see also* 5 U.S.C. § 557(b) (2018). The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts. *See Realcomp II, Ltd.*, 2007 WL 6936319, at *16 n.11 (F.T.C. Oct. 30, 2009), *pet. for review denied*, 635 F.3d 815 (6th Cir. 2011).

V. JURISDICTION

Respondent does not dispute that the Commission has jurisdiction over it and over the Acquisition challenged in the Complaint. Section 5(a) of the FTC Act grants the Commission authority to prevent "unfair methods of competition in or affecting commerce" by "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(1)-(2). Section 11 of the Clayton Act, 15 U.S.C. § 21, vests jurisdiction in the FTC to determine the legality of corporate acquisitions under Section 7 of that Act, 15 U.S.C. § 18. Otto Bock is a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, over which the Commission has jurisdiction. *See* JX1 (Complaint Counsel's and Respondent's Joint Stipulations of Law and

Fact) ¶ 5. Otto Bock's acts and practices at issue regarding the Acquisition are in or affect commerce as "commerce" is defined in Section 4 of FTC Act, 15 U.S.C. § 44, *see* JX1 at ¶ 1, and are subject matter over which the FTC has jurisdiction. *See* Ans. ¶ 13.

VI. LEGAL FRAMEWORK

Section 7 of the Clayton Act prohibits the acquisition of assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. *See, e.g., FTC v. Univ. Health, Inc.,* 938 F.2d 1206, 1218 (11th Cir. 1991)*; Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255, 274 (7th Cir. 1981). "Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). "Thus, to establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 623 n.22 (1974)).

Merger enforcement seeks to prevent the unlawful acquisition, enhancement, and exercise of market power. Acquisitions "that enhance market power can enable the merged firm to profitably alter its marketplace decisions to the detriment of consumers, for example, by raising prices, cutting output, or reducing product quality or variety." *ProMedica Health Sys., Inc.,* 2012 WL 1155392, at *12 (F.T.C. Mar. 28, 2012), *adopted as modified*, 2012 WL 2450574 (F.T.C. June 25, 2012), *pet. for review denied,* 749 F.3d 559 (6th Cir. 2014).

Courts and the Commission have traditionally analyzed Section 7 claims under a burden-shifting framework. *See, e.g., United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *ProMedica,* 2012 WL 1155392, at *12-13. Under this framework, the government can establish a presumption of liability by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in that market.[12] *See Phila. Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982-83. The typical measure for determining market concentration is the Herfindahl-Hirschman Index (the "HHI"). *CCC Holdings*, 605 F. Supp. 2d at 37. The HHI calculates market power by summing the squares of the individual market shares of all the firms in the market. *FTC v. Swedish Match,* 131 F. Supp. 2d 151, 166 n.11 (D.D.C. 2000).[13]

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12 *See infra* Section VII.B.1 (discussing application of the market concentration presumption and the role of additional evidence of unilateral anticompetitive effects).

13 We have noted in prior cases and the courts have also recognized that proving a relevant market and showing undue concentration in that market "does not exhaust the possible ways to prove a § 7 violation on the merits." *FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1036 (D.C. Cir. 2008); *see also ProMedica,* 2012 WL 1155392, at *13; *Evanston Nw. Healthcare Corp.*, 2007 WL 2286195, at *74-76 (F.T.C. Aug. 6, 2007). While a market share-based

Of course, in keeping with the admonition of the *Horizontal Merger Guidelines* that market shares are only the beginning of the inquiry, a plaintiff can bolster the presumption based on market structure with evidence showing that anticompetitive effects are likely. *Heinz*, 246 F.3d at 717. For example, the plaintiff may show that the merger would eliminate significant head-to-head competition, a particularly aggressive competitor in a highly concentrated market, or significant future competition. *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082-83 (D.D.C. 1997) (crediting evidence in those categories); *United States v. H&R Block, Inc.,* 833 F. Supp. 2d 36, 81-82 (D.D.C. 2011) (crediting evidence of head-to-head competition). Common sources of evidence for showing anticompetitive effects include the merging parties, customers, other industry participants, and industry observers. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 2.2 (2010) ("*Horizontal Merger Guidelines*").

"Once the Government establishes the *prima facie* case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects." *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *accord Baker Hughes*, 908 F.2d at 982-983; *see also id.* at 991 *and Heinz,* 246 F.3d at 725 (the stronger the government's *prima facie* case, the greater the respondent's burden of production on rebuttal). "[E]vidence on a variety of factors can rebut a prima facie case," *Baker Hughes*, 908 F.2d at 984, including "ease of entry into the market, the trend of the market either toward or away from concentration," the "continuation of active price competition," or "unique economic circumstances that undermine the predictive value of the government's statistics." *Heinz,* 246 F.3d at 715 n.7 (internal quotation marks omitted). Rebuttal evidence may also include other factors relating to competition in the relevant market or the competitive or financial weakness of the acquired company. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 494-504 (1974); *Baker Hughes,* 908 F. 2d at 985 (citations omitted).

Finally, if the respondent successfully rebuts the *prima facie* case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which remains with the government at all times. *Chicago Bridge*, 534 F.3d at 423. Although the burden shifting analysis "conjures up images of a tennis match," *Univ. Health,* 938 F.2d at 1218-19 & n.25, in reality the evidence is often considered all at once and the burdens are analyzed together. *Id.*; *see also, e.g.*, *Chicago Bridge*, 534 F.3d at 424-25.

VII. LIABILITY

A. THE RELEVANT PRODUCT MARKET

As the ALJ observed, a relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and

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approach is a common way to prove a Section 7 violation and market share statistics support a finding of liability here, we need not rely solely on market shares in this case.

substitutes for it." *Brown Shoe,* 370 U.S. at 325; *see du Pont,* 351 U.S. at 395. Cross-elasticity of demand refers to the extent to which sales of one product are responsive to changes in the price of another, *i.e.,* whether "an increase in the price for Product A causes a substantial number of customers to switch to Product B." ID at 20 (quoting *FTC v. Sysco Corp.,* 113 F. Supp. 3d 1, 25 (D.D.C. 2015)).

The enforcement agencies and many courts employ the "hypothetical monopolist test" to assess whether a candidate set of products constitutes a relevant market. *See Horizontal Merger Guidelines* § 4.1.1; *FTC v. Staples, Inc.,* 190 F. Supp. 3d 100, 121-22 (D.D.C. 2016). The test operationalizes and builds on the cross-elasticity inquiry by asking whether a hypothetical, profit-maximizing firm that is the only present and future seller of the products in the candidate market likely would impose at least a small but significant and non-transitory increase in price (a "SSNIP," usually defined as a five percent price increase) on at least one product in the market, including at least one product sold by one of the merging firms. *Horizontal Merger Guidelines* § 4.1.1-.2. If the hypothetical seller would lose sufficient sales to make the SSNIP unprofitable, the candidate market is too narrow and the analysis must add substitute products to the candidate market until the test is met. *See United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 20-21 (D.D.C. 2017); *Sysco Corp.,* 113 F. Supp. 3d at 33.

In addition to the hypothetical monopolist test, the case law also identifies and relies on "practical indicia" of market definition such as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe*, 370 U.S. at 325 (enumerating practical indicia to define the relevant product market). *See, e.g.*, *Staples*, 970 F. Supp. at 1075-80; *Sysco,* 113 F. Supp. 3d at 27-30; *Swedish Match*, 131 F. Supp. 2d at 159-64; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46-48 (D.D.C. 1998).

Market definition must "take into account the realities of competition." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008). Ordinary course of business documents reveal the contours of competition from the perspective of the parties, who may be presumed to "have accurate perceptions of economic realities." *Id.* at 1045 (Tatel, J., concurring) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)). Thus, in determining the relevant product market, courts pay "close attention to the defendants' ordinary course of business documents." *H&R Block*, 833 F. Supp. 2d at 52.

Applying these principles, the ALJ found that MPKs sold to prosthetic clinics in the United States constitute a relevant product market.[14] We agree.

14 The ALJ found, and the Respondent does not dispute, that the relevant geographic market is the United States. ID at 17. We adopt this finding.

1. Interchangeability of Use and Cross-Elasticity of Demand

As discussed above, the Supreme Court identified interchangeability of use and cross-elasticity of demand as key indicators of relevant market definition. *Cf. Brown Shoe,* 370 U.S. at 325. The hypothetical monopolist test assesses these factors by measuring the ability and willingness of buyers to switch their purchases to alternative products in the face of a small but significant price increase. Thus, we look to the available evidence to determine whether alternative products are sufficiently close substitutes for MPKs to constrain price increases (or other competitive harm) in MPKs. As discussed below, the evidence regarding functional interchangeability and cross-elasticity of demand shows that they are not.

MPKs exhibit a significantly greater level of interchangeability with each other than with their next-nearest substitute, mechanical knees. In the view of customers, MPKs provide more safety and stability than mechanical knees, leading to fewer stumbles and falls; MPKs allow patients to more easily traverse environmental barriers such as curbs, steps, and slopes, and to walk in crowded areas; and MPK users demonstrate a much better gait, and are better able to walk with a variable cadence, compared to users of mechanical knees. ID at 19-20; IDF 362-68. Clinical studies confirm these benefits, IDF 369-93, and the sellers of MPKs (even those who also sell mechanical knees) tout these advantages of MPKs over mechanical knees. IDF 331-61.

Furthermore, evidence demonstrates a lack of cross-elasticity of demand between mechanical knees, on the one hand, and MPKs, on the other. This evidence reveals that price-based switching between MPKs and mechanical knees is not substantial, IDF 449-53, which suggests that a hypothetical monopolist of MPKs could profitably impose a SSNIP. Many prosthetists and clinic owners testified that they would not switch patients to mechanical knees even if prices of MPKs were increased by 5 to 10%. *See, e.g.,* IDF 450 (Ability Prosthetics and Orthotics would not move its patients to mechanical knees if the cost of MPKs increased by 5%); IDF 451 (the Center for Orthotic and Prosthetic Care would not begin recommending more mechanical knees if MPK manufacturers increased prices by 5 to 10%); IDF 452 (Sprinkle Prosthetics typically would not switch a patient who would otherwise medically benefit from an MPK and whose insurance provided coverage for an MPK to a mechanical knee based on a 5-10% price increase). Prosthetists have a reputational and ethical obligation to fit each patient with a prosthetic knee that best meets the patient's medical needs, and their decision to fit a patient with an MPK versus a mechanical knee (if insurance coverage is available for both products) is a clinical one, not a financial one. IDF 447-48. As one clinic customer explained, it would be a "disservice to the patients and poor patient care" to threaten to shift MPK volume to mechanical knees because MPKs are "a much better knee, and if a patient is [an] eligible candidate for one, that is the knee they would prefer and deserve." IDF 449. Other customers testified similarly. *See* IDF 368 (collecting testimony of clinics regarding non-substitution to mechanical knees).

The determination of what constitutes the relevant product market "hinges . . . on a determination of those products to which consumers will turn, given reasonable variations in price." *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001); *see also du Pont,* 351 U.S. at 380-81, 400 (the products in a relevant market would be

characterized by cross-elasticity of demand, *i.e.*, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market); *cf. FTC v. Sanford Health,* 926 F.3d 959, 963-64 (8th Cir. 2019) (defining relevant geographic market based on whether health insurers could defeat a small but significant nontransitory price increase by a hypothetical monopolist of the relevant physician services). We concur in, and adopt, the ALJ's findings that interchangeability of use and cross-elasticity of demand support a relevant market limited to MPKs.

2. *Brown Shoe* Factors

The factors that the Supreme Court identified in *Brown Shoe* further buttress the relevant market of MPKs. ID 22-32. The Court described the *Brown Shoe* factors as "practical indicia" rather than requirements, 370 U.S. at 325, and courts have used them to define markets even when only some of the factors are present. *See, e.g., Staples,* 970 F. Supp. at 1075 (citations omitted).

a. Product's peculiar characteristics

The microprocessor in an MPK allows it to function, operate, and perform in a way that is different from a mechanical knee. IDF 330. An MPK's microprocessor uses a continuous stream of electronic data from movement and position sensors in the knee to make decisions in real time regarding the function of the knee. IDF 103-04; 332; 360. As one supplier put it, an MPK "relies on a microprocessor or computer to monitor the activity of a patient and steer the function of the knee to ensure appropriate reaction and response of that knee to whatever situation the patient might find themselves in." IDF 103 (quoting De Roy, Tr. 3542). By contrast, mechanical knees use other means such as friction-brakes, pneumatic cylinders, or hydraulic cylinders to regulate the swing and stance phases of a user's gait. ID 23; IDF 96-101. Unlike a microprocessor that "thinks instantaneously," a mechanical knee "has to go through a [gait] cycle for the knee to figure out what to do," and cannot respond "until it goes through that cycle." IDF 367 (quoting PX05119 (Kahle Dep.) at 33-34).

Copious evidence links the unique characteristics of MPKs to distinct functional advantages for amputees. Peer-reviewed research articles have repeatedly found increased safety and performance of MPKs over mechanical knees. IDF 369. Documented benefits of MPKs over mechanical knees include improved gait, reduction in falls, improved ability to walk on uneven ground as well as to climb or descend stairs, lower energy consumption from walking, increased patient activity, and greater patient satisfaction. IDF 374-80; 385-93. Surgeons and clinic customers see similar benefits. They believe that MPKs provide better safety and reduced likelihood of falls, allow more variation in walking speed, and improve walking efficiency. IDF 362-67. A better gait, in turn, causes less wear and tear on the body and can reduce risk for low back pain and osteoarthritis. IDF 362, 365.

Sellers of MPKs, including Respondent, recognize and tout the benefits that MPKs offer over mechanical knees. ID at 23-25. As Respondent's website explains, microprocessors provide "a more sophisticated method of control to a prosthetic knee. These more complex knee joints are designed to help you walk with a much more stable and efficient gait that more closely

resembles a natural walking pattern." PX08013. The ALJ's decision catalogues the voluminous evidence showing sellers' recognition of the distinct benefits that MPKs offer to amputees. IDF 331-61. Rather than repeat these findings, which we adopt, we summarize several highlights:

- A presentation sent by Respondent's executive medical director to a certified prosthetist highlighted several benefits of MPKs, specifically Otto Bock's C-Leg 4 and Compact, over mechanical knees, and represented that these benefits were supported by clinical evidence. The benefits included: "improved safety – less stumbles and falls (up to 80%!), improved balance and confidence"; "improved and faster slope negotiation"; "improved and faster negotiation of uneven terrain and obstacles"; "improved stair descent"; "reduced cognitive demand to walk and improved multi-tasking"; and "potential to increase overall mobility / K-Level." IDF 339.

- The head of Respondent's business unit for prosthetic lower-limb mechatronic systems, Andreas Eichler, testified that the primary benefits of MPKs are "safety and comfort." IDF 334. Eichler elaborated that safety meant "[t]hat patients can rely on their knee joints that it will be stiff when it's supposed to be stiff and it will be pliable when it's supposed to be pliable," and comfort meant "[l]ess pain. So less pain and subsequent damages as a result of everyday use and walking on the prosthetic." *Id.* Eichler also agreed that MPKs are more responsive than mechanical knees, which, as he explained, "are not responsive at all." *Id.*

- A 2015 Freedom presentation titled "Microprocessor Controlled Knees" includes slides titled, "What makes MPC Knees different?" (PX00814 at 003, 007-08). The listed differences are: "Increases stability and confidence"; "Reduces cognitive burden because of stumble recovery feature"; "Studies have shown that MPC knees can elevate some user's functional abilities (K-level) compared to conventional knees"; "Studies also suggest that [MPKs] actually are responsible for variable cadence achievement"; "Stability can reduce fear of falling"; "Studies show 88.1% increase in confidence"; "Studies also show 88.4% improvement of gait agility compared to non-MPK's"; "Reported that MPC knees can decrease frequency of falls by as much as 64%"; and "Amputees no longer have to watch every step." IDF 352.

- Freedom's CEO at the time of the Acquisition, David Smith, asserted that Freedom's Plié 3 and mechanical knees are "completely different products [at] completely different price points." IDF 344. He distinguished a mechanical knee from an MPK as follows: "One is rudimentary and one is sophisticated. One doesn't allow mobility and ambulation and one does. One restricts activity or limits your activity, or you want it limited for safety reasons because the patient is incapable. The other one allows it and facilitates it." *Id.*

Based on the entire record, we, like the ALJ, find that the peculiar characteristics of MPKs support their delineation as a distinct relevant market.

b. Industry recognition of the market as a separate economic entity

As the ALJ found, Otto Bock, Freedom, and mechanical knee manufacturers all view the market for MPKs as a distinct market from mechanical knees. ID at 28-30.

In Otto Bock's ordinary course of business documents, the company analyzes MPKs as comprising their own relevant market. In numerous documents, Otto Bock estimates its market share only in relation to other MPKs. IDF 411-16. Otto Bock tracks sales of its MPKs separately from sales of its mechanical knees. IDF 417. In its analysis of competition, Otto Bock compares the C-Leg 4 only to the Plié 3, Endolite's Orion 2, and Össur's Rheo 3 MPKs. IDF 418-21. According to Otto Bock's vice president of government, medical affairs, and future development, these are the "primary competitors" for the C-Leg 4 in the United States. IDF 419.

Freedom and other MPK manufacturers categorize their products similarly. In its ordinary course of business documents, Freedom examines the market share for Plié only in relation to shares of other MPKs (C-Leg, Rheo, and Orion), and views the Plié as competing in that market. IDF 422-26. Other manufacturers' ordinary course documents do the same. IDF 428, 430. According to the testimony of Endolite's executive chairman, Endolite "only look[s] at other MPKs" and not mechanical knees when analyzing competition for its MPK, the Orion 3. IDF 430. Using only MPKs, rather than MPKs and mechanical knees, as a reference point is appropriate because "the price point is completely different" and "customers don't tend to think of [the two types of knees] in the same way." *Id.* Similarly, College Park Industries ("College Park"), a mechanical knee manufacturer, did not identify any MPK as a competitive target for its pneumatic mechanical knee in development because it does not "believe they compete in the same market." IDF 435 (quoting PX05107 (Carver Dep.) at 106).

We find that this evidence supports an MPK-only market. *See Whole Foods Mkt.,* 548 F.3d at 1045 (Tatel, J., concurring) (cataloging evidence that competitors viewed themselves as competing in a market for premium natural and organic supermarkets; court found a likelihood of success defining a market accordingly); *H&R Block,* 833 F. Supp. 2d at 52-53 (finding relevant market of digital do-it-yourself tax preparation products because, *inter alia,* defendants' ordinary course documents showed that they viewed themselves as competing primarily against such products).

c. Distinct prices and sensitivity to price changes

Evidence regarding the price and price-setting of prosthetic knees also supports an MPK-only market. An MPK costs on average at least four to eleven times more than a mechanical knee. *See* IDF 395, 397-98 (providing examples). In 2017, the estimated average sale price for an MPK was [redacted] versus [redacted] for a mechanical knee. IDF 398. Reflecting this difference, payers reimburse prosthetic clinics at much higher rates for MPKs than for mechanical knees. IDF 401-04.

Further, in setting prices for the C-Leg 4, Otto Bock looked at prices and reimbursement rates of only three other products, all of which are MPKs—Freedom's Plié 3, Össur's Rheo 3, and Endolite's Orion. IDF 405. When setting its price for the Plié 3, Freedom looks at the prices of other MPKs and does not look to pricing of mechanical knees. IDF 406. Similarly, Össur and Endolite do not consider the prices of mechanical knees when setting the prices of their MPKs. IDF 407-08. Össur does not consider the prices of MPKs when setting the prices for its K-3 mechanical knees because Össur believes MPKs "play in a different segment." IDF 431. Furthermore, various clinics reported that prices of MPKs do not respond to price changes of mechanical knees and that clinics are unable to use prices of mechanical knees when negotiating with manufacturers for the price of MPKs. IDF 409-10.

As the ALJ correctly held, evidence that a seller develops "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market. ID at 31, quoting *H&R Block*, 833 F. Supp. 2d at 53; *see also Swedish Match*, 131 F. Supp. 2d at 165 (holding that the product market for loose leaf tobacco did not include moist snuff where, among other factors, "loose leaf pricing is determined upon the basis of competition with other loose leaf products, not moist snuff"); *Aetna*, 240 F. Supp. 3d at 24-25 (noting that evidence that Aetna does not assess the price of Medicare Advantage plans when it sets the price of MedSupp plans indicates that the two types of plans are not in the same relevant product market); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132-33 (D.D.C. 1986) (evidence that concentrate companies "make pricing and marketing decisions based primarily on comparisons with rival carbonated soft drink products, with little if any concern about possible competition from other beverages" shows that carbonated soft drinks are a relevant product market), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

For the above reasons, the "distinct prices" and "sensitivity to price changes" indicia support a distinct relevant product market consisting only of MPKs.

d. Distinct customers

Although the ALJ did not find this factor dispositive,[15] the record shows that the population of MPK users is largely distinct from that of non-MPK users. Only select customers are eligible for insurance reimbursement for an MPK, and patients who do not receive coverage very rarely purchase an MPK out-of-pocket. IDF 215. In order for the patient to obtain reimbursement, the prosthetist must demonstrate "medical necessity"—*i.e.*, that the patient has unmet needs that can be fulfilled by an MPK but not by a less expensive alternative such as a mechanical knee. IDF 187, 189. Often, this determination requires documentation not only that the amputee is a K-3 or K-4 level ambulator but also that the MPK would provide a clinically significant improvement to the amputee's life. *See* IDF 205-206, 213-14. Although some MPK-eligible patients may seek a mechanical knee,[16] as a general matter MPKs and mechanical knees

15 *See* ID at 22 n.13.

16 For example, some patients who engage in sports such as cycling, weightlifting, or CrossFit may prefer a mechanical knee because it is cheaper, more durable, and easier to replace if it breaks. IDF 220. Similarly, those who fish may prefer mechanical knees because of superior water resistance. IDF 222-23.

"don't really compete for the same population." IDF 427 (quoting PX05124 (De Roy Dep.) at 184-85). As another clinician testified, he would not fit a patient with a mechanical knee if he determined that an MPK would best serve the patient and the insurance provider would cover it, "[b]ecause they will fall and they will hurt themselves, and I don't like it when my patients fall and hurt themselves." *See* IDF 368 (collecting testimony of various prosthetists that, generally speaking, MPK-eligible patients will receive an MPK if insurance covers the cost); IDF 427 (quoting testimony of Össur's executive vice president of research and development that the patient population for MPKs includes "people with access to certain funds" and, if such patients "have access to a microprocessor knee, they'll buy a microprocessor knee"). Typically, as long as clinics can fit an MPK on a patient who has an MPK prescription and insurance coverage without losing money, they will. ID at 21; IDF 447-53.

Because MPKs are generally selected for a distinct population of users, we find that this *Brown Shoe* factor supports an MPK-only relevant market.

3. Respondent's Arguments Regarding Market Definition

Respondent argues that an MPK product market is "impermissibly vague" and therefore insupportable. RAB at 37-38. On appeal, Respondent does not advocate for an alternative market that it would have us adopt, but claims that the market the ALJ defined is "unusable." RAB at 38. According to Respondent, prosthetic knees are highly differentiated, and there is "significant technology overlap between knees that contain microprocessors, and those that do not." *Id.* at 37. In particular, Respondent states that the evidence does not support the exclusion from the market of what it calls "sophisticated non-MPKs," a term that Respondent does not define. *Id.* Conversely, Respondent argues that among knees that contain microprocessors, there is a wide range of price points, features, and levels of microprocessor control. *Id.* Respondent objects to a market comprising all of these products.[17] *See* RPTB at 2-4 (arguing that an MPK market is both "too narrow" and "too broad").

Respondent's argument, even if accepted, would not change the outcome of this case. In the administrative hearing, Respondent's expert opined that the relevant product market consists of prosthetic knees for K-3 and K-4 mobility levels, including some non-MPKs and excluding certain high-end and integrated MPKs. ID at 38; IDF 486. Even in such a market, and using the market share calculations of Respondent's own expert witness, the post-acquisition HHI of 4,359 would be well above 2,500 points, which indicates a highly concentrated market. ID at 38; IDF 486; *Horizontal Merger Guidelines* § 5.3. And the increase in HHI from Otto Bock's acquisition of Freedom would be at least 599 points, much greater than the 200-point increase that causes a presumption of anticompetitive effects under the *Horizontal Merger Guidelines* when a merger

17 Respondent also argues that the ALJ relied on a faulty opinion of Complaint Counsel's economic expert to support the relevant market. RAB at 38-39. Because we hold that the record evidence amply proves an MPK-only market even without the expert's opinion, we do not reach this argument.

results in a highly concentrated market. ID at 38; IDF 486; *Horizontal Merger Guidelines* § 5.3.[18]

In any event, we find Respondent's critique of the ALJ's market definition unpersuasive. To begin with, the market definition is not vague. It is clearly defined in terms of a specific feature, the use of a microprocessor. Otto Bock had no difficulty understanding and referring to this group of products in its ordinary business practice. *See, e.g.,* PX08013 (webpage of Respondent) ("In general, there are two kinds of prosthetic knees: non-microprocessor (or 'mechanical') and microprocessor"); Swiggum, Tr. 3329-30 (Otto Bock North America estimated its market shares for microprocessor knees in the U.S.).

As to Respondent's other objections, the fact that products may be differentiated does not prevent their being in the same market if they closely constrain each other's prices. *See generally* 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 563a at 407-08 (4th ed. 2014). Conversely, the existence of technological or functional overlap between MPKs and some non-MPKs, while relevant, does not mandate their inclusion in the same market. The key question is whether, when faced with a reasonable price variation, more than a "limited number" of customers would switch from MPKs to non-MPKs. *See Times-Picayune Pub'g Co. v. United States,* 345 U.S. 594, 612 n.31 (1953). If a hypothetical monopolist of MPKs could profitably raise price by a small amount, even with the loss of some customers, then MPKs constitute the relevant market. *See Sysco,* 113 F. Supp. 3d at 33. Respondent ignores the overwhelming body of evidence, described above and detailed in the ALJ's opinion, that a hypothetical seller of all MPKs would not lose substantial sales to non-MPKs in the event of a small but significant price increase. *See United States v. Archer-Daniels-Midland Co.,* 866 F.2d 242, 248 (8th Cir. 1988) (functionally interchangeable sweeteners were separate product markets because "a small change in the price of [one] would have little to no effect on the demand for [the other]"). The abundant evidence that sellers view the relevant market as composed solely of MPKs, and that they price their MPKs in relation to each other and not to products outside the market, reinforces this conclusion. IDF 405-19; 422-31; 435.

Finally, we note that the extensive evidence of head-to-head competition adduced at trial demonstrates rivalry between and among MPKs and not other products. *See* Section VII.B.2 below. The existence of such head-to-head competition, and the resulting potential for competitive harm, can inform market definition. *Horizontal Merger Guidelines* § 2.1.4; *see also Staples, Inc.,* 190 F. Supp. 3d at 122 (head-to-head competition in the "B-to-B space" found to support relevant market defined as such). We turn to this competition, and these harms, after addressing the rebuttable presumption of competitive harm generated by the high market concentration in this case.

18 Similarly, the transaction also generates a presumption of harm using a narrower market that excludes lower-end and higher-end MPKs. ID at 36-37; *see* Section VII.B.1 below.

B. ANTICOMPETITIVE EFFECTS

1. Concentration in the Relevant Market

Under the applicable legal framework discussed in Section VI above, "[s]ufficiently large HHI figures establish [a] prima facie case that a merger is anti-competitive." *Heinz*, 246 F.3d at 716; *see also Polypore Int'l, Inc.*, 2010 WL 9933413, at *22 (F.T.C. Dec. 13, 2010) (applying presumption of competitive harm in markets for various types of battery separators). This presumption of harm is, of course, rebuttable. *See Gen. Dynamics,* 415 U.S. at 497-98.

Under the *Horizontal Merger Guidelines*, mergers that cause an increase in the HHI of more than 200 points and result in a highly concentrated market—*i.e.*, with an HHI over 2,500—are presumptively anticompetitive. § 5.3; *see also ProMedica,* 749 F.3d at 568-70 (upholding Commission's presumption of competitive harm from HHI increases of over 1,000 points to a total exceeding 4,000 points).

Here, the results of the HHI analysis are substantially above the levels that would trigger a presumption. The Acquisition combines the first- and third-largest sellers of MPKs in a market that is already highly concentrated. Complaint Counsel's economic expert calculated, and we adopt as our findings, concentration levels and changes in HHI as follows:

- In a market consisting of all MPKs, using United States revenue in 2017, the Acquisition combined Otto Bock's [redacted] market share with Freedom's [redacted] share to yield a merged entity holding more than [redacted] of the market. It would increase HHI by 1,522 points to 6,767. ID 36; IDF 479.

- Using the same relevant market but calculating by unit share rather than revenues, the Acquisition combined Otto Bock's [redacted] share with Freedom's [redacted] share, yielding a merged entity with a share exceeding [redacted]. HHI increased by 1,799 points to 6,813.[19] ID 36-37; IDF 480.

Respondent argues that we should give the market share presumption no weight in a case that, like this one, relies on showing unilateral effects in a differentiated products market. RAB at 22 n.5.[20] Respondent would allow an exception if Complaint Counsel first established a correlation between market share and market power, which Respondent acknowledges the court found in *ProMedica.* 749 F.3d at 570; Oral Arg. Tr. 29. Had the court not found such evidence,

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19 Complaint Counsel's expert also considered an alternative market that excluded lower-end and higher-end MPKs. IDF 478, 482-85. In that market, the Acquisition increased the HHI by 1,949 points to 6,240 on a revenue basis, and by 2,062 points to 6,542 on a unit basis. ID []; IDF 483-84. As does the expert's preferred all-MPK market, this market triggers a presumption of competitive harm under the *Horizontal Merger Guidelines.* IDF 485.

20 Respondent also argues that a proposed divestiture of MPK assets must be incorporated into and undermines Complaint Counsel's *prima facie* case. As discussed below in Section VIII, because the transaction is already consummated, among other reasons, we find that in this case the divestiture would not affect liability and is properly assessed as a proposed remedy.

Respondent argues, the presumption would not apply at all. RRB at 2. We take Respondent's argument to mean that proof of high concentration by itself would tell us little about a central element of unilateral effects cases: the closeness of competition between the merging parties' products, which we discuss *infra* at Section VII.B.2.

Courts have long recognized that market share statistics are important, but they "[a]re not conclusive indicators of anticompetitive effects . . . ." *Gen. Dynamics,* 415 U.S. at 498 (citation omitted). As the *Horizontal Merger Guidelines* indicate, the antitrust enforcement agencies do rely "much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products." § 6.1; *ProMedica*, 749 F.3d at 569.[21] But "[e]ven in unilateral effects cases, at some point the Commission is entitled to take seriously the alarm sounded by a merger's HHI data." *ProMedica, id.* at 570. The Sixth Circuit in *ProMedica* found that, in a highly concentrated market like this one,[22] it was very likely that a significant fraction of the customers of one of the merging firms would turn to the other firm as a close substitute. *Id.* at 570. The court ultimately upheld the Commission's use of a presumption. *ProMedica*, 749 F.3d at 570. Likewise, here, the mere fact that Complaint Counsel allege unilateral effects in a differentiated product market does not nullify the presumption. In this case our finding of unilateral effects goes well beyond any market share-based presumption, so there is no need for the Commission to articulate the bounds of the *Philadelphia National Bank* presumption.

However, as previously noted, the presumption of illegality is rebuttable. *General Dynamics,* 415 U.S. at 498 (discussing *Brown Shoe*); *Heinz,* 246 F.3d at 717 n.12. It does not conclusively establish a violation but merely shifts the burden of production. If Respondent believes that the presumption should not apply in this case, it may demonstrate that competitive forces in the market counteract the inference of competitive harm raised by market structure, or that this inference is otherwise flawed. Here, on the contrary, other evidence strongly buttresses the conclusion of likely competitive harm drawn from the evidence of undue concentration. *See infra* Section VII.B.2.

2. Additional Evidence of Loss of Competition

Even apart from the presumption based on HHIs, the record evidence of competitive harm establishes a compelling case for liability. This includes evidence that a significant fraction of clinical customers view the C-Leg and Plié as their first and second choice; evidence

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21 The 2010 *Horizontal Merger Guidelines* reject a uniform, single factor analysis of competitive effects in favor of a holistic, fact-specific approach. *See* § 1. Some economic learning suggests that enforcers should avoid an overreliance on market shares or concentration in cases involving differentiated products and unilateral anticompetitive effects. *See*, *e.g.*, Gregory J. Werden & Luke M. Froeb, *Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries*, *in* THE ECONOMICS OF THE ANTITRUST PROCESS 65-88 (Malcolm B. Coate & Andrew N. Kleit eds., 1996); Christopher Garmon, The Accuracy of Hospital Merger Screening Methods, 48 RAND J. ECON. 1068 (2017).

22 On smaller HHIs than presented here, the Sixth Circuit noted that the merger "blew through [the Guidelines'] barriers in spectacular fashion." *ProMedica*, 749 F.3d at 568 (comparing an HHI increase of 1,078 points, to 4,391, to the presumptions set out in the *Horizontal Merger Guidelines*).

that the companies vigorously competed against each other prior to the Acquisition; evidence of Otto Bock's intent and plans with respect to the Acquisition; and evidence of changed incentives and reduced competition following the Acquisition.

a. Next-Best Choice Evidence

"Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice." *ProMedica*, 749 F.3d at 569 (quoting *Horizontal Merger Guidelines* § 6.1). When purchasers of one merging party's products view the other merging party's products as their best alternative, the merged firm has an incentive to raise prices because lost sales will be diverted to its other products. *See Horizontal Merger Guidelines* § 6.1. "For a merger to raise concerns about unilateral effects, however, not every consumer in the relevant market must regard the products of the merging firms as her top two choices." *ProMedica*, 749 F.3d at 569. It is sufficient that "a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice," and the "significant fraction . . . need not approach a majority." *Id.* at 569 (quoting *Horizontal Merger Guidelines* § 6.1 at 20-21). Here, the record contains abundant evidence that a significant fraction of Otto Bock's and Freedom's MPK customers view the other party's MPKs as their next-best choice, such that the merger will likely produce adverse unilateral effects.

Just a few weeks before the merger, Otto Bock estimated that [redacted] of Plié customers would switch to the C-Leg if the Plié were discontinued. PX01473-023 [redacted]; PX01003-022 (same); Swiggum, Tr. 3372-76. *See also* Scott Morton, Tr. 4240-42 [redacted]; Swiggum, Tr. 3376-80. Even using the conservative "downside" estimate, where only [redacted] of Plié customers would be diverted to the C-Leg, the merged firm would have a very substantial incentive to raise prices. *See* Scott Morton, Tr. 3937-38. Respondent argues that we should ignore its own diversion estimate because it was taken from a draft document and based on preliminary information. RAB 38-39; RRB 6-7. But Otto Bock's most senior executives used this "draft" document to evaluate the Acquisition, and Respondent does not provide any other diversion estimate that it purports to be more accurate. *See* Swiggum, Tr. 3361, 3380; Oral Arg. Tr. 32-33. Moreover, Otto Bock's former CEO corroborated the [redacted] diversion estimate. He testified that [redacted]. Swiggum, Tr. 3421-23. Further, nearly two months after the Acquisition, Otto Bock's top executives recommended increasing the price of the Plié based on the expectation of diverting sales to Otto Bock's MPKs. PX01302-081 [redacted]; Swiggum, Tr. 3420-22. Otto Bock itself believed that enough Plié customers would turn to the C-Leg such that a price increase would be profitable.

The record also contains evidence of substantial customer switching between the C-Leg and the Plié, as well as customer testimony that their clinicians prefer the functionality of the Plié and the C-Leg over other MPKs. This provides further proof that the Plié and C-Leg are the top two choices for a significant share of customers. For example, in 2017, clinicians from Hanger, the largest network of orthotic and prosthetic clinics in the United States, reported quality issues with the newly-released C-Leg 4, and some clinicians shifted their purchases from the C-Leg to other MPKs. Hanger's CEO testified that those clinicians who shifted away from the C-Leg turned primarily to the Plié. Asar, Tr. 1401, 1450. *See also generally* PX01091-012 [redacted]. Similarly, the Center for Orthotics & Prosthetic Care ("COPC"), another customer, shifted volume from Otto Bock to Freedom in 2016 and 2017 due to Freedom's discounting. Senn, Tr. 221-22; IDF 515. COPC is currently not willing to move volume to Össur and Endolite, because its practitioners prefer the functionality of Otto Bock's and Freedom's knees. Senn, Tr. 223-25; IDF 650, 661. *See also* Ford, Tr. 937 ("C-Legs and the Plié knees are our clinicians' preference"); Ell, Tr. 1731 (Otto Bock and Freedom MPKs are the only ones Mid-Missouri O&P purchases because "[t]hey have clearly defined themselves as providing and servicing a better product for my patients").

Respondent argues that an assessment of whether a significant fraction of customers of one firm would turn to the other in response to a price increase cannot be based on the testimony of a few witnesses selected by Complaint Counsel to testify at trial. RAB at 27. Hanger, however, controls 25% to 30% of U.S. prosthetic clinics and is both Otto Bock's and Freedom's largest customer, accounting for over 50% of Freedom sales [redacted] IDF 713, 717; Swiggum, Tr. 3440. And Respondent itself describes COPC as [redacted] RRB at 12. Together, Hanger and COPC could constitute a "significant fraction" of customers in and of themselves. Complaint Counsel thus provided evidence of the experience of clinicians serving a substantial share of consumers.

Otto Bock's and Freedom's sales figures also provide evidence of customers shifting between the two companies in response to innovation and price changes. The launch of the Plié 3 in 2014 led to a decrease in Otto Bock's MPK sales. IDF 573. The launch of the C-Leg 4 in 2015 caused a significant decrease in sales of the Plié 3. *Id.* 592-600; PX03008-005 ("the introduction of the new C-Leg 4 resulted in a [redacted] decline in Freedom's knee unit sales from September 2015 to April 2016 compared to the same period for the prior year"). And, in turn, Freedom's subsequent discounting and bundling impacted Otto Bock's sales. IDF 637. This evidence, too, suggests that the C-Leg and Plié are the first- and second-best choices for a significant number of customers.

Respondent argues that the C-Leg and Plié are not close substitutes and that other MPKs are closer substitutes for both products. RAB at 22-24. Respondent claims that Össur's Rheo is the closest substitute to Otto Bock's C-Leg, because it is most similar to the C-Leg 4 in terms of functionality, quality, and price, and it asserts that Freedom's closest competitors are Endolite, Proteor, and DAW. *See* RAB at 10-11, 23-24, 26-27; RRB at 7-9. But, a merger can cause unilateral effects even if the merging products are not each other's closest competitors. *See H&R Block*, 833 F. Supp. 2d at 83 (holding that the fact that another product "may be the closest

competitor" to a merging product "does not necessarily prevent a finding" that unilateral effects are likely (citing Areeda & Hovenkamp, ¶ 914, 77-80 (explaining that the merging parties need not be the closest rivals for there to be unilateral anticompetitive effects) and Commentary on the Horizontal Merger Guidelines (2006) at 28 ("A merger may produce significant unilateral effects even though a non-merging product is the 'closest' substitute for every merging product . . ."));
see also ProMedica, 749 F.3d at 569 (explaining that "a significant fraction" of a merging firm's customers must view the products of the other firm as the next-best choice, but that the fraction "need not approach a majority"). Moreover, Respondent's arguments regarding the substitutability of competing products, based largely on purported functional similarities and differences between the MPKs, are inconsistent with the much more direct next-best-choice evidence discussed above. That evidence shows that a significant portion of customers shift their purchases between the C-Leg and Plié and that the C-Leg would likely recapture at least 50% of Plié customers if the Plié were discontinued. In other words, Otto Bock's own diversion estimate undercuts its arguments about substitutability based on the functional differences between the products, because its diversion estimate accounts for consumer preferences *given* any such functional differences.

Moreover, Freedom's forthcoming MPK, the Quattro, which Freedom nicknamed the "C-Leg killer,"[23] is expected to be a closer competitor to the C-Leg than any other MPK, including the Rheo. *See infra* at VII.B.2.c. *See also* PX01471-003 (summary of in-person Quattro evaluation; Quattro "will compete better with the C-Leg 4" than the Rheo "because the stance phase functions will be much better than Rheo can achieve."); [redacted] Otto Bock's own documents repeatedly discuss the potential threat of the Quattro to its MPK business, [redacted]; PX01471-003 ("Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the U.S."). The closeness of competition between the C-Leg and the Quattro strongly supports a finding of likely competitive harm.

b. Evidence of Head-to-Head Competition Between Plié and C-Leg

Evidence that Otto Bock and Freedom vigorously competed before the merger further supports a finding of likely anticompetitive effects. "[M]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (2017) (quotation omitted); *Aetna*, 240 F. Supp. 3d at 43 (same); *Staples, Inc.*, 190 F. Supp. 3d at 131 (same). "A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result

23 *See, e.g.*, [redacted]

more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Horizontal Merger Guidelines* § 6.2.

Customers testified that they have been able to negotiate lower prices based on competition between Otto Bock and Freedom. For example, the owner and chief prosthetist at Mid-Missouri Orthotics and Prosthetics ("Mid-Missouri O&P") testified that, in competing for its business, Otto Bock and Freedom have both offered discounts, and Otto Bock has matched Freedom's MPK prices. IDF 540; Ell, Tr. 1750-51. The president and managing partner of Prosthetic and Orthotic Associates testified that the company has used the option of purchasing the Plié from Freedom in negotiations with Otto Bock "to get better pricing on the C-Leg 4." IDF 547-548; Ford, Tr. 1004-05. The president and CEO of Jonesboro Prosthetic & Orthotic Laboratory ("Jonesboro O&P") testified that Freedom and Otto Bock compete on product features, customer service, as well as price, and that as a result of this competition, Jonesboro O&P has been able to obtain "relatively competitive pricing structures from both manufacturers." IDF 552; PX05108 (Yates Dep.) 72-73. And, after COPC increased its Plié purchases due in part to Freedom's lower pricing, Otto Bock responded by offering greater discounts on the C-Leg to get COPC to shift volume back to Otto Bock. IDF 513-15, 521; Senn, Tr. 221-22; *see also* PX05128 (Senn Dep.) at 24-25 (testifying that after COPC increased its purchases of Plié 3 in 2015, Otto Bock responded with "increasingly more aggressive pricing on . . . their C-Leg 3 and C-Leg 4," meaning greater discounts, in order to encourage volume). *See also* PX05149 (Brandt Dep.) at 71-72 (testifying that the price paid by Ability Prosthetics & Orthotics for the C-Leg has gone down significantly in the past six or seven years, in part due to competition from the Plié); PX05140 (Weott Dep.) at 40 (testifying that Orthotic & Prosthetic Centers saw the price for the C-Leg 3 decrease from [redacted] after the launch of the Plié 3).

As detailed in the ALJ's opinion, there is a substantial history of Otto Bock and Freedom responding competitively to each other not just on price, but on other metrics as well. For example, the competitors have tried to outmatch each other in innovation. *See* ID at 43-47. In the words of Hanger's CEO, "every time a new generation [MPK] from one manufacturer comes out, the other manufacturer is working on something to leapfrog it." Asar, Tr. 1393; IDF 505. In September 2014, Freedom launched its Plié 3. IDF 573. Freedom priced the Plié below Otto Bock's C-Leg 3 MPK and heavily emphasized its water resistance, which the C-Leg lacked. IDF 564, 570; PX05130 (Governor Dep.) at 131-32. Otto Bock responded with promotions and discounts on the C-Leg 3. IDF 576; PX01331 at 004-005; PX01519. It also provided its sales and marketing team with "arguments to convince customers" to buy C-Legs instead of Pliés. IDF 579; PX05150 (Kannenberg Dep.) at 128-29. In July 2015, Otto Bock released the C-Leg 4, which among other things included a water resistance feature. IDF 581, 586. The launch materials prepared for the sales force contained a chart comparing the C-Leg 4 to other MPKs, including the Plié 3, which was listed first. IDF 582; PX01518-003. The C-Leg 4 launch plan included "Sales and Marketing Goals," with the first item listed being to "[r]egain market share from competitors especially from Plié in the US[.]" IDF 590; PX01057-023. After the release of the C-Leg 4, Freedom's marketing team brainstormed various ideas for "how to best combat the launch of the C-Leg 4" and created presentations and marketing materials comparing the Plié 3 with the C-Leg 4 to help the sales team compete. IDF 601-05; PX01247-001. Freedom also

published on its website a "Plié 3 Microprocessor Knee Fact Sheet" that compared the Plié 3 with the C-Leg 4, identifying Plié functions comparable to those of the C-Leg and highlighting features that the C-Leg lacked. IDF 607-09; PX08008. In response to the competitive pressure from the C-Leg 4, Freedom lowered the price of the Plié 3 and offered a promotion called the "Ideal Combo," under which it provided a free or discounted foot with the purchase of a Plié. IDF 611-17, 633-38. In turn, in September 2015, Otto Bock provided its sales team with advice for countering Freedom's Ideal Combo promotion. IDF 632; PX01272 at 001-02. Although Freedom's discounting helped it stay competitive and regain some lost sales, it "kn[e]w [Otto Bock] will be responding in kind." IDF 638; PX01184-001.[24]

c. Evidence of Likely Competition Between C-Leg and Quattro

Competition between Otto Bock and Freedom was set to intensify even further with Freedom's impending introduction of the Quattro, dubbed the "C-Leg killer"[25] because of its [redacted]. The elimination of the Quattro as a potential competitor to the C-Leg is a further likely harm to competition. [redacted][26] [redacted][27] [redacted][28]

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24 Respondent argues that it started developing the C-Leg 4 and designing its features in 2012, more than two years before Plié 3's 2014 launch. RRB at 6. Even so, there is ample evidence that competition from Freedom motivated Otto Bock to innovate and discount and even more evidence that Freedom directly targeted Otto Bock in developing, pricing, and promoting its MPKs. *See, e.g.*, PX01570-011 (notes of April 2015 internal Otto Bock conference call; "C-Leg 4 is going to blow the Plié out of the water"); PX01057-023 (C-Leg 4 launch plan listing sales and marketing goal to "[r]egain market share from competitors especially from Plié in the US"); PX01004-056 [redacted].

25 *See, e.g.*, [redacted]

26 [redacted]

27 [redacted]

28 [redacted]

Freedom executives viewed the Quattro as a "crown jewel" that would increase its MPK sales and market share.[29] Otto Bock executives, on the other hand, viewed the Quattro as a serious competitive threat. *See, e.g.*, PX01471-003 (summary of Quattro in-person evaluation; "Anyone who takes this product will cut in to C-Leg 4 market share. Especially in the U.S."); [redacted][30]

Respondent downplays the Quattro's competitive significance. It asserts that the Quattro's benefits and likely impact on the MPK market are exaggerated. Respondent claims that Freedom has encountered technical difficulties in developing the Quattro [redacted]. Respondent also emphasizes that Otto Bock placed no value on the Quattro in preparing its bid for Freedom. Oral Arg. Tr. 34-36.

However, [redacted][31]

[redacted]

29 PX02010-001; [redacted]

30 Otto Bock also acknowledged that it may need to improve the C-Leg in the face of competition from the Quattro. After an in-person evaluation of the Quattro, Otto Bock executives observed that some of the Quattro's features would surpass the C-Leg and noted that if Otto Bock did not control the Quattro, Otto Bock would have to modify the C-Leg to add functions from the Genium, Otto Bock's higher-end MPK. PX01471-003; [redacted]

31 [redacted]

[redacted]

As for Otto Bock's failure to attribute value to the Quattro in its acquisition bid, that apparently stemmed from an overlap in the merging companies' product lines and did not reflect the true value of the knee. *See* [redacted] Otto Bock viewed the Quattro as an important product not because of how much it would make from selling that MPK but because of how much it would lose if Freedom retained or Össur or someone else acquired it. *See infra* Section VII.B.2.d. Otto Bock recognized potential hurdles to the Quattro's development, but still viewed it as a competitive threat. [redacted][32]

In any case, we need not conclude that, without question, the Quattro would have cut into the C-Leg's sales or induced Otto Bock to improve the C-Leg. The requirements of Section 7 are satisfied when a "'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown." *See United States v. Penn-Olin Chem. Co*., 378 U.S. 158, 171 (1964) (quoting *Brown Shoe*, 370 U.S. at 323). "Congress used the words 'may be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. The fact that, at the time Otto Bock acquired Freedom, Freedom was preparing to introduce a new MPK that it expected to take significant share away from Otto Bock and that Otto Bock itself described as a "serious threat" provides further proof of the likely anticompetitive effects of the Acquisition.

d. Evidence of Strategic Objectives

"Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects." *Polypore Int'l, Inc.*, 150 F.T.C. 586, 600, 2010 WL 9549988, at *9 (Nov. 5, 2010), *aff'd*, 686 F.3d 1208 (11th Cir. 2012) (citations omitted). Although evidence of anticompetitive intent is not necessary to a finding of liability under Section 7, it is an "admission against interest" that "cannot be disregarded." 4A Phillip E.

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32 Moreover, Otto Bock submitted its bid before it had an opportunity to test the Quattro; it had seen only videos of the Quattro in use. *See* [redacted]; IDF 871 (final bid submitted September 5, 2017); PX01471-001 (September 19, 2017 email summarizing that day's Quattro assessment). After an in-person evaluation, Otto Bock executives found the Quattro prototype to be substantially better than what they expected based on the videos. [redacted]; PX01471-001 ("The Quattro is better than we viewed in the Roosevelt videos").

Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 964a, c at 18, 20 (4th ed. 2016). "Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger." *Horizontal Merger Guidelines* § 2.2.1.

Here, the evidence shows that a key reason for Otto Bock's purchase of Freedom was to keep Freedom's MPKs out of the hands of its competitors, and in particular to prevent rival Össur from acquiring the Quattro. Swiggum, Tr. 3348-50, 3362-63; PX01299-006 [redacted] In Otto Bock's executives' own words, the acquisition of Freedom was a [redacted]. Otto Bock executives believed the Quattro would give Össur a better product to compete against the C-Leg 4 than their Rheo MPK. [redacted] PX01471-003. Acquiring Freedom and its Quattro afforded Otto Bock the opportunity to [redacted]

During the due diligence phase, Otto Bock executives recommended [redacted] After the Acquisition (and after in-person testing), Otto Bock reevaluated its plans for the Quattro. [redacted]

On November 7 and 8, 2017, approximately a month and a half after the merger, top executives from Otto Bock and Freedom met for an integration workshop to discuss the future of Freedom's MPK products. Carkhuff, Tr. 576, 578-84; PX01306-002 (meeting minutes). At that meeting, [redacted]

As for the Plié, both before and after the Acquisition, Otto Bock executives proposed raising its price or discontinuing it. [redacted] During the same

period, Otto Bock executives also discussed [redacted] Some of them expressed concern that continuing to sell the Plié post-Acquisition would cannibalize sales of the C-Leg. PX05148 (Swiggum Dep.) at 106.

[redacted].

Respondent claims that Otto Bock did not actually increase the price of the Plié or reposition the Quattro. Oral Arg. Tr. 73-74. It asserts that when Otto Bock had more complete margin, cost, and pricing data from Freedom, [redacted]. RRB at 7 (citing RRF 1362-64 and RPF 1540-1545). The materials Respondent cites, however, do not support this assertion. They establish only that, [redacted] *See* RRF 1362-64; RPF 1540-45; [redacted] RRB at 15; *see also* IDF 683. A "dual brand strategy," however, is not inconsistent with increasing the Plié's price. Given that the Plié is significantly cheaper than the C-Leg, Otto Bock could raise the price of the Plié and still offer it as a "value-priced" option relative to the C-Leg. Indeed, a presentation from the integration workshop recommended [redacted]. PX01302-081; *see also* PX01462-002 [redacted]. Otto Bock could also raise the price of both products. Further, relegating one product to "value-priced" status could suppress innovation for that product, as the merged company must ensure that the lower-priced product does not cannibalize sales of the higher-priced product. *See* PX01302-010 [redacted]. As the court found in *H&R Block*, even with a "dual brand strategy," a merger could "have the effect of stifling price and feature competition." 833 F. Supp. 2d at 85.[33] *See* PX1302-081 [redacted]

33 The case concerned a merger between H&R Block ("HRB") and TaxACT. HRB sought to maintain both brands under a "dual brand strategy," with the HRB-brand focusing on higher-priced products and the TaxACT brand focusing on the lower-priced products. The court determined that the merger could have anticompetitive effects even with a dual-brand strategy, reasoning:

[redacted].

Nor could Respondent's assertion that Otto Bock did not actually raise prices [redacted] after the Acquisition refute Complaint Counsel's showing of likely anticompetitive effects. For one thing, as noted and as we discuss below, anticompetitive harm can occur even without a price increase. Moreover, Otto Bock may be forbearing from raising prices or repositioning the Quattro while the Acquisition is under antitrust review. As the Supreme Court explained, "[i]f a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit [i]s threatened or pending." *Gen. Dynamics*, 415 U.S. at 504-05; *see Chicago Bridge*, 534 F.3d at 434-35; *Polypore*, 2010 WL 9549988, at *8 n.16. Indeed, even the "dual brand strategy" may be a temporary measure. *See* [redacted].

e. Evidence of Past Harm and Impact on Incentives

Even though Complaint Counsel need not prove past anticompetitive harm to show that harm is likely in the future, and the evidence discussed above clearly suffices to find harm to competition from the date of the Acquisition forward, Complaint Counsel have produced direct evidence that the Acquisition has in fact changed the parties' incentives and substantially lessened competition between the companies.

Respondent's counsel conceded that incentives had changed after the Acquisition, Oral Arg. Tr. 16-17, and the record confirms this. Otto Bock's CEO at the time of the Acquisition testified that he agreed that [redacted] PX05148 (Swiggum Dep.) at 193. And, indeed, almost immediately after the

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> HRB may feel comfortable raising its "premium" prices because it knows that consumers looking for lower-cost . . . options would be most likely to migrate to TaxACT, the established "value leader" in the market. Since HRB will also control TaxACT post-merger, however, HRB can still ensure that TaxACT's value proposition does not get "too good" and undermine the paid HRB products with the highest profit margins. For example, HRB might restrict the features of TaxACT's free and low-cost products to ensure they do not cannibalize sales of HRB's higher priced offerings. . . . Post-merger, TaxACT will not have the same incentives it has today to develop robust free and low-cost offerings that can compete with the functionality offered by HRB and Intuit[, another competitor]. Thus, this merger could potentially have the effect of stifling price and feature competition compared with maintaining TaxACT as an independent firm.

H&R Block, Inc., 833 F. Supp. 2d at 85 (citation omitted).

Acquisition, Freedom and Otto Bock personnel complained about and sought to chill the aggressive competition between the companies that preceded the Acquisition. For example:

- On October 5, 2017, Matthew Swiggum, Otto Bock's CEO at the time, wrote to Jeremy Mathews, Freedom's VP of Domestic Sales, to address a complaint from Freedom's Florida Territory Manager about an Otto Bock sales representative's disparaging claims regarding the Plié 3. PX01425 at 001-002. In response to this complaint, Swiggum wrote, "I am jumping on the sales calls again this week and next week and will try to be even more clear. . . . We are absolutely one company today and the target is not each other! This will be my message." PX01425-001. Mathews responded with, "as long as we are aligned in our messaging, we will get through this." *Id*.

- [redacted]

- David Reissfelder, the Freedom CEO put in place by Otto Bock after the Acquisition, testified that Swiggum and Andreas Schultz (Otto Bock's CFO) also expressed concern to him about perceived aggressive promotions and discounting on the Plié 3 after the Acquisition. Reissfelder testified that Swiggum and Schultz told him that "they felt like it was a lot of discounting" and "they thought that it wasn't something they would allow the OttoBock sales team to do, and therefore they recommended or they wanted us to stop doing it." PX05138 (Reissfelder Dep.) at 89-90.

Despite this, Respondent argues that there has been no harm to competition because Otto Bock executed and complied with a Hold Separate Agreement, dated December 19, 2017. RAB at 3, 31; RRB at 11. As to the three months before the Hold Separate, Respondent suggests that competition was not injured because Freedom and Otto Bock operated separately under a dual-brand strategy and continued to view each other as competitors. RAB at 3; RRB at 11. Respondent also suggests that [redacted]. RRB at 15.

The Hold Separate Agreement does not foreclose anticompetitive harm and does not rebut the evidence of chilled competition. As a general matter, hold separates prevent the intermingling of assets during the pendency of litigation to ensure that a transaction can be unwound and the acquired assets effectively divested. *See FTC v. Weyerhaeuser Co*., 665 F.2d 1072, 1075 (D.C. Cir. 1981); 4A Areeda & Hovenkamp, *supra* ¶ 990c4 at 131-36. But hold separate agreements do not preclude harm to competition or counteract the changed incentives that result from unified ownership. "[E]ven if all or part of an acquired company is held separate from its acquiring parent, competition between the enterprises will not retain the vigor it had prior to the merger." *Weyerhaeuser*, 665 F.2d at 1086. In a company with multiple divisions,

each division "will act to pursue the common interests of the whole corporation." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984)).

There are other reasons why the Hold Separate Agreement did not and could not prevent anticompetitive harm in this case. For one thing, the Hold Separate was signed *three months* after the Acquisition; it could have no effect on competition, or lack thereof, during those three months. Moreover, in early October 2017, Otto Bock and Freedom executives discussed being "aligned in our messaging" and "jumping on the sales calls" to make clear that "the target is not each other." PX01425-001. By the time the Hold Separate Agreement was signed, that message already would have been communicated to the sales teams, with a likely stifling effect on future competition.

Nor did Otto Bock's adoption of a dual-brand strategy ensure against competitive harm. As discussed above in Section VII.B.2.d, a dual-brand strategy can stifle innovation for the lower-priced product. Complaint Counsel argue this effect occurred here. Before the Acquisition, Freedom had been planning to launch a new version of the Plié 3, called the Plié 4 or Plié 3 Fast Fit, [redacted] Although [redacted], at the time of the Acquisition, it was still in Freedom's project pipeline. *See* [redacted] After the Acquisition, however, Freedom, now owned by Otto Bock, placed the Plié upgrade "on hold." [redacted] Although there is no evidence that Otto Bock was involved in this decision,[34] the Acquisition may still have influenced the outcome. Given that Otto Bock viewed the Plié as redundant of its own MPKs, sought to [redacted] and considered discontinuing the knee altogether, Freedom as part of Otto Bock would have had little incentive to continue to invest time, money, and effort into upgrading the Plié.

Respondent argues that we must focus not on the parties' incentives or communications, but on actual changes in the marketplace. Oral Arg. Tr. 18-19. It claims that Otto Bock continued to innovate and that prices did not rise after the Acquisition. RPF 1009, 1012-13, 1075-76. It even points to two instances after the Acquisition where Freedom [redacted]. RRF 141 [redacted]. Respondent also asserts that Freedom's sales team continued to compete for C-Leg customers after the

34 Freedom's Maynard Carkhuff testified that failure of the Plié 4 to materialize was unrelated to the Acquisition. Carkhuff, Tr. 687-88.

Acquisition and identifies one instance where that happened. RPF 1053; RRF 1476. But these examples do not foreclose an anticompetitive effect. The fact that Freedom reduced the price of the Plié for two customers does not mean that all customers received lower prices, and the favored customers may have negotiated even better prices absent the Acquisition. Similarly, the fact that Freedom attempted to sell Pliés to a C-Leg customer does not mean that competition continued as vigorously as it had before the Acquisition.

In all, we find that Complaint Counsel have put forward compelling evidence of substantial past, as well as likely future, harm from the Acquisition.

C. RESPONDENT'S REBUTTAL TO SHOWING OF UNILATERAL EFFECTS

Respondent argues that it has rebutted Complaint Counsel's *prima facie* case by producing evidence that expansion by other MPK manufacturers,[35] bargaining leverage of "power buyers," and the prevalence of open prescriptions and caps on insurance reimbursements would constrain its ability to raise prices. We find these arguments unpersuasive. Assessed separately or together, they are insufficient to overcome Complaint Counsel's strong showing of likely anticompetitive effects.

1. Expansion

Respondent claims that other manufacturers—Össur, Endolite, and Proteor—whose MPKs are part of the same "base class" as the Plié and C-Leg are poised to expand production and fill the competitive void left by the merger. RAB at 9, 23. It argues that this expansion would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract" any potential anticompetitive effects resulting from the transaction. RAB at 9 (quoting *H&R Block*, 833 F. Supp. 2d at 74). Respondent asserts that "if [Otto Bock] were to try and raise prices above competitive levels, it would lose enough sales to competing manufacturers that the price increase would be unprofitable." RAB at 9 (quoting Argue, Tr. 6149).

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35 Respondent does not make the related argument that new entry would prevent any anticompetitive effects from the Acquisition. To alleviate concerns about anticompetitive effects, entry must be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Horizontal Merger Guidelines* § 9. Entry clearly would not be timely. For entry to be considered "timely," it typically must occur within approximately two years. *See, e.g., H&R Block,* 833 F. Supp. 2d at 73 n.28 (citing Commentary on the Horizontal Merger Guidelines (2006) at 45-46). Developing a new MPK takes several years, even for the few firms that are experienced manufacturers. *See, e.g.,* PX05007 (Carkhuff, IHT) at 155-56, 297-300 (it took Freedom approximately three years to develop the original Plié and a further three years to develop the second generation Plié 2); PX05133 (Eichler Dep.) at 114 (alterations on an MPK can take "up to two years, sometimes even three or four"). The highly patented nature of the MPK industry presents a formidable barrier. *See* PX05107 (Carver Dep.) at 117 (characterizing the MPK market as a [redacted]). A prospective entrant needs to develop a sales force, qualify for reimbursements, and undergo multiple phases of product testing. PX05133 (Eichler Dep.) at 115-16. The entrant must also develop a strong brand and reputation. *See, e.g.,* PX05007 (Carkhuff, IHT) at 297-300 (it took Freedom about three years after the launch of the Plié in 2007 for the company "to really gain credibility" and compete effectively in the market); PX05117 (Choi Dep.) at 95 (potential new entrant estimating three years post-launch to establish meaningful brand recognition in the United States).

To support this assertion, Respondent claims that Össur, Endolite, and Proteor could expand production within one year by a total of [redacted] MPKs. RAB at 9. This, Respondent claims, would counteract any impact from the acquisition of Freedom, which sold just [redacted] MPKs in 2017. *Id.* at 1, 9-10. Respondent also points to Össur's substantial annual R&D investment and [redacted], and it touts the Rheo's strong reputation among prosthetists. *Id.* at 11. Regarding Endolite, Respondent states that it recently [redacted]. *Id.* at 13-14. Respondent maintains that Endolite has rehabilitated its blemished MPK reputation, which had been based on a product that preceded the Orion 3. *Id*. at 14-16. Regarding Proteor, Respondent claims that it transformed from "fringe" to "mainstream" in 2017 and 2018. Respondent highlights Proteor's launch of the full-release version of the Allux MPK, its acquisition of a successful foot products line, a new distribution agreement, as well as newfound customer interest and praise. *Id*. at 16-18.

To the extent Respondent's "expansion" argument rests on competing manufacturers' available capacities, the argument is deficient, because the mere ability to manufacture more units does not lead to greater sales in a differentiated product market. The argument looks solely to supply-side issues in a market where demand characteristics matter. *See* 4 Areeda & Hovenkamp, *supra* ¶ 914h at 146 (unilateral effects in a differentiated products market depend on "demand side" assessment of the "willingness of consumers to switch to other products" in response to an increase in price). Respondent's assertion that Endolite currently has idle capacity of [redacted] MPKs, *see* RAB at 13, underscores that merely having extra capacity does not mean that customers will choose to buy that product.

As to the more general assertion that other competitors would fill any competitive void and render a price increase unprofitable, this is inconsistent with more direct evidence, including Otto Bock's own course-of-business documents. The evidence shows that a significant portion of customers consider the C-Leg and Plié as their first and second choice. *See supra* VII.B.2.a. Otto Bock itself [redacted]. PX01473-023 [redacted]. Moreover, the fact that Otto Bock proposed to discontinue or raise the price of the Plié post-acquisition shows that it believed such a plan would be profitable and that expansion or repositioning by any individual firm or all firms collectively would not prevent harm.

Furthermore, the evidence regarding Össur, Endolite, and Proteor does not support a finding that they would timely and sufficiently "fill the competitive void" left by the merger. *Swedish Match*, 131 F. Supp. 2d at 169. While some clinicians like Össur's Rheo MPK, many others view it as inferior to the C-Leg and the Plié or have concerns about its safety. *See, e.g.*, Senn, Tr. 223-24; PX05128 (Senn Dep.) at 44; Ell, Tr. 1732; Ford, Tr. 950-51, 1015-16; PX05001 (Endrikat, IHT) at 21-22; PX05141 (Bright Dep.) at 201-02; *see also* IDF 647-53; [redacted] Endolite is a small competitor with no more than a [redacted] share of the United States MPK market, despite having been selling MPKs in the U.S. for 20 years. IDF 479-80, 656. Endolite is only just now

overcoming the steep reputational barriers it has faced due to past reliability issues and poor customer support. IDF 658-63; [redacted] IDF 665; Blatchford, Tr. 2176-79.[36] As for Proteor, it has minimal presence in the U.S., with less than [redacted] market share. IDF 479-80. Many clinicians are unfamiliar with the Allux MPK or refuse to purchase it due to reliability and customer service concerns. IDF 667-72.[37]

Respondent argues that we cannot take a backward-looking view of the competitive landscape and must focus on market dynamics in the future. RAB at 10, 18. Even if these companies were not as relevant historically, Respondent asserts we must consider their competitive potential and product pipelines. But Respondent itself ignores the future by focusing only on the Plié and ignoring the Quattro. Freedom was primed to become an even more significant competitor to Otto Bock because of its planned introduction of the Quattro, the so-called "C-Leg killer." *See supra* Section VII.B.2.a and c. There is simply insufficient evidence that any future updates or developments by other manufacturers would timely, likely, and sufficiently counteract the anticompetitive effects of removing Freedom as an independent competitor. In all, we are unpersuaded by Respondent's argument that Össur, Endolite, and Proteor would replace the competition lost due to the Acquisition.

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36 Respondent's argument that Endolite and other competitors could fill the competitive void left by the merger relies heavily on its repeated assertion that Hanger's CEO admitted that Hanger could shift 100% of its MPK purchases to Endolite, *see* RAB at 10, 15, [redacted]; RRB at [redacted], but this argument mischaracterizes the Hanger CEO's testimony. That testimony does not address the feasibility or likelihood of Hanger shifting any MPK purchases to Endolite in response to a price increase by Respondent. Rather, the witness was responding to the ALJ's hypothetical questions regarding the accuracy of corporate projections. *See* Asar, Tr. 1448 [redacted]

37 Respondent asserts that we should not rely on much of the testimony of Keith Senn (President of Kentucky and Indiana Operations of COPC) and Mark Ford (President and Managing Partner of POA) because they are not prosthetists and lack first-hand knowledge of the functionality, features, and benefits of MPKs. RAB at 12. Respondent also asserts that Tracy Ell (Owner and Chief Prosthetist at Mid-Missouri O&P) "admitted that he does not have first-hand knowledge choosing MPKs." RAB at 13 (citing Ell, Tr. 1777). But Respondent itself relies on these witnesses' testimony when it supports Respondent's arguments. *See* RAB at 13, 25-27. More importantly, that Mr. Senn and Mr. Ford are not themselves prosthetists who fit these MPKs does not undermine their testimony; they testified not about their personal prosthetic choices but about their clinics' business practices and about the aggregate opinions and preferences of the companies' clinicians. With respect to Tracy Ell, Respondent mischaracterizes his testimony. He stated that doctors are the ones to select whether the patient should get a mechanical or microprocessor-controlled knee, Ell, Tr. 1776-77, but nothing in this testimony indicates that "he does not have first-hand knowledge of choosing MPKs." RAB at 12. On the contrary, Mr. Ell testified that, unless the physician prescribes a particular brand of MPK and indicates that no substitution is allowed, he facilitates the patient's MPK selection. Ell, Tr. 1759-64.

2. Impact of Power Buyers

Respondent argues that clinic customers have bargaining leverage vis-à-vis MPK suppliers because they obtain discounts based on the overall volume of MPKs they buy. RAB at 21. In the face of a potential price increase, argues Respondent, such customers can simply switch suppliers in order to realize an increased discount, preventing unilateral harm. *Id.*; RRB at 18.

This argument ignores or assumes away the crux of the matter—what the merger changed. In most markets that are not pure monopolies, buyers possess some leverage by virtue of their ability to switch suppliers or consolidate purchases. Thus, proper assessment of competitive harm takes as a backdrop the buyers' ability to use existing purchasing strategies and evaluates whether the buyers' alternatives have changed as a result of the transaction. *FTC v. Wilh. Wilhelmsen Holding ASA,* 341 F. Supp. 3d 27, 70 (D.D.C. 2018) ("In assessing a power buyer argument, the court should 'examine the choices available to powerful buyers and how those choices likely would change due to the merger,' keeping in mind that '[n]ormally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer'." (quoting *Horizontal Merger Guidelines* § 8)). The problem with a merger that enhances market power is that it increases the seller's leverage while leaving the buyer's unchanged. *See FTC v. Penn State Hershey Med. Ctr.,* 838 F.3d 327, 346 (3d Cir. 2016) ("whatever leverage the payors will have after the merger, they have that leverage now"; the relevant question is whether the merger will increase the merging parties' leverage and allow them to impose a price increase).

Respondent also fails to account for harm to smaller buyers. Respondent argues that Hanger, the nation's largest customer of sellers of prosthetics, IDF 42, has buyer power. RAB at 21. But MPK prices are set through individualized negotiations with the different clinics, and MPK manufacturers charge different prices to different clinic customers. IDF 315-16. In these circumstances, even if Hanger had buyer power, Respondent provides no reason to conclude that any protection such power arguably could confer would extend to other clinics. *See Polypore*, 150 F.T.C. at 637-38.

The evidence before us shows that, in this highly-concentrated market, a significant fraction of customers—including "sophisticated" buyers like Hanger—have directly benefitted from head-to-head price and feature competition between Otto Bock and Freedom. *See supra* Section VII.B.2.b; *see also* IDF 507. The loss of such competition harms them. Like the defendants in *Wilh. Wilhelmsen,* Respondent has failed to point in mitigation to "any *new* [buying] strategy or alternative likely to emerge post-merger," 341 F. Supp. 3d at 71 (emphasis in original), such as the ability to sponsor entry or to integrate upstream. Instead, Respondent has "focused on strategies that are already part of the competitive landscape and which show no promise of becoming more effective." *Id.* Complaint Counsel proved that buyers would lose one proven strategy—the ability to play Otto Bock and Freedom against each other—while Respondent has failed to identify any equally or more effective option that buyers would gain. We therefore reject Respondent's "sophisticated customer" defense.

3. Effect of Open Prescriptions and Reimbursement Structure on Pricing

Respondent argues that the ALJ failed to accept rebuttal evidence that the prescription and reimbursement system for MPKs facilitates interbrand substitution and constrains Otto Bock's ability to raise prices above the competitive level. RAB at 19. Respondent points out that surgeons' prescriptions rarely specify a brand of prosthetic, so clinics are free to switch between MPKs for patients who clinically require an MPK. *Id.* A price increase would simply encourage clinics to change MPK brand. RRB at 18. At the same time, Medicare and private insurance companies reimburse clinics a fixed amount for each MPK based on the L-Codes associated with the MPK's features and functions, regardless of who manufactures the MPK. RAB at 20. The reimbursement level puts a ceiling on the ability of manufacturers to raise price. *Id.*

As we have discussed, even if some customers could switch MPK products in response to a post-Acquisition price increase, many of those switches would be to Respondent's own products, enhancing the profitability of the price increase to the Respondent. *See* PX01473-023 ([redacted]); PX01302 at 081 (internal Otto Bock slide presentation, recommending that Respondent [redacted]). This is a classic example of a unilateral anticompetitive effect. *See Horizontal Merger Guidelines* § 6.1; Section VII.B.2 *supra.* Moreover, the fact that some customers of Respondent's MPKs could switch to a different MPK in the face of a price increase does not mean that they could do so without sacrificing quality, service, or other characteristics that they prefer. Their pre-Acquisition purchasing pattern reveals their preference for particular MPK products, and, in a differentiated product market such as this one, a transaction that forces buyers to deviate from their preferred purchases in order to mitigate a price increase poses a harm. *See* PX06003 (Scott Morton Rebuttal Report) at ¶ 48 (explaining that a customer's current basket of purchases reveals its preferences for particular products).

Respondent further posits that the insurance reimbursement system "puts a ceiling on what the manufacturers can realistically charge the clinics for the purchase of the knee." RAB at 20 (quoting Argue, Tr. 6229). According to Respondent, [redacted] *Id.* Reimbursement "is part of the strategy of how much [the manufacturer] can put into that knee and how much they're going to be able to charge for that knee, because they have to leave enough margin for the clinics to cover their other costs, so it very much puts a restraint on their manufacturers." *Id.* (quoting Argue, Tr. 6229).

However, the existence of a reimbursement ceiling does not rule out competitive harm in the space below the ceiling. For example, there is ample room under the reimbursement ceiling for Respondent to raise the price of the Plié 3. By the estimate of Respondent's own expert, the average price of a Plié 3 in 2016 was [redacted] the average price of a C-Leg 4. IDF 494; ID at 59. The record shows that prosthetists are able to fit the C-Leg 4 at a positive

margin, IDF 735, so presumably they would also be able to fit the Plié 3 profitably even after a price increase. *See* PX06001A (Scott Morton Expert Report) at Table 3 and ¶ 74 (even with a 5% price increase, the contribution margin that a clinic earns on a Freedom MPK is still well above the contribution margin for an Otto Bock MPK). *See also* IDF 736 (Hanger could still make a profit if the price of the Plié or C-Leg were to increase by $1,000); IDF 737.[38]

The ALJ's concern about a potential price increase on the Plié 3 is justified. Otto Bock's executives contemplated just such an increase in November 2017. *See* PX01302 at 081.

D. EFFICIENCIES

One economic benefit of some mergers is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. *Horizontal Merger Guidelines* § 10. Respondent's Third Affirmative Defense avers that efficiencies and other unidentified procompetitive benefits resulting from the Acquisition outweigh any anticompetitive effects. Ans. at p. 29. Respondent asserts that its acquisition of Freedom will result in annual, Acquisition-specific, pro-competitive efficiencies of [redacted] EBITDA by [redacted]. RAB at 28. The claimed efficiencies purportedly would be realized under Respondent's proposed dual-brand strategy, which would position Otto Bock's and Freedom's brands differently in the same market while under common ownership. *Id.*; IDF 683. *See supra* Section VII.B.2 d. The burden-shifting framework requires us to assess these claims.

Only "merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service" are cognizable for this analysis. *Horizontal Merger Guidelines* § 10; *see Univ. Health,* 938 F.2d at 1223 (defendant must show that the acquisition "would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers"). Efficiencies must be "verifiable." *Penn State Hershey,* 838 F.3d at 348-50. This means that a party's claimed efficiencies must survive "rigorous analysis" to ensure that they represent "more than mere speculation and promises about post-merger behavior." *Heinz,* 246 F.3d at 721. The burden of proving efficiencies is on the proponent. *See* 4A Areeda & Hovenkamp*, supra* ¶ 970f at 42.

Here, Respondent asserts that the Acquisition will generate merger-specific synergies in the broad categories of [redacted][39] RX-1048 (Peterson Expert Report) at ¶ 132.a.

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38 Moreover, as the ALJ correctly points out, a clinic's margin is not dictated only by the price of the MPK. ID at 59. The components of the overall lower-limb prosthetic, including the foot, socket, suspension mechanism, adapters, hardware, and liners, have additional L-Codes for which clinics obtain reimbursement and which allow some amount of margin for the clinic. *Id.* As Respondent's expert witness Dr. David Argue agreed, a clinic may earn a profit on the prosthetic leg as a whole even if the clinic does not make a profit on the MPK component. *Id.*; IDF 739.

39 [redacted] *See*

We find that Respondent's efficiencies are neither sufficiently concrete nor verifiable to rebut a showing of competitive harm. Respondent's claimed efficiencies are based on the work performed by its integration team. IDF 680-81, 684. Yet, Respondent's own integration consultant characterized the work relating to identifying synergies opportunities as "early stage" and "incomplete." IDF 686. [redacted] IDF 687. The team lead testified that, of the synergies that the team had identified, [redacted] IDF 688. As he further explained, [redacted]. IDF 688. [redacted] IDF 691. Nor do the calculations by Respondent's financial expert, James Peterson, supply the needed verification. Mr. Peterson's work consisted of examining Respondent's financial model for calculating synergies, then conducting what he termed a "sensitivity analysis," which essentially meant discounting the model's calculations by [redacted] in order to be conservative. Peterson, Tr. 6673-74; RX-1048 (Peterson Expert Report) at ¶ 133 and Table 9; *see also* IDF 704. However, the fact that Peterson simply gave Respondent's estimates a "haircut," IDF 704 (citing PX05174 (Peterson Dep.) at 276), does not rectify Respondent's failure to come up with reliable calculations in the first place. *See H&R Block,* 833 F. Supp. 2d at 91 (rejecting claimed efficiencies that were not independently verifiable).

Furthermore, Respondent failed to prove that its claimed efficiencies are merger-specific. To do so, Respondent would have to show that its "efficiencies . . . cannot be achieved by either company alone because, if they can, the [Acquisition's] asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz,* 246 F.3d at 722. Here, a substantial share of the claimed efficiencies relate to [redacted], which in turn purportedly is "driven by existing manufacturing infrastructure and expertise resident at Ottobock." IDF 705. This explanation is vague, and it gives us no basis on which to conclude that Freedom could not have obtained manufacturing infrastructure and expertise elsewhere. *See Horizontal Merger Guidelines* § 10 (merger-specific efficiencies are "only those [that are] likely to be accomplished with the proposed merger and unlikely to be accomplished in [its] absence . . . ."); *FTC v. OSF Healthcare Sys.,* 852 F. Supp. 2d 1069, 1091-93 (N.D. Ill. 2012) (rejecting claimed efficiencies because, *inter alia,* the court "cannot say . . . that they can only be achieved through the proposed merger").

The proponent of efficiency claims must also demonstrate that the savings will be passed through to consumers in order to rebut any showing of competitive harm from the transaction. *Anthem,* 855 F. 3d at 362 (citing *Univ. Health*, 938 F.2d at 1223 (savings must "benefit competition and, hence, consumers")). In a transaction that results in high market concentration levels, "extraordinary" efficiencies are required in rebuttal, *Heinz,* 246 F.3d at 720, and the

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Horizontal Merger Guidelines § 10 ("Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.").

greater the potential adverse competitive effect of a merger, "the more [the efficiencies] must be passed through to consumers." *Horizontal Merger Guidelines* § 10. Here, neither of Respondent's experts analyzed the degree to which, if at all, customers would benefit from the projected savings. *See* Peterson, Tr. 6749; Argue, Tr. 6259-60; *see also* IDF 711. In fact, a substantial portion of the claimed efficiencies arise outside the United States. RX-1048 (Peterson Expert Report) at ¶ 131.a, b. Respondent has provided no reason why we should consider these savings, and we do not.

Because Respondent has failed to demonstrate the existence of independently verifiable, Acquisition-specific efficiencies that are likely to be passed through to consumers in the relevant market, its efficiencies defense fails. We need not reach Complaint Counsel's additional argument about whether the claimed efficiencies would result from an anticompetitive reduction in output or quality. CCAB at 29-30.

E. Failing Firm Defense

Respondent argues that it has demonstrated the failing firm defense, which would be a complete defense to Complaint Counsel's showing of liability. RAB at 39-42; RRB at 18-20.

1. Legal Standard

The Supreme Court first recognized the failing firm defense in *International Shoe Co. v. FTC,* 280 U.S. 291 (1930), where it refused to enjoin the acquisition of a failing corporation by the only available purchaser. *Id.* at 301-03. The defense provides a safety valve for the parties when, in the absence of the proffered transaction, the competitive assets would otherwise exit the market. *Horizontal Merger Guidelines* § 11. The defense is, "in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition" from the company's going out of business. *Gen. Dynamics,* 415 U.S. at 507.

The *Horizontal Merger Guidelines* explain that the antitrust agencies do not normally credit a failing firm defense unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the market and pose a less severe danger to competition than does the proposed merger. § 11; *see also Citizen Publ'g Co. v. United States,* 394 U.S. 131, 136-8 (1969). The *Horizontal Merger Guidelines* define a "reasonable alternative offer" as one that exceeds the liquidation value of the assets. § 11 n.16.

A successful failing firm defense effectively permits a transaction that otherwise would violate the antitrust laws. Thus, the Supreme Court has "narrowly confined the scope of the doctrine," *Mich. Citizens for an Indep. Press v. Thornburgh,* 868 F.2d 1285, 1288 (D.C. Cir. 1989), *aff'd per curiam*, 493 U.S. 38 (1989). *See also FTC v. Warner Commc'ns,* 742 F.2d 1156, 1164 (9th Cir. 1984) (noting that the defense has "strict limits"). The proponent of the

defense bears the burden to prove each element, *Citizen Publ'g Co.,* 394 U.S. at 138-39, and failure to prove any element is fatal.

2. Element 1: Whether Freedom Was Failing

We first examine whether Respondent proved that Freedom's business was "failing" in the sense required by the first element of the defense.[40]

a. Background Regarding Freedom's Financial Condition

Respondent proved that Freedom experienced operating losses and certain financial challenges in the years leading up to the Acquisition. Freedom sustained operating losses [redacted]. PX01656; RX-0833; RX-0464 (summarized in RX-1048 (Peterson Expert Report) at 7, Table 1). Relatedly, Freedom's EBITDA [redacted] RX-0464 (summarized in RX-1048 (Peterson Expert Report) at 7, Table 1).

As noted in Section II.D above, Freedom sought to address its financial challenges by overhauling its management and improving its operations. In April 2016, Freedom hired a new CEO, David Smith, who had extensive operating experience. IDF 774. Smith, in turn, made a number of changes to Freedom's management including [redacted] and hiring a new vice president of domestic sales. Smith, Tr. 6511; PX02034 at -049; PX05137 (Mathews Dep.) at 13. Under Smith's leadership the company embraced "[b]etter communication, direct meetings with customers, encouragement in communication with the sales force, improvements in general in business, [and] reversal of some very poor policies of previous management." PX05005 (Smith, IHT) at 121. [redacted] PX05122 (Smith Dep.) at 82. Of particular moment, Freedom also took actions to improve product quality and service for the Plié 3. PX02034 at -049. Freedom's chairman testified that [redacted]. Carkhuff, Tr. 571.

Freedom's operational reforms began to show positive results from late 2016 into early 2017. On a monthly and quarterly basis during 2017, Freedom achieved revenue increases and improved its EBITDA over the prior year. IDF 781-97. For example, for the first quarter of 2017, Freedom's revenue was about [redacted] ahead of plan and about [redacted] ahead of revenue for the first quarter of the prior year. IDF 787. These improvements were due in part to the quality and service improvements for the Plié 3, which began to experience increased sales in late 2016 leading up to a [redacted] year-over-year increase for January-February 2017. IDF 646, 782.

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40 As noted above, the *Horizontal Merger Guidelines* describe the first element of the defense as asking whether the allegedly failing firm would be unable to meet its financial obligations in the near future. § 11.

Freedom had a term loan on its balance sheet that was due to mature on February 16, 2017. IDF 745. By the end of 2016, Freedom owed the lenders approximately [redacted]. IDF 748. [redacted]. ID at 66; IDF 750-53. The lenders also required Freedom's primary shareholder, HEP, to infuse an additional [redacted] of equity capital into Freedom up front, IDF 752, plus up to [redacted] PX01677 at § 7.13.6.

Shortly after Smith became CEO, Freedom's lenders began to press the company to pursue alternative sources of capital. In June 2016, the lenders deferred a portion of Freedom's debt amortization payment due on June 30, 2016; [redacted] IDF 747; PX03008 at -002 and -007. During the approximately fourteen months that followed, Freedom explored possibilities for both a recapitalization and a sale, culminating in the Acquisition by Otto Bock in September 2017. *See infra* Section VII.E.4. Otto Bock satisfied Freedom's remaining debt to the lenders—$28 million—at the closing of the Acquisition. IDF 758-59.

b. Adequacy of Respondent's Showing that Freedom Was Failing

In order to demonstrate the first element of the defense, *i.e.,* that Freedom was unable to meet financial obligations, Respondent cannot simply show that it had an imminent payment that exceeded its existing cash on hand. Rather, the analysis must account for the commercially reasonable options that firms in today's markets can pursue when facing a liquidity shortfall. To meet the first element, Respondent needs to prove that Freedom had "resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" absent the challenged transaction. *Int'l Shoe,* 280 U.S. at 302; *United States v. Pabst Brewing Co.,* 296 F. Supp. 994, 1002 (E.D. Wis. 1969).

We find that Respondent failed to meet the first prong of the defense by demonstrating a grave probability of Freedom's failure. At the time of the Acquisition and during the approximately one year leading up to it, Freedom was engaged in a turnaround that had begun to show results. Freedom hired its new CEO, Mr. Smith, in April 2016. IDF 774. By December 2016, many of Freedom's financial metrics were starting to improve. IDF 781 (quoting PX02034 at -050) [redacted]; *see also* PX05005 (Smith, IHT) at 121, 133-34 (discussing "inflection point" in Freedom's recovery in December 2016); PX05126 (Kim Dep.) at 62 (revenue improved in late 2016-early 2017). Freedom's improving results continued into 2017. IDF 781-93. By August of that year, the month before the Acquisition, Freedom's year-to-date revenues were [redacted] of plan and [redacted] over the prior year; its year-to-date EBITDA was

[redacted] ahead of plan; and its year-to-date cash balance was approximately [redacted] higher than anticipated by August 31, 2017. IDF 795.

Freedom's financial upturn stemmed from real operating improvements, including better service, sales, and quality. As Mr. Smith testified, [redacted] Smith, Tr. 6537, 6543, 6496-97. Product development accelerated during Smith's tenure, and Smith conveyed that the R&D pipeline was the "best it's ever been in the history of the company" as of July 2017, two months before the Acquisition. IDF 835. In the months leading up to the Acquisition, Freedom maintained an active R&D pipeline, increased expenditures on sales and marketing and R&D, hired additional sales employees in Europe, and even paid executive bonuses. IDF 830-31, 833, 837.

Respondent objects that Freedom's lenders would still have liquidated the company in September 2017, regardless of any financial or operational turnaround plan, because they had lost patience with Freedom and wanted to exit the loans at any cost. RPTB at 103. However, the record contains no testimony of the lenders. Moreover, the creditors' actions were consistent with a preference for an orderly sale of Freedom. Between March 2013 and August 2016, the lenders repeatedly amended the credit agreements rather than foreclosing. IDF 746-47. In June 2016, instead of seeking liquidation, Freedom's lenders directed the company to explore additional sources of capital. PX03008 at -002 and -007. As part of amending the credit agreement in August 2016, the lenders required Freedom to provide them an enterprise valuation, which Freedom did via its investment banker, Moelis & Company ("Moelis"), in October 2016. PX03009 at -001, -002. This valuation ranged from [redacted], PX03016 at -003, an amount that would have been sufficient to pay the lenders in full.[41]

By contrast, there is no evidence that Freedom or its lenders ever formally calculated a liquidation value for Freedom's assets. To the extent that Smith attempted a preliminary analysis, [redacted] and the estimates he generated were less than the [redacted] that Freedom owed the banks. Smith, Tr. 6554-56. In April 2017, rather than pursuing a liquidation, the lenders entered the Seventh Amendment to the Credit Agreement with the understanding that Freedom would have sufficient liquidity to withstand a long sale process in the second half of 2017, even without additional outside capital. IDF 828; PX03009 at -004. The lenders based this assessment on Freedom's cash flow forecasts through December 31, 2017. PX03009 at -004. Though Freedom may have been under pressure to sell or recapitalize, it had time to do so between June 2016 (the date the lenders first pressed Freedom to seek additional capital sources) and September 2017. As we discuss further in subsection VII.E.4.b below, Freedom failed to direct sufficient efforts during this time toward finding a less anticompetitive buyer than Otto Bock.

41 Though Freedom apparently received a lower valuation from a different advisor, *see* RX-1048 (Peterson Expert Report) at ¶ 110 (citing [redacted] figure), that amount also far exceeded the amount owed to the lenders. *Id.*

Finally, the existence of Freedom's pending debt repayment is not sufficient to show that the firm was insolvent. Respondent does not argue that conditions in credit markets were extraordinary or unusually constrained, so as to preclude refinancing or recapitalizing to help make the payments due at the conclusion of its term loan. *See* PX05172 (Hammer Dep.) at 139 (Freedom's greatest financial obstacle in 2017 was that "they weren't going out and refinancing when they could have"); PX06002 (Hammer Expert Report) ¶¶ 51-57 (describing Freedom's refinancing and recapitalization options). At a minimum, Respondent would have to show that the acquired company could not refinance or recapitalize despite reasonable efforts, taking into account that it may have had to accept non-preferred terms rather than enter an anticompetitive sale. As we discuss below, Respondent failed to meet this burden.

3. Element 2: Freedom's Prospects for Chapter 11 Reorganization

A second requirement of the failing firm defense is that a failing firm not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act. *See Citizen Publ'g Co.,* 394 U.S. at 138 (prospects of reorganization must be "dim or nonexistent" to make the failing company doctrine applicable); *Horizontal Merger Guidelines* § 11. As with the defense's other elements, Respondent bears the burden of proof. *Citizen Publ'g Co.*, 394 U.S. at 138-39.

Respondent argues that Freedom considered and rejected the possibility of Chapter 11, determining that it would not have successfully emerged from the process. RAB at 40-41. Freedom's then-CEO David Smith concluded, based on his prior experience with Chapter 11, that it would have been [redacted] Smith, Tr. 6485-86. Respondent's financial expert, James Peterson, echoed Smith's opinion: "I don't see any reason why they would have been a good candidate for Chapter 11, much less would they have emerged." Peterson, Tr. 6609. Respondent contends that Freedom would have no reasonable prospect to obtain financing to continue operating during Chapter 11 [redacted] RX-1048 (Peterson Expert Report) ¶¶ 106-07; Smith, Tr. 6485-86.

Complaint Counsel point out that [redacted] PX05113 (Chung Dep.) at 100. [redacted] *Id.* Thus, Freedom [redacted] PX05122 (Smith Dep.) at 47-48.

Although this element is a closer call, we find that Respondent has not demonstrated that prospects for Chapter 11 reorganization were "dim or nonexistent." *Citizen Publ'g Co.,* 394 U.S. at 138. Although Respondent asserts after the fact that, due to Freedom's limited cash position, it could not have afforded reorganization, Freedom [redacted] (describing this as [redacted] than she has seen with companies in bankruptcy). Freedom had valuable products in its pipeline, including Quattro, that drove its projected revenue growth and underpinned its investment bankers' [redacted] enterprise

valuation. PX03016 at -003, -005. Yet Freedom did not, it appears, explore the possibilities [redacted][42] that could have helped it surmount its liquidity challenges and launch those products. *See* Hammer, Tr. 2968-70 [redacted]. The limited record evidence regarding Freedom's consideration of Chapter 11 reorganization suggests that [redacted]. PX05113 (Chung Dep.) at 100. This approach, while perhaps understandable from the perspective of the shareholders' interests, is insufficient for a seller that seeks to invoke the failing firm defense to insulate an otherwise anticompetitive transaction from scrutiny.

4. Element 3: Freedom's Efforts to Refinance or Sell to a Less Anticompetitive Buyer

To sustain a failing firm defense, the proponent is called upon to demonstrate that the acquiring company was "the only available purchaser." *Citizen Publ'g Co.,* 394 U.S. at 138; *United States v. Greater Buffalo Press, Inc.,* 402 U.S. 549, 555 (1971) (defendant must show that there was "no other prospective purchaser" for the acquired company). The antitrust enforcement agencies have implemented this element of the failing firm defense by focusing on the respondent's efforts to elicit "reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition." *Horizontal Merger Guidelines* § 11. Defendant's burden is "quite heavy." *FTC v. Harbour Grp. Invs., L.P.,* 1990 WL 198819, at *3 (D.D.C. 1990). Like the ALJ, ID at 68-74, we hold that Respondent failed to meet its burden.

a. Factual Background of Freedom's Efforts to Refinance or Sell

In approximately September 2016, Freedom and HEP began to reach out to potential equity investors and explore ways to refinance the company's debt. PX05113 (Chung Dep.) at 148-49; *see*, *e.g.*, RX-0274 at -001, 002. Smith and Maynard Carkhuff, Freedom's vice chairman and chief innovation officer at the time, also met with the chairman and primary owner of Otto Bock Germany, Professor Hans Georg Näder, in Berlin, Germany in October, 2016, to gauge Otto Bock's interest in acquiring Freedom. IDF 849. The parties met again in New York later that month to further explore a sale. IDF 850.

Executives from Freedom and Otto Bock met again in Berlin in March 2017, and the following month, Otto Bock informed Freedom that Otto Bock viewed Freedom's valuation to be [redacted]. IDF 858-59. Unsatisfied with this potential offer, Freedom's board authorized its investment banker to communicate to Otto Bock that Freedom was disappointed in the valuation and that there was no need to submit an offer at [redacted]. PX02088 at -001; PX05113 (Chung Dep.) at 168-69. Freedom then launched a more expansive process to seek additional potential buyers. PX05113 (Chung Dep.) at 169. This process involved formally retaining an investment banker to conduct a bidding process. *Id.*

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42 [redacted] PX06004 (Hammer Rebuttal Report) at ¶ 49 and n.106.

In April-May 2017, Freedom's investment banker reached out to approximately seven potential buyers regarding an acquisition of Freedom. IDF 861, 863. In June 2017, the investment banker sent letters to Össur and Otto Bock seeking written indications of interest in Freedom. IDF 864. These two firms eventually submitted final bids of [redacted] (Össur) and [redacted] (Otto Bock). IDF 869-71. Otto Bock acquired Freedom on September 22, 2017. IDF 872.

b. Adequacy of Freedom's Efforts to Refinance or Sell to a Less Anticompetitive Buyer

Respondent states that Freedom preferred a refinancing to a sale, but that it could not obtain refinancing, such that a sale to a strategic acquirer became the only option. RAB at 41. However, the evidence suggests that potential financing sources did express interest in Freedom, but on terms that the existing shareholders did not like. As of August 2017, for example, Freedom's minority shareholder Parker Hannifin Corporation ("Parker Hannifin") understood that [redacted] was considering replacing half of Freedom's debt with equity, but with a [redacted] valuation that was unfavorable compared to strategic players offering [redacted] IDF 846-47.[43] As a Parker Hannifin witness (and Freedom Board member) expressed it, a "[n]ew investor, if contributing equity will be very painful to both HEP and Parker [Hannifin] in terms of the dilution impact." PX0392-001. That same witness explained, "A few players were approached, but the terms of valuation were very unfavorable compared to the strategic bidders . . . [i]t was evident to us that . . . one of the strategic players and notably Ottobock would have the highest offer." IDF 848 (citing PX05125 (Dorotheou Dep.) at 111).[44] Perhaps for this reason, Freedom simply omitted to contact numerous potential financing sources that its investment banker had identified. *See* PX03016 at -007 (presentation by Moelis to Freedom listing various royalty and mezzanine funds, venture debt, and banks as "potential private capital sources"); Hammack, Tr. 6106-08 (identifying twelve of the listed sources that were never contacted).

As to the sales process, the evidence again shows that Freedom focused prematurely on Otto Bock. Freedom's representatives began to meet with Otto Bock regarding a potential sale in October 2016. IDF 849. Then, from October 2016 to April 2017, neither Freedom nor its investment banker contacted any potential alternative strategic buyers besides Otto Bock. IDF 860. They finally did so because they were not satisfied with Otto Bock's initial offer. PX05113 (Chung Dep.) at 169.

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43 Two firms, Bank of Montreal ("BMO") and Madison Capital Funding, LLC, each held 50% of the outstanding debt under Freedom's credit agreement. IDF 744. The [redacted] arrangement would have replaced the half of Freedom's debt held by BMO. IDF 846. As to the other half of Freedom's debt, existing lender Madison Capital expressed in July 2017 that it "can't lead refinancing, but [was] happy to participate in someone else's transaction." IDF 845.

44 *See also* PX05113 (Chung Dep.) at 160 (Q. [regarding refinancing sources:] "[D]o you mean, they weren't returning your calls? A. More so that they weren't interested in engaging or *the valuations that they were, you know, verbally throwing around were not where we had marked them before.*") (emphasis added).

Freedom's belated outreach to strategic acquirers besides Otto Bock suffered from shortcomings similar to those experienced with its refinancing efforts. First, Freedom's investment banker, Moelis, did not contact companies about acquiring Freedom unless they had the ability to pay at least [redacted]. IDF 873. This floor exceeded Freedom's preliminary estimates of liquidation value by [redacted],[45] and was therefore an unjustified limit on the search for offers. *See Horizontal Merger Guidelines* § 11 n.16 ("reasonable alternative offer" is one that exceeds the liquidation value of the assets).

Second, a respondent must make a "sufficiently clear showing" that it "undertook a well-conceived and thorough canvass of the industry such as to ferret out viable alternative partners for merger." *Pabst Brewing,* 296 F. Supp. at 1002. Here, Moelis contacted seven potential strategic acquirers, IDF 861, 863, but failed to contact several prosthetics makers who later expressed interest in Freedom. These companies included [redacted]. IDF 875-77, IDF 887-88; [redacted]. The bankers also did not reach out to other players in the prosthetics industry such as [redacted]. IDF 875. Some of the firms that Moelis neglected were small, but two—[redacted]—are firms that Respondent now touts as capable of replacing competition lost by the Acquisition. And "at least in some cases, approaching smaller companies in a given industry might be exactly what is required of a company seeking the protection of the failing company defense." *Harbour Grp. Invs.,* 1990 WL 198819, at *4.

Third, Freedom rejected overtures from two potential buyers, Nabtesco and Össur, that could have resulted in transactions with fewer anticompetitive effects than the Acquisition by Otto Bock. Nabtesco reached out to Freedom's chairman, Maynard Carkhuff, on September 7, 2017, regarding potentially acquiring Freedom. IDF 877. After Smith told Carkhuff that Freedom already had offers in hand—one of which was from Otto Bock—Carkhuff responded to Nabtesco that Freedom was not interested in Nabtesco's buying it. IDF 877-78.[46] Nabtesco, with its Allux MPK, possessed a [redacted] market share in the United States, IDF 479-80, and would not likely have posed a competitive problem in buying Freedom. Freedom also rejected an offer from Össur of [redacted], which exceeded Freedom's liquidation value, choosing Otto Bock's higher bid instead. ID at 72-73. Acquisition by Össur, while raising questions in its own right, may have been more favorable from a competitive standpoint than acquisition by Otto Bock. An Össur/Freedom transaction would have resulted in an HHI

45 Although neither party offered a formal estimate of Freedom's liquidation value, Smith's preliminary estimates of that value were less than the [redacted] that Freedom owed the banks. Smith, Tr. 6554-56.

46 Respondent argued to the ALJ that Nabtesco's overture came too late: by the time Nabtesco reached out to Freedom, a closing with Otto Bock was days away, and it would have been "unreasonable" to halt that process. RPTRB at 127. Unreasonable or not, the problem was of Freedom's own making. Freedom had first reached out to Otto Bock to explore a sale in October 2016, *more than eleven months earlier,* yet never contacted Nabtesco—not even during its supposedly "robust" May 2017 process. RAB at 5; IDF 849, 863; PX03264.

increase of 339 points in MPKs, IDF 908, presumptively problematic under the *Horizontal Merger Guidelines*, but less than the 1,522-point increase for the Otto Bock transaction.[47]

In sum, Freedom's executives and shareholders were focused on obtaining the highest possible offer, IDF 874,[48] which is a different objective from searching for a reasonable alternative offer above Freedom's liquidation value. *See United States v. Energy Sols., Inc.,* 265 F. Supp. 3d 415, 446 (D. Del. 2017) (rejecting the failing company defense where the acquired company was "clearly focused on obtaining what it perceived to be . . . fair value, not an offer above the liquidation value"). Informed observers could foresee that Otto Bock would have the most favorable bid for Freedom because it had the most to protect in the form of preventing competition for its C-Leg sales.[49] A firm's willingness to pay a premium for its distressed competitor could signify a likelihood of consumer harm.[50] To meet the third prong of the failing firm defense, a seller must not simply have accepted the highest offer that presented itself, but must instead have exhausted reasonable efforts to find a less anticompetitive alternative buyer.

Freedom and its investment bankers did not consider whether the Otto Bock acquisition raised antitrust concerns. Carkhuff, Tr. 727; PX05110 (Hammack Dep.) at 176. We, however, must do so, and we conclude that Respondent failed to demonstrate a reasonable, good faith effort to engage in an alternative, less anticompetitive transaction.

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Because Respondent failed to establish the three elements of the failing firm defense—*i.e.,* that Freedom would be unable to meet its financial obligations in the near future, that it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, and that it conducted a reasonable, good faith search for alternative offers that would keep its assets in the market and pose a less severe danger to competition—we find the defense inapplicable.

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47 Respondent argues that an Össur/Freedom transaction would have caused a serious competitive problem in a putative relevant market for "K-3 and K-4 prosthetic feet." RAB at 42. We lack sufficient information to evaluate this claim. Respondent did not describe the products found in such a market, discuss *Brown Shoe* criteria such as industry recognition of a market, address the ease of entry, *etc.* In any event, Respondent's claim is non-dispositive because (1) Freedom's search for refinancers and purchasers was otherwise deficient, and (2) Respondent failed to meet the first two prongs of the failing firm defense. *See supra* Sections VII.E.3 and 4.

48 *See also* PX05125 (Dorotheou Dep.) at 82; PX05113 (Chung Dep.) at 199.

49 Össur believed that, [redacted] De Roy, Tr. 3611.

50 *See* PX01004-008, 064 [redacted].

VIII. DIVESTITURE

Respondent has entered into [redacted]. Respondent argues that the proposed divestiture [redacted] must be considered in determining whether Complaint Counsel have made a *prima facie* showing of anticompetitive effects.[51] RAB at 28-31. Respondent claims that a structural presumption of anticompetitive effects is inappropriate because, with the proposed divestiture, the HHI increase from the Acquisition is zero. RAB at 4, 28-29, 32; RRB at 1, 9-11. According to Respondent, Complaint Counsel ignored the divestiture and failed to establish a *prima facie* case. RAB 28-30, 32. Respondent cites to several cases to support its argument: *FTC v. Arch Coal*, No. 1:04-cv-00534, ECF No. 67 (D.D.C. July 7, 2004); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969); and *White Consolidated Industries, Inc. v. Whirlpool Corp.*, 781 F.2d 1224 (6th Cir. 1986). In each of these cases, the court found that the divestiture agreement should be considered together with the merger in determining whether the merger would violate Section 7. *Arch Coal* and *Libbey* factored the divestiture into the *prima facie* analysis, as did the district court opinion in *White Consolidated Industries,* which was affirmed on appeal.[52] *See White Consol. Indus.*, *Inc. v. Whirlpool Corp.*, 619 F. Supp. 1022, 1026 (N.D. Ohio 1985), *aff'd,* 781 F.2d 1224 (6th Cir. 1986); *Arch Coal*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004); *Libbey*, 211 F. Supp. 2d at 46.

All of those cases, however, are distinguishable in two important respects. First, in each case, the merger was unconsummated and would occur simultaneously or almost simultaneously with the divestiture. And second, in each case, the parties entered into the divestiture agreement before the plaintiff filed the complaint or soon after, such that the divestiture could be deemed part of the transaction being challenged.[53] Thus, in each of the cases Respondent cites, the challenged transaction consisted of both the merger and the divestiture, even if they were technically separate agreements. That is not the situation here.

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51 Although in the proceeding below Respondent argued that [redacted] should be assessed, on appeal it focuses on the [redacted]. *Compare* RAB at 3-4 *with* RPTB 84, 89-90.

52 In *Atlantic Richfield*, the court stated that the Government could not establish a reasonable probability of success at trial by citing market share statistics while completely ignoring the sale agreement accompanying the merger, and that merging firms should be able to "eliminate probable anti-competitive effects by . . . a disposition of assets[.]" 297 F. Supp. at 1068-69.

53 In *Arch Coal*, the court explained that the Commission brought its complaint after it was made aware of the divestiture agreement, such that the Commission had assessed and was in reality challenging the merger agreement with the divestiture. 1:04-cv-00534, ECF. No. 67, slip op. at *4. So, too, in *Atlantic Richfield*, the court noted that the sale was "fully known to the Government when the complaint was drawn." 297 F. Supp. at 1067. In *White Consolidated Industries*, the complaint sought to enjoin both the initial sale and the related divestiture. 612 F. Supp. 1009, 1012 (N.D. Ohio 1985). In *Libbey*, the complaint was filed one week before the parties finalized their agreement that included a third-party asset sale, but in that case the finalized agreement amended the original merger agreement, which was deemed abandoned. The FTC then voted to enjoin the amended merger agreement, which the court construed as an indication that the Commission was now challenging the amended transaction. *Libbey,* 211 F. Supp. at 46.

Here, the Acquisition was consummated two years ago, while the divestiture is still in the future. The Commission filed its Complaint challenging the Acquisition long before Respondent entered into any divestiture agreement. [redacted].[54] [redacted] Under these facts, the [redacted] divestiture is not part of the challenged transaction but is one of several post-Acquisition proposals that would override the Commission's choice of remedy. The cases that incorporate the divestiture into the *prima facie* analysis of the merger are entirely inapposite.[55]

Further, in this case, the proposed future divestiture cannot preclude a finding of liability because the Acquisition has already harmed competition. Nearly two years have passed since the Acquisition, and nearly two years of competitive harm have accrued. A future divestiture cannot erase past competitive injury, and it cannot defeat liability based on the harm that already has occurred.

In any case, [redacted] We cannot fail to find liability on the facts of this case and allow an anticompetitive merger to stand based on a [redacted] agreement.

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54 [redacted]

55 Even if this were an unconsummated transaction on all fours with *Arch Coal* and other cases cited by Respondent, a divestiture of assets would not automatically result in an HHI change of zero. The HHI calculation would depend on our assessment of whether the divestiture would succeed in creating an effective new competitor. *See infra* Section IX.A (finding the proposed divestiture to [redacted] insufficient to restore competition). For instance, it would be inappropriate to assign the current market share of an existing successful competitor to a buyer of divested assets who is unlikely to be as effective a competitor. Acquiring a company and then divesting it to a buyer who is likely to fail would have a similar effect on competition as buying and then shelving the assets of a competing firm. *See White Consol. Indus.,* 612 F. Supp. at 1022 (regarding Whirlpool's planned purchase of KitchenAid and accompanying partial divestiture to Emerson: "[T]he importance of the [HHI] statistics hinges upon the viability and sincerity of Emerson as a new competitor in the dishwasher market. If Emerson will become a vibrant new force in the dishwasher market, the plaintiffs' assignment of KitchenAid's manufactured units market share to Whirlpool is inappropriate and the statistical warning system is never triggered. Still, if Emerson is overly optimistic about its prospects or disingenuous about its intentions, the assignment of the KitchenAid percentage points to Whirlpool is proper and the statistical warning system demands careful scrutiny of the transaction.").

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Having concluded that Respondent has failed to rebut Complaint Counsel's showing of anticompetitive effects, including past and likely future competitive harm, and that Respondent failed to demonstrate efficiencies or establish a failing firm defense, we hold that the Acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

IX. REMEDY

The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *Polypore,* 2010 WL 9933413, at *32 (citing *inter alia Ford Motor Co. v. United States,* 405 U.S. 562, 573 n.8 (1972)). Divestiture is generally the proper remedy to accomplish this purpose. *See du Pont,* 366 U.S. at 331 (divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found"); *ProMedica,* 749 F.3d at 573 (quoting *du Pont,* 366 U.S. at 329) ("[O]nce a merger is found illegal, 'an undoing of the acquisition is a natural remedy'").

In *Ford Motor Co.,* 405 U.S. at 573, the Court observed that complete divestiture is "particularly appropriate" where asset or stock acquisitions violate the antitrust laws. Divestiture in such cases is "simple, relatively easy to administer, and sure." *du Pont,* 366 U.S. at 330. Thus, absent "unusual circumstances," total divestiture of the acquired assets has long been considered the best means of restoring competition. *See, e.g.*, *RSR Corp.,* 88 F.T.C. 800, 1976 WL 180019 (F.T.C. Dec. 2, 1976), *aff'd, RSR Corp. v. FTC,* 602 F.2d 1317 (9th Cir. 1979); *see also Evanston Nw. Healthcare,* 2007 WL 2286195, at *77-79. The fact that the parties may have already consummated their transaction, while a relevant consideration, does not prevent us from ordering divestiture as a remedy for a violation when otherwise appropriate. *See ProMedica,* 2012 WL 1155392, at *1, 48-9 (ordering divestiture in consummated transaction), *upheld*, 749 F. 3d at 573; *Chicago Bridge & Iron Co.,* 138 F.T.C. 1024, 2004 WL 5662266, at *294 (2004) (citing *inter alia Olin Corp.,* 113 F.T.C. 400, 619, 1990 WL 10012633 (F.T.C. June 13, 1990) and *Crown Zellerbach Corp.,* 54 F.T.C. 769, 808, 1957 WL 16302 (F.T.C. Dec. 26, 1957), *aff'd*, 296 F.2d 800 (9th Cir. 1961)); *but cf. Ekco Prods. Co.,* 65 F.T.C. 1163, 1964 WL 72993, at *43 (F.T.C. June 30, 1964) (cautioning against structural relief "so drastic, or inequitable, that the cure would be worse than the disease").

A. ADEQUACY OF THE PROPOSED DIVESTITURE

Although Respondent's proposed divestiture does not preclude a finding of liability in this case, it is relevant to the question of remedy. *See United States v. Quad/Graphics, Inc*., No. 1:19-cv-04153, Dkt. No. 46 (N.D. Ill. July 10, 2019) (bifurcating merger trial to first address liability issues and then consider defendants' proposed divestiture remedies). "Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger[.]" *Staples, Inc.*, 190 F. Supp. 3d at 137 n.15 (citing *H&R Block*, 833 F. Supp. 2d at 89). Thus, Respondent must show that its proposed divestiture to [redacted] would restore the pre-Acquisition level of competition. *See, e.g., Ford Motor Co.*, 405 U.S. at 573; *Aetna Inc.*, 240 F. Supp. 3d at 60; *Sysco*, 113 F. Supp. 3d at 72. "Restoring competition requires replacing the

competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." *Sysco*, 113 F. Supp. 3d at 72 (quoting Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004)) (emphasis in *Sysco*). "[T]he divestiture assets must be substantial enough to enable the purchaser to *maintain the premerger level of competition*, and should be sufficiently comprehensive that the purchaser will use [the acquired assets] in the relevant market and be unlikely to liquidate or redeploy them." *Id.*.

The proposed divestiture to [redacted] does not meet these standards and is likely to result in less vigorous competition than existed before the Acquisition, because the proposed divestiture excludes certain Freedom assets and [redacted].[56]

1. Failure to Include [redacted]

The proposed divestiture could stifle the development of and innovation for the Quattro MPK because it fails to transfer [redacted]

56 Complaint Counsel allege that the proposed divestiture is inadequate because, in addition to the deficiencies we identify below, [redacted]. *See* CCAB at 35-36, 39-40. The record does not support a finding that these additional omissions in the proposed divestiture would harm [redacted] ability to compete.

[redacted]

[redacted].

[redacted].

2. Failure to Transfer [redacted]

The divestiture also fails to transfer patents [redacted].[57] [redacted]

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57 [redacted]

[redacted].

[redacted].

[redacted].

3. Failure to Provide [redacted]

Another deficiency [redacted][58] [redacted].

[redacted]

58 *See* PX01392-013; PX01409 at -005, -007.

[redacted].[59] [redacted].[60]

[redacted]

[redacted].

59 The Commission is aware that Ottobock and [redacted] cannot compel employees to accept employment at [redacted]. Yet, like Commission divestiture orders, the APA should, at the very least, remove impediments and disincentives that would hinder or discourage employees from accepting employment with the buyer of the divested assets.

60 [redacted]

4. Failure to Include [redacted]

The divestiture is also deficient because it fails to include [redacted] After Otto Bock's launch of the C-Leg 4 in 2015, Freedom sought to regain lost sales by introducing the "Ideal Combo" promotion, under which a customer would get a free or discounted foot with the purchase of a Plié knee. IDF 612-16; PX01158-001.[61] The promotion was a success. Testerman, Tr. 1147. It helped drive Plié sales and converted multiple customer accounts to the Plié from other MPKs. IDF 617, 624; Testerman, Tr. 1147-48; PX01091-012. Both Freedom's and Otto Bock's executives recognized the promotion's effectiveness.[62] Respondent's own expert witness concluded based on the case record that bundling Freedom's feet with its Plié MPK positively impacted Plié sales. IDF 630 (citing Argue, Tr. 6387-88). In fact, the Ideal Combo promotion was so successful that Freedom continued to use it to sell Pliés through the time of the Acquisition and beyond. *See* [redacted]; PX05138 (Reissfelder Dep.) at 77-79; PX00787. The proposed divestiture, however, [redacted].

[redacted]

61 *See also, e.g.,* PX00833-007 (Freedom advertisement offering either a free Highlander, Agilix, or DynAdapt foot or $1000 off of a Kinterra prosthetic foot/ankle system with the purchase of a Plié 3); PX00787-001 (offering free graphite foot or 50% off a Kinterra). The combination of the Kinterra and the Plié 3 accounts for the majority of Freedom's Ideal Combo sales. IDF 620.

62 *See* Testerman, Tr. 1147-48 (Ideal Combo promotions "are effective" at keeping Freedom "competitive" and "tak[ing] share from all microprocessor knees"); Carkhuff, Tr. 408-09 (Ideal Combo is an "effective marketing tool" that "incentivizes customers to buy more Freedom knees and more Freedom feet"); Ferris, Tr. 2395 (Ideal Combo promotion "drives value and utilization"); Swiggum, Tr. 3340 (Freedom's bundling the Plié 3 with prosthetic feet is "an effective marketing tool"); Solorio, Tr. 1648 (Freedom's promotions bundling feet and knees are "effective"); PX01091-012 [redacted].

[redacted].[63]

[redacted][64] [redacted].

[redacted]

63 [redacted]

64 [redacted]

In sum, although we draw no conclusions about the suitability of [redacted] as a potential buyer for a more complete divestiture of Freedom's assets, we find the proposed divestiture under the terms of [redacted] inadequate to replace the competitive intensity lost as a result of the Acquisition.

B. THE ALJ'S REMEDIAL ORDER IS APPROPRIATE AND NECESSARY TO FULLY RESTORE COMPETITION

We concur in the ALJ's ruling that divestiture of Freedom's entire business, with potential exceptions for certain lines of prosthetic foot products that may not be necessary for competition in the MPK market, is the appropriate remedy in this case. *See* ALJ Order, ID at 234, Sections I.I and I.J, II.A.1, and Appendix A and B.[65]

In cases involving an unlawful merger, such as those described at the beginning of Section IX, Respondent may still affirmatively show that a remedy other than full divestiture would adequately redress any violation found. *See, e.g., Staples,* 190 F. Supp. 3d at 137 n.15 (*dicta*) ("Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger. . . ."); *Fruehauf Corp.,* 90 F.T.C. 891, 1977 WL 189065, at *1 n.1 (F.T.C. Dec. 21, 1977); *Diamond Alkali Co.,* 72 F.T.C. 700, 1967 WL 94030, at *33 (F.T.C. Oct. 2, 1967) ("In the absence of proof to the contrary the assumption . . . must be that only divestiture can reasonably be expected to restore competition and make the affected markets whole again.") (internal quotation and citation omitted). In any event, as set forth in Section IX.A and discussed further below, we rely on affirmative record evidence to conclude that a complete divestiture of Freedom, less a potential exception for certain prosthetic foot product lines, is necessary to restore competition in the MPK market.

Respondent argues that a divestiture of Freedom's MPK assets would completely restore competition and that any divestiture beyond MPKs is "punitive." RAB at 42-43. We disagree. As discussed in Section IX.A above, a divestiture of only MPK assets would not suffice to restore competition. Freedom used its foot products to support the development and sale of its MPKs. *See* Section IX.A.1 (discussing the interrelationship between the [redacted]) and Section IX.A.4 (discussing Freedom's use of its foot products to stimulate sales of MPKs). To allow the divestiture buyer to compete as effectively as Freedom, the buyer must be offered the same competitive advantages that were available to Freedom. Consequently, a broader divestiture is necessary. *See Chicago Bridge,* 534 F.3d at 441-42 (finding that divestiture of multiple products was necessary for the divestiture buyer to replicate

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65 Our Final Order also adopts other aspects of the ALJ's Order, as to which Respondent has not stated a basis for objection (apart from issues pertaining to the scope of assets covered) and which we find necessary for a successful divestiture. These aspects include requirements for continuing to hold Freedom's assets separate pending divestiture, Final Order ¶ II.A.3; providing a potential acquirer full due diligence, Final Order ¶ II.A.4; ensuring full and effective divestiture of the relevant assets, Final Order ¶¶ II.A.5(a) and (b), 6-8, and 10-12; preserving Freedom's assets and business until divestiture is accomplished, Final Order ¶¶ III-IV; permitting appointment of a person to monitor Otto Bock's compliance with its obligations, Final Order ¶ VI; providing for appointment of a Divestiture Trustee if Otto Bock fails to divest within the time and in the manner required, Final Order ¶ VII; and requiring the filing of compliance reports, Final Order ¶ VIII.

pre-merger competition "on an equal footing," and thus was "reasonably calculated to eliminate the anti-competitive effects" of the acquisition).

Contrary to Respondent's assertion, a divestiture that includes Freedom's foot products is not "punitive" but necessary to remedy the Acquisition's anticompetitive effects. Respondent's reliance on *Jim Walter Corp.,* 90 F.T.C. 671, 1977 FTC LEXIS 10 (1977), *vacated on other grounds,* 625 F.2d 676 (5th Cir. 1980) is misplaced. In that case, the Commission chose not to order the respondent to divest its entire construction products business. The *Jim Walter* respondent had a single operating division that participated in the relevant antitrust market of concern, which was limited to asphalt and tar roofing products; the division operated as a separate profit center from the rest of the firm and had a separate sales force and separate plants. 1977 FTC LEXIS 10 at *206-07. The respondent could divest the smaller entity without impairing its viability as a standalone competitor.[66] Freedom's MPK business, however, is enmeshed with its prosthetic foot business. The Quattro and [redacted]. *See* Section IX.A.1. Moreover, Freedom uses its foot products to stimulate sales of the MPKs. *See* Section IX.A.4. We consequently have reason to doubt that Freedom's interrelated product lines can be carved up without impairing the acquiring firm's competitive prospects.[67]

Other cases like *Chicago Bridge* and *Polypore* are more applicable. In *Chicago Bridge*, the Fifth Circuit Court of Appeals upheld our order requiring the divestiture of respondent's water tank business notwithstanding that Complaint Counsel proved a violation only in the sale of cryogenic tanks. 534 F.3d at 441. The sale of water tanks provided a steady source of revenue that complemented the revenue from the sale of cryogenic tanks, which was very sporadic; divesting both business lines was necessary to create a viable competitor. *Id.* Similarly, in *Polypore,* we ordered the respondent to divest its overseas plant in Feistritz, Austria, even though the relevant geographic market was limited to the United States. 2010 WL 9933413, at *32-35. Among other benefits, the Feistritz plant enabled a buyer of the divested U.S. facilities to overcome capacity constraints that would have limited the buyer's ability to compete. *Id.* at *33. Inclusion of the Feistritz plant also helped the divestiture buyer meet some customers' preferences to buy from a global supplier, making it a more attractive competitor. *Id.* at *34. The Court of Appeals upheld the order as an appropriate use of our broad discretion as to remedy. *Polypore Int'l, Inc. v. FTC,* 686 F.3d 1208, 1218-19 (11th Cir. 2012); *see also Olin Corp.,* 1990 WL 10012633, at *159 (F.T.C. June 13, 1990) (requiring divestiture of assets outside the relevant market to "give [the] acquirer a real chance at competitive success"), *pet. for review denied*, 986 F.2d 1295 (9th Cir. 1993).

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66 And even while the Commission declined to order the broader divestiture in *Jim Walter*, it simultaneously observed that it is "certainly within our power" to do so. *Id.* at *206-07.

67 The fact that a divestiture buyer may have been willing to acquire only Freedom's MPK products does not assure that it will succeed, [redacted]. *See supra* Section IX.A.

By including Freedom's foot products in the divestiture order, we aim to avoid placing the risk of a failed remedy on consumers. Our recent study of past Commission remedies suggests that divestiture of an ongoing business is "most likely to maintain or restore competition" as compared to divestiture of more limited asset packages, which may "increase[ ] the risk that a remedy will not succeed." Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012 at 5 (Jan. 2017). Consistent with that study, the evidence in this case indicates that a divestiture limited to MPK assets would deprive the divestiture buyer of tools Freedom used to compete effectively and would risk diminishing competition. Indeed, Otto Bock clearly believed that offering such a bundle would be important and useful: one of the first marketing initiatives that Otto Bock discussed after acquiring Freedom was to offer [redacted] PX01302 (Nov. 2017 presentation) at 085. Dividing Freedom's MPK business from its successful foot lines would force consumers to bear the risk that the divestiture buyer would be unable to re-create Freedom's competitive impact in MPKs. At the same time, Otto Bock could entrench its MPK share further by offering the very Freedom foot bundle that it wishes to deny its competitor. This outcome would fall short of the public interest standard that the Supreme Court articulated in *du Pont,* 366 U.S. at 327-28, which not merely "authorize[s]" but "require[s]" us to provide relief effective to redress the Respondent's violations. *Id.* at 326.

Given the importance of Freedom's Ideal Combo, the [redacted] and the risk that a proffered divestiture buyer could not successfully replicate these competitive initiatives, we find that divestiture of only Freedom's MPKs would fail to "replac[e] the competitive intensity lost as a result of the merger." *Sysco*, 113 F. Supp. 3d at 72 (internal quotation marks and emphasis omitted). To render the greatest likelihood that competition will be restored to its pre-Acquisition state, we enter a Final Order requiring the divestiture of Freedom's entire business, with potential exceptions for certain lines of foot products as described below.

Under the first potential exception, Otto Bock *may retain* any or all of the prosthetic foot products of Freedom specified in "Divestiture Products Group A," unless the acquirer demonstrates to the Commission's satisfaction (i) that any such asset is necessary to achieve the purposes of our Final Order; and (ii) that the acquirer needs such asset to effectively operate the Freedom business in a manner consistent with the purpose of the Final Order, and the Commission approves the divestiture with the divestiture of such asset. Final Order, ¶ II.A. Divestiture Products Group A consists of prosthetic feet that, according to Complaint Counsel, [redacted]. ID at 93; Final Order, Appendix A.

Under the second potential exception, Otto Bock *must divest* any or all of the products specified in "Divestiture Products Group B" unless the acquirer demonstrates to the Commission's satisfaction: (i) that any such asset is not necessary to achieve the purpose of our Final Order; and (ii) that the acquirer does not need such asset to effectively operate the Freedom business in a manner consistent with the purpose of the Final Order, and the Commission

approves the divestiture without such asset. Final Order, ¶ II.A. Divestiture Products Group B consists of Freedom prosthetic foot products that Complaint Counsel assert [redacted].[68] ID at 93; Final Order, Appendix B.

The manner and scope of divestiture are subject to the Commission's broad discretion. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *Chicago Bridge*, 534 F.3d at 440-42. The Final Order strikes an appropriate balance, providing adequate assurance that the divestiture buyer will have the assets that it needs to restore the competition lost from the Acquisition, while at the same time allowing Otto Bock potentially to retain certain non-MPK assets that are not necessary to this remedial purpose.

X. CHALLENGES TO THE LEGITIMACY OF THE COMMISSION'S ENFORCEMENT PROCEEDING

For the first time, on appeal, Respondent asserts that the Commission's Part 3 proceedings are unconstitutional. RAB at 43-45; RRB at 20-23. Respondent challenges the legitimacy of the appointment and removal processes for the ALJ; the division of antitrust enforcement workload between the FTC and the U.S. Department of Justice; and various procedural rules that govern the offering and admissibility of evidence at Part 3 trials.

Respondent failed to raise any of these objections in its pleadings or while the matter was pending before the ALJ, waiting instead until the ALJ had ruled against it.[69] Respondent has therefore waived its current claims. *See 1-800 Contacts, Inc.,* 2018 WL 6078349, at *53 (F.T.C. Nov. 7, 2018), *pet. for review pending,* No. 18-3848 (2d Cir.); *see also LabMD, Inc.,* 2015 WL 5608167, at *2 (F.T.C. Sept. 14, 2015).

Even if Respondent had timely raised its challenges, however, we would still reject them for the reasons discussed below.

A. THE ALJ'S APPOINTMENT AND PROTECTION FROM REMOVAL

Respondent raises two distinct Constitutional challenges to the ALJ's authority. First, citing *Lucia v. SEC,* 138 S. Ct. 2044, 2055 (2018), Respondent argues that the ALJ's appointment violated Article II's Appointments Clause. *Lucia* held that ALJs are "officers of the United States" under the Constitution who must be appointed by the President, a court of law, or a "Head[ ] of Department[ ]," which in this case would be the Commission. *See generally Lucia,* 138 S. Ct. at 2050-52; U.S. CONST. art. II, § 2, cl. 2. According to Respondent, the ALJ was not

68 On its appeal, Respondent does not object to Complaint Counsel's delineation of the Group B products as having been used by Freedom in the Ideal Combo promotion, or of the Group A products as not having been so used.

69 In fact, before the ALJ issued his Initial Decision, Respondent took precisely the opposite position, arguing that "due process dictate[d] that the ALJ, and not the Commission, should decide" a motion then pending before the Commission to strike one of Respondent's affirmative defenses. Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense at 3 (Feb. 28, 2018).

originally appointed pursuant to the Appointments Clause, but only had his appointment ratified by the Commission. Consequently, Respondent argues, the ALJ's hearing, rulings, and Initial Decision are void. RAB at 44.

Second, Respondent contends that the ALJ's so-called "multilevel protection from removal" is unconstitutional. RAB at 44; RRB at 22. Congress in the Administrative Procedure Act directed that the ALJ be removable only "for good cause" found by the Merit Systems Protection Board ("MSPB"), 5 U.S.C. § 7521 (2018). The MSPB's members, in turn, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d) (2018). Respondent urges us to extend the Supreme Court's holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 484 (2010), which held unconstitutional what Respondent deems a "similar multilayered removal process[ ]" for members of the Public Company Accounting Oversight Board. RRB at 23. The Court in *Free Enterprise Fund* found that the unique removal protections afforded to members of that body, who themselves were appointed by the Securities and Exchange Commission, violated the separation of powers. 561 U.S. at 498.

We reject Respondent's challenges to the ALJ's authority. Regarding the Appointments Clause, Respondent acknowledges that the Commission ratified the ALJ's appointment in September 2015, more than two years before the Complaint in this case was issued. *See LabMD, Inc.,* 2015 WL 5608167, at *3, Exh. A. Respondent does not even attempt to explain why our ratification would not cure any Appointments Clause violation.

Respondent observes that the *Lucia* court declined to decide whether ratification of an official's appointment suffices to cure an Appointments Clause defect. RRB at 22 (citing *Lucia,* 138 S. Ct. at 2055 n.6). We note, however, that circuit courts have already answered a much more difficult question: whether improperly-appointed officials can subsequently ratify their own, formerly invalid actions after their appointment becomes proper. The courts have found that they can. *See, e.g., Wilkes-Barre Hosp. Co. v. NLRB,* 857 F.3d 364, 370-71 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB,* 820 F.3d 592, 606 (3d Cir. 2016); *CFPB v. Gordon,* 819 F.3d 1179, 1190-92 (9th Cir. 2016); *FEC v. Legi-Tech, Inc.,* 75 F.3d 704, 708-09 (D.C. Cir. 1996). These cases presented the scenario of an official's (or agency's) *post hoc* ratification of his/her (or its) originally *ultra vires* decision to bring an enforcement action, while that action was still pending. Here, Respondent's challenge to ratification has even less merit than the challenges denied by those courts, because the Commission cured any Appointments Clause violation years before the ALJ took any action in Respondent's case.

We also deny Respondent's objection to what it terms the ALJ's "multilevel protection from removal." As we held in *1-800 Contacts,* the FTC's ALJ "occupies a different role" than the PCAOB members whom the Supreme Court found to be improperly insulated from presidential control in *Free Enterprise Fund. 1-800 Contacts,* 2018 WL 6078349, at *54. The PCAOB had "expansive powers to govern an entire industry," including registering and routinely inspecting all accounting firms that audit public companies, promulgating auditing and ethics standards, initiating formal investigations, and issuing "severe sanctions" in disciplinary matters. *Free Enter. Fund,* 561 U.S. at 485. The FTC ALJ, by contrast, primarily, and for all purposes

relevant, serves "adjudicative rather than enforcement or policymaking functions," *id.* at 507 n.10, and his adjudicative power is limited to initial factfinding and initial rulings that the Commission reviews *de novo. Id.*; 16 C.F.R. §§ 0.14, 3.54(a). The Court noted these differences when it declined to sweep agency ALJs within the scope of its ruling on the PCAOB. *Free Enter. Fund,* 561 U.S. at 507 n.10.

Our discretion to remove the ALJ, and hence oversight of his activities, is also greater than the SEC's authority over the PCAOB members in *Free Enterprise Fund*. In creating the PCAOB, Congress "enacted an unusually high standard that must be met" before Board members could be removed, enumerating a discrete set of bases for removal and requiring a formal Commission notice and opportunity for a hearing. 561 U.S. at 503. Here, by contrast, if the Administrative Procedure Act's "good cause" standard for removal is properly construed—*i.e.,* to allow us to remove an ALJ for failure to perform adequately or to follow agency policies, and to limit the Merit Systems Protection Board's role to determining whether a factual basis exists for the agency's proffered grounds for removal—the APA gives the President a constitutionally adequate degree of control over ALJs. *See 1-800 Contacts,* 2018 WL 6078349, at *54; Brief for Respondent Supporting Petitioners at 48-53, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130).

B. CHALLENGE TO THE FTC/DOJ CLEARANCE AGREEMENT

Respondent further asserts that the unsigned FTC/DOJ Clearance Agreement is unlawful and violates Respondent's Constitutional right to Equal Protection. According to Respondent, the DOJ and FTC divide antitrust enforcement "arbitrarily and capriciously," and in a manner that Congress did not intend, thus violating the Administrative Procedure Act. RAB at 45 (citing 5 U.S.C. § 706(2)(A)); RRB at 21-22. Respondent also argues that the agencies lack a rational basis to apply different procedures—federal court litigation versus the administrative litigation process—based solely on the industry in which respondents participate, so that "similarly situated groups" are "subject to different procedures, and levels of due process leading to different substantive outcomes." RAB at 45; *see also* RRB at 21. Respondent does not explain in what respect the outcomes of the two processes differ or how it has been prejudiced by any differences in procedures.

Respondent has failed to make out an APA or Equal Protection violation. The Commission and the DOJ have shared concurrent enforcement of the Clayton Act for more than a century since the Act's inception. Clayton Act § 11, 15 U.S.C. § 21 (vesting authority in the FTC to enforce Section 7); *id*., § 15, 15 U.S.C. § 25 (granting district courts jurisdiction to hear Clayton Act injunction actions brought by the United States under direction of the Attorney General). Thus, either agency could have brought an action against Respondent. Indeed, in *FTC v. Cement Institute,* 333 U.S. 683, 694–95 (1948), the Supreme Court upheld the concurrent jurisdiction, finding that the Sherman Act and the FTC Act provided the Government with "cumulative remedies against activity detrimental to competition." To the extent that the agencies choose to divide their workload, such that one brings an action rather than both doing so, this hardly gives a basis for complaint. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 862 (9th Cir. 2018) (noting that "two cops on the beat is not unusual," and favorably citing FTC and

DOJ concurrent enforcement). In any event, Respondent has failed to explain how its treatment would materially differ by agency where, as here, both agencies enforce the Clayton Act pursuant to the same case law and a shared set of enforcement guidelines.

C. THE COMMISSION'S PROCEDURAL RULES FOR PART 3 PROCEEDINGS

Finally, Respondent argues that Part 3 provides "unequal treatment" to respondents and Complaint Counsel, thus failing to accord procedural due process. RAB at 44-45. Respondent cites Rule 3.43(d)(3), which provides a rebuttable presumption that a respondent's documents produced from its own files are authentic and kept in the ordinary course of business. Respondent also points to Rule 3.43(e)[70] which, according to Respondent, "allow[s Complaint Counsel] to use as evidence anything obtained during its investigation." Respondent asserts that these provisions are one-sided because they do not provide the same benefits to Respondent as to Complaint Counsel. RAB at 44-45. Respondent also complains—in half of a sentence—about the admissibility of hearsay against respondents. RRB at 23.

Respondent's concerns about the fairness of the Part 3 rules appear to be based on misapprehension of those rules. For example, Part 3's hearsay rule, 16 C.F.R. § 3.43(b) (2019), providing that hearsay may be admitted if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair," confers no special advantage on Complaint Counsel because it applies equally to both parties. Rule 3.43(d)(3), regarding authenticity of respondent's records, accurately notes that respondents "are in the best position to determine the nature of documents generated by [them] and which come from their own files," and accordingly gives respondents the burden to rebut a presumption of authenticity for their own records. *Id.* This rule is not inconsistent with federal court practice, which allows a court to infer a document's authenticity from the fact that an opposing party produced it. *See, e.g., Snyder v. Whittaker Corp.,* 839 F. 2d 1085, 1089 (5th Cir. 1988); *Orr v. Bank of America, NT & SA,* 285 F. 3d 764, 777 & n.20 (9th Cir. 2002). Rule 3.43(e) allows the Commission to disclose and offer evidence gathered "under any of its powers," notwithstanding that such powers normally come with confidentiality obligations attached. *See* 15 U.S.C. §§ 57b-2(b)(3)(C) (Commission's duty of confidentiality), 57b-2(d)(1)(C) (ability to disclose confidential materials in a proceeding). Rule 3.43(e) does not guarantee that Complaint Counsel's evidence will be admitted, nor does it prevent respondents from offering their own evidence.[71]

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70 Rule 3.43(e) reads, "Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding."

71 Respondent does not argue, nor can it, that respondents lack access to the investigative materials that Complaint Counsel gather during their investigation. *See, e.g.,* Rule 3.31(b) (mandating broad initial disclosure of "all documents and electronically stored information . . . relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent . . . .").

In any event, Respondent fails to articulate any harm to it from the Commission's purportedly unfair rules. Respondent does not identify a single piece of evidence that it wanted to admit but could not, nor any evidence that was admitted against it that should not have been. This lack of harm is fatal to Respondent's procedural due process claim. *See Perry v. Blum,* 629 F.3d 1, 17 (1st Cir. 2010).[72]

72 Nor do we accept Respondent's arguments that its Constitutional rights were violated by our declining to grant Respondent's motions (i) to remove this case to the settlement process and (ii) to extend the briefing schedule for its appeal. It is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 544 (1978). Furthermore, agencies have discretion to manage the disposition of their caseloads. *See, e.g., Nader v. FCC,* 520 F.2d 182, 195 (D.C. Cir. 1975) (upholding such authority "in the strongest terms"). Within the time set forth in our rules, Respondent filed thorough briefs that set forth a comprehensive variety of arguments. Particularly in a consummated acquisition that threatens continuing harm to consumers, it is reasonable and appropriate for the Commission to manage its docket in a manner that keeps the case on track to a final disposition.

FINAL ORDER

I.

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

A. "Otto Bock" or "Ottobock" or "Respondent" means Otto Bock Healthcare North America, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Otto Bock Healthcare North America, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means the Person that acquires, with the prior approval of the Commission, the Freedom Assets and Business from Otto Bock pursuant to Paragraph II, or from the Divestiture Trustee pursuant to Paragraph VII of this Order.

D. "Acquisition" means the acquisition of the Freedom Assets and Business by Respondent Otto Bock pursuant to the Agreement and Plan of Merger dated September 22, 2017 andsubsequent amendments and schedules.

E. "Acquisition Date" means September 22, 2017, the date on which Otto Bock acquired theFreedom Assets and Business.

F. "Confidential Business Information" means any non-public information relating to theFreedom Assets and Business either prior to or after the Effective Date of Divestiture,including, but not limited to, all customer lists, price lists, distribution or marketing methods, or Intellectual Property relating to Freedom Assets and Business and:

1. Obtained by Otto Bock prior to the Effective Date of Divestiture; or,

2. Obtained by Otto Bock after the Effective Date of Divestiture, in the course of performing Otto Bock's obligations under any Divestiture Agreement.

Provided, however, that Confidential Business Information shall not include:

1. Information that Otto Bock can demonstrate it obtained prior to the Acquisition Date, other than information it obtained during due diligence pursuant to any confidentiality or non-disclosure agreement;

2. Information that is in the public domain when received by Otto Bock;

3. Information that is not in the public domain when received by Otto Bock and thereafter becomes public through no act or failure to act by Otto Bock;

4. Information that Otto Bock develops or obtains independently, without violatingany applicable law or this Order; and

5. Information that becomes known to Otto Bock from a third party not in breach ofapplicable law or a confidentiality obligation with respect to the information.

G. "Direct Cost" means the cost of direct material and direct labor used to provide therelevant assistance or service.

H. "Divestiture Agreement" means any agreement, including all exhibits, attachments, agreements, schedules and amendments thereto, that has been approved by the Commission pursuant to which the Freedom Assets and Business are divested by Otto Bock pursuant to Paragraph II, or by the Divestiture Trustee pursuant to Paragraph VII inthis Order.

I. "Divestiture Products Group A" means all Freedom Assets and Business related to theproducts listed in Appendix A of this Order.

J. "Divestiture Products Group B" means all Freedom Assets and Business related to theproducts listed in Appendix B of this Order.

K. "Divestiture Trustee" means the Person appointed pursuant to Paragraph VII of this Order to divest the Freedom Assets and Business.

L. "Effective Date of Divestiture" means the date on which the divestiture of the Freedom Assets and Business to an Acquirer pursuant to Paragraph II or Paragraph VII of this Order is completed.

M. "Freedom Assets" means all of Otto Bock's right, title, and interest in and to the Freedom Business and all related assets, tangible or intangible, business, and properties, including any improvements or additions thereto made subsequent to the Acquisition, relating to the operation of the Freedom Business, including, but not limited to:

1. All Real Property of the Freedom Business;

2. All Tangible Personal Property;

3. All Intangible Property;

4. All consumable or disposable inventory;

5. All rights under any contracts and agreements, including, but not limited to, all rights to leases, service agreements, supply agreements and procurement contracts;

6. All rights and title in and to the use of the Freedom Business name and marks ona permanent and exclusive basis;

7. All Intellectual Property;

8. All governmental approvals, consents, licenses, permits, waivers, or other authorizations to the extent transferrable;

9. All rights under warranties and guarantees, express or implied;

10. All items of prepaid expense; and

11. Books, records, files, correspondence, manuals, computer printouts, databases, and other documents relating to the operation of the Freedom Business, electronic and hard copy, located on the premises of Freedom Business Real Property or in the possession of any Otto Bock Employee (or copies thereof where Otto Bock has a legal obligation to maintain the original document), including, but not limited to:

    a. Customer files and records, including customer lists, customer product specifications, customer purchasing histories, customer serviceand support materials, and customer information;

    b. Research and development data and files;

    c. Financial records;

    d. Personnel files;

    e. Maintenance records;

    f. Advertising, promotional and marketing materials, including website content;

    g. Documents relating to policies and procedures;

    h. Documents relating to quality control;

i. Documents relating to Payors; and

j. Documents relating to Suppliers.

Provided, however, Freedom Assets does not include any assets exclusively related to the Otto Bock business (including prosthetic products sold or marketed by Otto Bock) prior to the Acquisition Date, unless such assets were also used by the Freedom Business after the Acquisition Date.

M. "Freedom Business" means all activities relating to the manufacture and sale of prosthetics and other related products and services.

Provided, however, the Freedom Business does not include any activities relating to Otto Bock's manufacture and sale of prosthetics and other related products and services prior to the Acquisition Date.

N. "Freedom Assets and Business" means the Freedom Assets and the Freedom Business.

O. "Freedom Employee(s)" means Any Person:

1. Employed by the Freedom Business as of the Acquisition Date; and/or

2. Employed by the Freedom Business at any time from the Acquisition Date through the Effective Date of Divestiture.

Q. "Freedom Key Employee(s)" means any Person listed in Confidential Appendix C Attached to this Order.

R. "Hold-Separate Agreements" means the Letter Agreement and Hold Separate and Asset Maintenance Agreement signed by Otto Bock and Bureau of Competition Staff on December 20, 2017, attached as Confidential Appendix D to this Order, and the Procedures, Terms and Conditions Agreement.

S. "Hold-Separate Manager Agreement" means the Agreement signed by Otto Bock and the Hold Separate Manager on December 22, 2017, attached as Confidential Appendix E to this Order.

T. "Hold-Separate Monitor Agreement" means the Agreement signed by Otto Bock and the Hold Separate Monitor on December 27, 2017, attached as Confidential Appendix F to this Order.

U. "Intangible Property" means intangible property relating to the operation of the Freedom Business including, but not limited to, Intellectual Property, the Freedom

name and marks, trademarks, logos, and the modifications or improvements to such intangible property.

V. "Intellectual Property" means, without limitation: (i) all patents, patent applications, inventions, and discoveries that may be patentable; (ii) all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality-control practices and information, research and test procedures and information, and safety, environmental and health practices and information; (iii) all confidential or proprietary information, commercial information, management systems, business processes and practices, patient lists, patient information, patient records and files, patient communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, patient support materials, advertising and promotional materials; and (iv) all rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

W. "Licensed Intangible Property" means Intangible Property licensed to Otto Bock or to the Freedom Business from a third party relating to Freedom Assets and Business including, but not limited to, Intellectual Property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality-control information, trademarks, trade names, service marks, logos, and the modification or improvements to such intangible property that are licensed to Otto Bock or to the Freedom Business ("Licensed Intangible Property" does not mean modifications and improvements to intangible property that are not licensed to Otto Bock).

X. "Monitor" means the Person appointed pursuant to Paragraph VI of the Order and withthe prior approval of the Commission.

Y. "Monitor Agreement" means the agreement Otto Bock enters into with the Monitor andwith the prior approval of the Commission.

Z. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point-of-service organizations; prepaid hospital, medical, or other health-service plans; health maintenance organizations; government health-benefits programs; employers or other persons providing or administering self-insured health-benefits programs; and patients who purchase medical goods or services for themselves.

AA. "Person" means any natural person, partnership, corporation, association, trust, jointventure, government, government agency, or other business or legal entity.

BB. "Procedures, Terms and Conditions Agreement" means the Procedures, Terms and Conditions Regarding Access to the Held-Separate Business for FTC Litigation PurposesPursuant to Hold Separate and Asset Maintenance Agreement dated December 20, 2017, between Bureau of Competition Staff and Otto Bock, signed on January 31, 2018, and attached as Confidential Appendix G to this Order.

CC. "Real Property" means all real property interests (including fee simple interests and real property leasehold interests including all rights, easements and appurtenances, together with all buildings, structures, facilities) that Otto Bock acquired pursuant to the Acquisition and/or that Otto Bock acquired after the Acquisition to the extent the interests relate to the operation of the Freedom Business. Real Property includes, but is not limited to, the assets, which are identified and listed on Appendix H to this Order.

DD. "Supplier" means any Person that has sold to the Freedom Business or Otto Bock any goods or services for use in connection with the operation of the Freedom Business; provided, however, that "Supplier" does not mean an employee of Otto Bock.

EE. "Tangible Personal Property" means all machinery, equipment, spare parts, tools, and tooling (whether customer specific or otherwise); furniture, office equipment, computer hardware and software; supplies and materials; vehicles and rolling stock; and other items of tangible personal property of every kind whether owned or leased, together with any express or implied warranty by the manufacturers, sellers, or lessors of any item or component part thereof, and all maintenance records and other documents relating thereto.

FF. "Technical Services Agreement" means the provision by Otto Bock at Direct Cost of all advice, consultation, and assistance reasonably necessary for any Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any asset, right, or interest related to the Freedom Business.

GG. "Transitional Services" means the Technical Services Agreement and the TransitionServices Agreement.

HH. "Transition Services Agreement" means an agreement requiring Otto Bock to provide at Direct Cost all services reasonably necessary to transfer administrative support services to the Acquirer, including, but not limited to, such services related to payroll, employee benefits, accounts receivable, accounts payable, and other administrative and logistical support.

II.

IT IS FURTHER ORDERED that:

A. Otto Bock shall:

1. No later than ninety (90) days from the date this Order becomes final and effective, divest absolutely and in good faith, and at no minimum price, the Freedom Assets and Business to an Acquirer that receives the prior approval of the Commission and in a manner, including pursuant to a Divestiture Agreement,that receives the prior approval of the Commission;

Provided, however, that Otto Bock may retain any or all of the Divestiture Products Group A *unless* the Acquirer demonstrates to the Commission's satisfaction: (i) that any such asset is necessary to achieve the purpose of this Order; and (ii) that the Acquirer needs such asset to effectively operate the Freedom Business in a manner consistent withthe purpose of this Order, and the Commission approves the divestiture with the divestiture of such asset.

Provided, however, that Otto Bock must divest any or all of the Divestiture Products Group B *unless* the Acquirer demonstrates to the Commission's satisfaction: (i) that any such asset is not necessary to achieve the purpose of this Order; and (ii) that the Acquirerdoes not need such asset to effectively operate the Freedom Business in a manner consistent with the purpose of this Order, and the Commission approves the divestiture without the divestiture of such asset.

2. Comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order; and any failure by Otto Bock to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however*, that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Otto Bock under such agreement; *provided further*, that if any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Otto Bock cannot fully comply with both terms, the Order Term shall determine Otto Bock's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to complywith this Order.

3. Prior to the Effective Date of Divestiture, Otto Bock shall not rescind the Hold- Separate Agreements, the Hold-Separate Manager Agreement, the Hold-Separate Monitor Agreement, or the Procedures, Terms, and Conditions Agreement or any term of the above Agreements necessary to comply with any Paragraph of this Order.

4. No later than thirty (30) days from the date this Order becomes final and effective, Otto Bock shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Freedom Assets and Business customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine.

Provided further that Otto Bock shall permit prospective Acquirers of the Freedom Assets and Business to have reasonable access to personnel and to make inspections of the physical facilities; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process; *provided, however*, that Otto Bock shall require all prospective Acquirers to sign a confidentiality agreement pursuant to which that prospective Acquirer shall be required to maintain all Confidential Business Information obtained as part of the due diligence process as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the potential Acquirer that were not involved in the due diligence process. Otto Bock shall require, as part of a confidentiality agreement, that the potential Acquirer limit access to Confidential Business Information to only those employees necessary to conduct sufficient due diligence.

5. Take all actions and shall effect all arrangements in connection with the divestiture of the Freedom Assets and Business necessary to ensure that the Acquirer can conduct the Freedom Assets and Business in substantially the same manner as operated prior to the Acquisition, including, but not limited to:

   a. Complying with the Hold-Separate Agreements, the Hold-Separate Manager Agreement, the Hold-Separate Monitor Agreement, or the Procedures, Terms, and Conditions Agreement or any term of the aboveAgreements,

   b. Providing Transitional Services,

   c. Providing the opportunity to recruit and employ all Freedom Employees.

6. Convey as of the Effective Date of Divestiture to the Acquirer the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the operation of the Freedom Business by the Acquirer and if the Acquirer is unable, using commercially-reasonable efforts, to obtain equivalent rights from other third parties on commercially-reasonable terms and conditions.

7. Otto Bock shall:

   a. Place no restrictions on the use by the Acquirer of the Freedom Assets and Business, including any Intangible Property;

   b. On or before the Effective Date of Divestiture, provide to the Acquirer contact information about customers, Payors, and Suppliers for the Freedom Assets and Business;

   c. With respect to contracts with Freedom Business Suppliers, at the Acquirer's option and as of the Effective Date of Divestiture:

      i. If such contract can be assigned without third-party approval, assign its rights under the contract to the Acquirer; and

      ii. If such contract can be assigned to the Acquirer only with third-party approval, assist and cooperate with the Acquirer in obtaining:

         (a) Such third-party approval and in assigning the contract to the acquirer; or

         (b) A new contract.

8. At the request of the Acquirer, for two (2) years from the Effective Date of Divestiture, with the option of the Acquirer to renew for two six (6) month periods with written notification to Commission staff, except as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

   a. Otto Bock shall provide Transitional Services to the Acquirer sufficient to enable the Acquirer to conduct the Freedom Business in substantially the same manner that the Freedom Business was conducted prior to the Acquisition and during the Hold-Separate Period.

b. Otto Bock shall provide the Transitional Services required by this Paragraph II.A.8 at substantially the same level and quality as such services are provided by Otto Bock in connection with the Hold-SeparateAgreements.

Provided, however, that Otto Bock shall not (i) require the Acquirer to pay compensationfor Transitional Services that exceeds Direct Cost of providing such goods and services, (ii) terminate its obligation to provide Transitional Services because of a material breach by the Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) include a term in any agreement to provide Transitional Services that limits the type of damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to seek in event of Otto Bock's breach of such agreement.

9. Otto Bock shall allow the Acquirer an opportunity to recruit and employ any Freedom Employee in connection with the divestiture of the Freedom Assets andBusiness, including as follows:

a. No later than five (5) days after execution of a divestiture agreement, Otto Bock shall (i) identify each Freedom Employee, (ii) allow the Acquirer an opportunity to interview any Freedom Employee, and (iii) allow the Acquirer to inspect the personnel files and other documentation relating toany Freedom Employee, to the extent permissible under applicable laws.

b. Otto Bock shall (i) not offer any incentive to any Freedom Employee to decline employment with the Acquirer, (ii) remove any contractual impediments that may deter any Freedom Employee from accepting employment with the Acquirer, including, but not limited to, any non- compete or confidentiality provisions of employment or other contracts with Otto Bock that would affect the ability of the Freedom Employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment of any Freedom Employee by the Acquirer.

c. Otto Bock shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Freedom Employee who accepts an offer of employment from the Acquirer no later than thirty (30) days from the Effective Date of Divestiture and (ii) if the Acquirer has made a written offer of employment to any Key Employee, as identified and listed on Confidential Appendix C to this Order, provide such Key

Employee with reasonable financial incentives to accept a position with the Acquirer at the time of the Effective Date of Divestiture, including, but not limited to (and subject to Commission approval), payment of an incentive equal to up to three (3) months of such Key Employee's base salary to be paid only upon such Key Employee's completion of one (1) year of employment with the Acquirer.

Provided, however, that Otto Bock and the Acquirer will work together in good faith todetermine whether any additional Freedom Employee should be identified as a Key Employee and subject to the provisions of this Paragraph II.A.9.c.

d. For a period ending two (2) years after the Effective Date of Divestiture,Otto Bock shall not, directly or indirectly, solicit, hire, or enter into any arrangement for the services of any Freedom Employee employed by the Acquirer, unless such Freedom Employee's employment has been terminated by the Acquirer; provided, however, this Paragraph II.A.9.d shall not prohibit Otto Bock from: (i) advertising for employees in newspapers, trade publications, or other media not targeted specifically at the Freedom Employees, (ii) hiring employees who apply for employmentwith Otto Bock, as long as such employees were not solicited by Otto Bock in violation of this Paragraph II.A.9.d, or (iii) offering employment to a Freedom Employee who is employed by the Acquirer in only a part- time capacity, if the employment offered by Otto Bock would not, in any way, interfere with that employee's ability to fulfill his or her employment responsibilities to the Acquirer.

10. Otto Bock shall submit to the Acquirer, at Otto Bock's expense, all Confidential Business Information, and:

a. Deliver such Confidential Business information as follows: (i) in good faith; (ii) as soon as practicable, avoiding any delays in transmission of the respective information; and (iii) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

b. Pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that

contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

11. Except in the course of performing its obligations under this Order, Otto Bockshall:

a. Not provide, disclose, or otherwise make available any Confidential Business Information, including trade secrets or any sensitive or proprietary commercial or financial information relating to the Acquirer or the Freedom Business to any Person other than the Acquirer, and shall not share such information for any reason or purpose;

b. Disclose any Confidential Business Information trade secrets or any sensitive or proprietary commercial or financial information related to theAcquirer or the Freedom Business to any Person other than the Acquirer (i) only in the manner and to the extent necessary to satisfy Otto Bock's obligations under this Order and (ii) only to Persons who agree in writingto maintain the confidentiality of such information; and

c. Enforce the terms of this Paragraph II.A.11 as to any Person and take such action as is necessary, including training, to cause each such Person to comply with the terms of this Paragraph II.A.11, including any actionsOtto Bock would take to protect its own trade secrets or sensitive or propriety commercial or financial information.

Provided, however, that Otto Bock may provide, disclose, use, or otherwise make available any Confidential Business Information relating to any of the Divestiture Products Group A or Divestiture Products Group B retained under Paragraph II.A.1 of this Order to the extent that such Confidential Business Information is solely under the use or control of Otto Bock.

12. Otto Bock shall, no later than five (5) days after the date this Order becomes finaland effective:

a. Require that each employee of Otto Bock, including the Hold-Separate Manager and the Hold-Separate Monitor, who has, had, or may have had access to Confidential Business Information relating to the Freedom Assets and Business, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to

maintain all Confidential Business Information related to the Freedom Assets and Business as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of Otto Bock (other than as necessary to comply with therequirements of this Order), or the use of such Confidential Business Information in any way.

b. Cause all Persons under Otto Bock's control, including all Otto Bock employees, the Hold-Separate Manager, and the Hold-Separate Monitor, having access to Confidential Business Information of or pertaining to theFreedom Assets and Business to submit a signed statement to the Commission's staff that the individual will maintain the confidentiality required by this Order.

c. Provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Freedom Assets and Business by Otto Bock's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Otto Bock shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for two (2) years after the date this Order becomes final and effective. Otto Bock shall maintain complete records of all such notifications at Otto Bock's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program.

B. The purpose of the divestiture of the Freedom Assets and Business is to ensure the continued operation of the Freedom Business by the Acquirer, independent of Otto Bock, and to remedy the lessening of competition resulting from the Acquisition.

III.

IT IS FURTHER ORDERED that from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein) until the Effective Date of Divestiture, Otto Bock shall abide by the Hold-Separate Agreements and shall not:

A. Sell or transfer any Freedom Assets;

B. Eliminate, transfer, or consolidate any service offered in connection with the FreedomBusiness;

C. Fail to maintain the employment of all Freedom Employees or otherwise fail to keep theFreedom Business staffed with sufficient employees; provided, however, that Freedom Employees may be terminated for cause as provided by the Hold-Separate Agreements (in which event Otto Bock shall replace such employees).

IV.

IT IS FURTHER ORDERED that:

A. From the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein) until the Effective Date of Divestiture, Otto Bock shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Freedom Assets and Business, as provided in the Hold-Separate Agreements. Among other things that may be necessary, as provided for in the Hold- Separate Agreements, Otto Bock shall:

1. Maintain the operations of the Freedom Business relating to the Freedom Assetsin the ordinary course of business and in accordance with the Hold-Separate Agreements;

2. Use best efforts to maintain and increase revenues of the Freedom Business, and to maintain at budgeted levels for the year 2018 or the current year, whichever are higher, all administrative, technical, and marketing support for the Freedom Business and in accordance with the Hold-Separate Agreements;

3. Use best efforts to maintain the current workforce and to retain the services of employees and agents in connection with the Freedom Business, including payments of bonuses as necessary, and maintain the relations and goodwill withcustomers.

B. No later than thirty (30) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), Otto Bock shall filea verified written report to the Commission that identifies (i) all assets included in the Freedom Assets, (ii) all assets originally acquired or that replace assets originally acquired as a result of the Acquisition, and (iii) all services, functions, and agreements that Otto Bock discontinued after the Acquisition.

V.

IT IS FURTHER ORDERED that no later than five (5) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), Otto Bock shall provide a copy of this Order to each of Otto Bock's officers, employees, or agents having managerial responsibility for any of Otto Bock's obligations under Paragraphs II, III, and IV of this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), the Commission may appoint a Person ("Monitor")to monitor Otto Bock's compliance with its obligations under this Order, consult with Commission staff, and report to the Commission regarding Otto Bock's compliance withits obligations under this Order.

B. If a Monitor is appointed pursuant to Paragraph VI.A of this Order, Otto Bock 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 Otto Bock's compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Orderand in consultation with the Commission or its staff.

2. Within ten (10) days after appointment of the Monitor, Otto Bock shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor OttoBock's compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by Otto Bock, the Monitor shall sign a confidentiality agreement prohibiting the use or disclosure to anyone other than the Commission (or any Person retained by the Monitor pursuant to Paragraph VI.B.5 of this Order), of any competitively-sensitive or proprietary informationgained as a result of his or her role as Monitor, for any purpose other than performance of the Monitor's duties under this Order.

3. The Monitor's power and duties under this Paragraph VI shall terminate three (3) business days after the Monitor has completed his or her final report pursuant to Paragraph VI.B.8 of this Order or at such other time as directed by the Commission.

4. Otto Bock shall cooperate with any Monitor appointed by the Commission in theperformance of his or her duties, and shall provide the Monitor with full and complete access to Otto Bock's books, records, documents, personnel, facilities, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. Otto Bock shall cooperate with any reasonable request of the Monitor. Otto Bock shall take no action to interfere with or impede the Monitor's ability to monitor Otto Bock's compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Otto Bock, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Otto Bock, 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 his or her services, subject to the approval of the Commission.

6. Otto Bock 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 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 the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph VI.B.6, the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph VI.B.5 of this Order.

7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor in the same manner asprovided by this Order.

8. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), (ii) no later than thirty (30) days from the date Otto Bock completes its obligations under this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Otto Bock's compliance with this Order.

C. Otto Bock shall submit the following reports to the Monitor: (i) no later than twenty (20) days after the date the Monitor is appointed by the Commission

pursuant to Paragraph VI.A of this Order, a copy of the Accounting required by Paragraph IV.B of this Order; and (ii) copies of all compliance reports filed with the Commission.

D. Otto Bock shall provide the Monitor with: (i) prompt notification of significant meetings, including date, time and venue, scheduled after the execution of the Monitor Agreement, relating to the regulatory approvals, marketing, sale and divestiture of the Freedom Assets and Business, and such meetings may be attended by the Monitor or his representative, at the Monitor's option or at the request of the Commission or staff of theCommission; and (ii) the minutes, if any, of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of Otto Bock.

E. 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 compliancewith the requirements of this Order.

F. The Monitor appointed pursuant to this Order may be the same Person appointed asDivestiture Trustee pursuant to Paragraph VII of this Order.

VII.

IT IS FURTHER ORDERED that:

A. If Otto Bock has not divested, absolutely and in good faith, the Freedom Assets and Business pursuant to the requirements of Paragraph II of this Order, within the time and manner required by Paragraph II of this Order, the Commission may at any time appoint one or more Persons as Divestiture Trustee to divest the Freedom Assets and Business, at no minimum price, and pursuant to the requirements of Paragraph II of this Order, in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General of the United States 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, Otto Bock shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including appointment of 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 Otto Bock to comply with this Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, Otto Bock shall consent to the following terms and conditions regardingthe 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 effect the divestiture pursuant to therequirements of Paragraph II of this Order and in a manner consistent with thepurposes of this Order.

2. Within ten (10) days after appointment of the Divestiture Trustee, Otto Bock shallexecute an agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture and perform the requirements of Paragraph II of this Order for which he or she has been appointed.

3. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described in Paragraph VII.C.2 of this Orderto accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court.

4. Otto Bock shall provide the Divestiture Trustee with full and complete access to the personnel, books, records, and facilities related to the assets to be divested, or to any other relevant information, as the Divestiture Trustee may request. Otto Bock shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Otto Bock shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Otto Bockshall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

5. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestitureshall be made only to an Acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished

only in a manner that receives the prior approval of the Commission; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Otto Bock from among those approved by the Commission; provided, further, that Otto Bock shall select such entity within ten (10) business days of receiving written notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Otto Bock, 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 Otto Bock, 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 his orher services, all remaining monies shall be paid at the direction of Otto Bock, and the Divestiture Trustee's power shall be terminated. The Divestiture Trustee's compensation may be based in part on a commission arrangement contingent on the Divestiture Trustee's divesting the assets.

7. Otto Bock 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 liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VII.C.7, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VII.C.6 of this Order.

8. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII for appointment of the initial Divestiture Trustee.

9. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.

10. The Divestiture Trustee shall report in writing to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

D. 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 divestiture required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph VII may be the same Personappointed as the Monitor pursuant to Paragraph VI of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Otto Bock shall submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after theDivestiture Date.

B. Otto Bock shall submit verified written reports ("compliance reports") in accordance withthe following:

1. Otto Bock shall submit:

a. Interim compliance reports (i) no later than thirty (30) days after the Orderbecomes final and effective (without regard to the finality of the divestiture requirements herein), and every thirty (30) days thereafter untilthe divestiture of the Freedom Assets and Business is accomplished, and (ii) thereafter, every sixty (60) days (measured from the Effective Date of Divestiture) until the date Otto Bock completes its obligations under this Order; and

b. Additional compliance reports as the Commission or its staff may request.

2. Otto Bock shall include in its compliance reports, among other things required bythe Commission, a full description of the efforts being made to comply with the relevant Paragraphs of this Order, the identity of all parties contacted, copies of all written communications to and from such parties, internal documents and communications, and all reports and

recommendations concerning the divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Otto Bock is in compliance with each Paragraph of the Order. Conclusory statements that Otto Bock has complied with its obligations under the Order are insufficient.

C. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the chief executive officer or another officer or employee specifically authorized to perform this function. Otto Bock shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Otto Bock shall provide a copy of each compliancereport to the Monitor.

IX.

IT IS FURTHER ORDERED that Otto Bock shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Otto Bock;

B. Any proposed acquisition of, or merger or consolidation involving Otto Bock, or

C. Any other change in Otto Bock including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

X.

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 5 days' notice to Otto Bock, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, Otto Bock shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Otto Bock and in the presence of counsel for OttoBock, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Otto Bock related to compliance with this Order, which copying services shall be provided by Otto Bock at the request of

the authorized representative ofthe Commission and at the expense of Otto Bock; and

B. To interview officers, directors, or employees of Otto Bock, who may have counselpresent, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

APPENDICES TO ORDER:REDACTED IN THEIR ENTIRETY