

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2018, TO JUNE 30, 2018

PUBLISHED BY THE COMMISSION

VOLUME 165



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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2018 TO JUNE 30, 2018**

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Took oath of office May 1, 2018

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Took oath of office April 4, 2012.

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Took oath of office May 2, 2018

REBECCA KELLY SLAUGHTER, *Commissioner*
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CONTENTS

Members of the Commission	ii
Table of Cases	iv
Findings, Opinions, and Orders	1
Interlocutory, Modifying, Vacating, and Miscellaneous Orders.....	1401
Responses to Petitions to Quash	1505
Table of Commodities.....	1540

TABLE OF CASES

VOLUME 165

File or Docket #	Name	<u>Page(s)</u>
9372	1-800 Contacts, Inc. (Interlocutory Order)	
	1406, 1415, 1461
C-4641	7-Eleven, Inc.	409

A

C-4638	Agrium Inc.	179
C-4642	Air Medical Group Holdings, Inc.	896
	AIRMD, LLC	896
182 0030	Alfa S.A.B. de C.V. (Petition to Quash)	1524
C-4631	Alimentation Couche-Tard Inc.	30
C-4635	Alimentation Couche-Tard Inc.	243
C-4631	Alimentation Couche-Tard Inc. (Divestiture)	
	1483, 1500
	American Made Matters	511
C-4650	Amneal Holdings, LLC	1281
C-4650	Amneal Pharmaceuticals, Inc.	1281
C-4650	Amneal Pharmaceuticals, LLC	1281
C-4642	AMR Holdco, Inc.	896
9382	Auto/Mate, Inc.	488

B

C-4627	Bankrate, Inc.	303
C-4627	Bankrate, Inc. (Divestiture)	1476
C-4637	Becton, Dickinson and Company	110
C-4646	Benjamin Moore & Co., Inc.	731
C-4534	Biomet, Inc.	1411
C-4643	Bollman Hat Company	511

TABLE OF CASES
continued

C

C-4637	C. R. Bard, Inc.	110
	California Products Corp.	845
	Caring Holding, LLC	1476
	Caring.com	303, 1476
9382	CDK Global, Inc.	488
9382	CDK Global, LLC	488
9382	Colson, G. Larry Jr.	488
9381	Conagra Brands, Inc.	376
C-4458	Corelogic, Inc.	1491
181 0030	Corpus Christi Polymers LLC (<i>Petition to Quash</i>)	1524
C-4639	Cowboy AG LLC	1
	Cowboy Scion	1
	Cowboy Toyota	1
9377	Cristal USA Inc. (<i>Interlocutory Order</i>) .	1409, 1479
C-4631	CrossAmerica Partners LP	30
C-4635	CrossAmerica Partners LP	243
C-4631	CrossAmerica Partners LP (<i>Divestiture</i>)	1483, 1500

D

	DJO Global, Inc.	1411
9380	Drew Marine Group, Inc. (<i>Interlocutory Order</i>)	1488
9380	Drew Marine Intermediate II B.V. (<i>Interlocutory Order</i>)	1488

E

	ECOS Paints	764
172 3132	Encore Plus Solutions, Inc. (<i>Petition to Quash</i>)	1513, 1514
	Envision Healthcare	896
9382	Esposito, Michael	488
9382	Eustace, Elsa	488
9382	Eustace, Glen	488
9382	Eustace, Robert	488

TABLE OF CASES
continued

F

184 0030	Far Eastern New Century Corporation <i>(Petition to Quash)</i>	1524
----------	--	------

G

G.I. Jobs	89
-----------------	----

H

Holiday Companies	243
-------------------------	-----

I

C-4648	ICP Construction Inc.	845
C-4650	Impax Laboratories, Inc.	1281
9373	Impax Laboratories, Inc.	960
9373	Impax Laboratories, Inc. (Interlocutory Order)	1407, 1482, 1502
C-4650	Impax Laboratories, LLC	1281
C-4647	Imperial Paints, LLC	764
183 0030	Indorama Ventures Plc (Petition to Quash) ...	1524
	Itafos	179

J

9381	J.M. Smucker Company, The	376
	Jet-Pep, Inc.	30

K

C-4642	KKR North America Fund XI (AMG) LLC	896
--------	--	-----

TABLE OF CASES
continued

L

	Lambda Corp.	110
	LifeTeam	896
185 0030	Lohia, Alope (<i>Petition to Quash</i>)	1524
186 0030	Lohia, Suchitra (<i>Petition to Quash</i>)	1524
9374	Louisiana Real Estate Appraisers Board (<i>Interlocutory Order</i>) .. 1401, 1403, 1408, 1412, 1429, 1462, 1473, 1477, 1484	
	Lullaby Paints,	764
C-4534	LVB Acquisition, Inc.	1411

M

	Marketplace Development LLC	1483
	Merit Medical Systems, Inc.	110
	Military Friendly	89
	Muralo Paints	845

N

9377	National Industrialization Company (TASNEE) (<i>Interlocutory Order</i>)	1409, 1479
9377	National Titanium Dioxide Company Limited (Cristal) (<i>Interlocutory Order</i>)	1409, 1479
	<i>Newberg Graphic, The</i>	715
	<i>News-Register</i>	715
172 3143	Nordic Clinical Inc. (<i>Petition to Quash</i>)	1513, 1514
C-4652	Northrop Grumman Corporation	1236
C-4638	Nutrien Ltd.	179

O

	Oliver Acquisition Corp.	243
C-4652	Orbital ATK, Inc.	1236
C-4645	Oregon Lithoprint, Inc.	715
9378	Otto Bock Healthcare North America, Inc. (<i>Interlocutory Order</i>)	1410, 1463, 1472

TABLE OF CASES
continued

P

C-4644	Patton, Noel Thomas	558
C-4651	PayPal, Inc.	1198
C-4301	PepsiCo, Inc.	1414
C-4638	Potash Corporation of Saskatchewan Inc. ...	179
	PPBB LLC	1500

R

C-4627	Red Ventures Holdco, LP	303
C-4627	Red Ventures Holdco, LP (<i>Divestiture</i>)	1476
9380	Resolute Fund II, L.P. (<i>Interlocutory Order</i>) .	1488

S

C-4643	SaveAnAmericanJob, LLC	511
C-4264	Sears Holdings Management Corporation ...	1416
	SEI Fuel Services, Inc.	409
C-4641	Seven & i Holdings Co., Ltd.	409
172 3090	SLAC, Inc. (<i>Petition to Quash</i>)	1505
C-4641	Sunoco LP	409

T

C-4644	Telomerase Activation Sciences, Inc.	558
	Trammo, Inc.	179
9377	Tronox Limited (<i>Interlocutory Order</i>) ..	1409, 1479

V

C-4640	Victory Media, Inc.	89
--------	----------------------------------	----

W

9380	Wilhelm Wilhelmsen (<i>Interlocutory Order</i>) ...	1488
9380	Wilhelmsen Maritime Services AS (<i>Interlocutory Order</i>)	1488

Y

C-4649	YOLO Colorhouse, LLC	873
--------	-----------------------------------	-----

TABLE OF CASES
continued

Z

C-4534	Zimmer Holdings, Inc.	1411
--------	------------------------------------	------

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2018, TO JUNE 30, 2018

IN THE MATTER OF

COWBOY AG LLC

D/B/A

COWBOY TOYOTA AND COWBOY SCION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION M, AND REGULATION Z

*Docket No. C-4639; File No. 172 3009
Complaint, January 4, 2018 – Decision, January 4, 2018*

This consent order addresses Cowboy AG LLC's Spanish-language advertising that only provided disclosures in fine-print English. The complaint alleges that respondent violated Section 5(a) of the Federal Trade Commission Act by representing in its Spanish-language advertisements that: (1) consumers could purchase new 2016 automobiles with no down payments, (2) that advertised low monthly payments were available to those who financed automobile purchases, (3) that advertised interest rates, monthly payments, and other terms were available to consumers with bad credit, and (4) that certain new 2016 model year Toyotas were available for purchase in 2017. The complaint further alleges that respondent's credit sale advertisements violated the Truth in Lending Act and Regulation Z by failing to disclose or to disclose clearly and conspicuously required terms. The consent order prohibits the respondent from misrepresenting the costs of financing the purchase or the leasing of automobiles or any qualifications or restrictions on advertised merchandise.

Participants

For the *Commission*: *M. Hasan Aijaz* and *James R. Golder*.

For the *Respondent*: *Derek Rollins*, *Shackelford*, *Bowen*, *McKinley & Norton*.

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Cowboy AG LLC, a Texas limited liability company, doing business as Cowboy Toyota and Cowboy Scion, (Respondent) has violated provisions of the Federal Trade Commission Act (FTC Act); the Truth in Lending Act (TILA) and its implementing Regulation Z; and the Consumer Leasing Act (CLA) and its implementing Regulation M; and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Cowboy AG LLC, doing business as Cowboy Toyota and Cowboy Scion, is a Texas limited liability company with its principal office or place of business at 9325 East R.L. Thornton Freeway, Dallas, Texas 75228.

2. The acts or practices of Respondent alleged in this Complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. Since at least October 2016, Respondent has disseminated or caused to be disseminated advertisements to the public promoting credit sales and other extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit sale,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

4. Since at least October 2016, Respondent has disseminated or caused to be disseminated advertisements to the public promoting consumer leases for automobiles, as the terms “advertisement” and “consumer lease” are defined in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.

5. Respondent placed full-page newspaper advertisements in *Al Día*, a regional Dallas, Texas area Spanish-language newspaper published by the *Dallas Morning News*. *Al Día* is a free subscription newspaper that is delivered twice weekly on Wednesdays and Saturdays. *Al Día* makes current editions available on its *aldiadallas.com* website. Exhibits A and B are representative examples of Respondent’s full-page Spanish-

Complaint

language *Al Día* ads from October and November 2016. The full-page *Al Día* ads measured approximately 22” high by 12” wide.

6. Respondent ran frequent Spanish-language advertisements in *Al Día*, including during its “Mes de la Herencia Hispana!” (Hispanic Heritage Month!) sales event and its “Acción de Gracias” (Thanksgiving) sales event. *See* Exhibits A and B, respectively. Although Respondent’s ads evolved, since at least October 2016, the full-page Spanish-language newspaper ads contained substantially similar statements, offers, depictions, and fine print disclaimers.

7. In numerous instances, since at least October 2016 until at least July 2017, Respondent’s advertisements in *Al Día* prominently touted the availability of various deals to consumers with bad credit, with no down payment, 0% interest rates for 60- or 72-month periods, low monthly payments amounts, and other favorable terms. In numerous instances, however, Respondent’s advertisements included buried fine print disclaimers, including a lengthy fine print disclaimer written only in English, that contradicted its advertisements’ more prominent claims.

Representative Advertisement for “Mes de la Herencia Hispana!” (Hispanic Heritage Month!) Event

8. The top section of Respondent’s full-page October 2016 Hispanic Heritage Month *Al Día* advertisements, excerpted from Exhibit A, touted that Respondent’s deals were available to individuals with bad credit without requiring a down payment, a Social Security number, or a driver’s license. For example, Respondent made the following representations: “Sin Engache,” “Con Buen o Mal Credito,” “Sin Seguro Social,” “Sin Licencia de conducir,” “Financiamos,” and “Aceptamos Tax ID.” These representations translate to English as follows: “Without Down Payment,” “With Good or Bad Credit,” “Without Social Security,” “Without Driver’s License,” “We Finance,” and “We Accept Tax ID”:

Complaint

6C - AL DÍA EDICIÓN DE FIN DE SEMANA 9/10/2016 www.aldiadallas.com

COWBOYTOYOTA.COM

Cowboy Toyota celebra:
MES DE LA HERENCIA
HISPANA!






Te esperamos para ayudarte a comprar tu carro!

Con La mejores ofertas del Metroplex!

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

Exhibit B is an example of a substantially similar Thanksgiving ad that ran in *Al Día* in November 2016. In December 2016, Respondent altered its advertisements and moved language concerning financing to individuals with good or bad credit without requiring a down payment, a Social Security number, or a driver's license to a prominent border area surrounding the featured new Toyota vehicles.

9. In the second section of Respondent's full-page 2016 Hispanic Heritage Month *Al Día* advertisements, Respondent announced offers for new 2016 Toyota Tundras, Camrys, and Corollas. Respondent touted the availability of 0% interest rates over 60- or 72-month periods and low monthly payment amounts, suggesting that consumers could obtain all of these terms when financing to purchase these automobiles:

<p>NUEVO 2016 TOYOTA TUNDRA 0% DE INTERESES POR 60 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: red; font-weight: bold; font-size: 1.2em;">\$379/MES</p> <p style="font-size: 0.8em;">Solo \$999 de Enganche</p>	<p>NUEVO 2016 TOYOTA TACOMAS DISPONIBLES 2 Años de Mantenimiento Incluidos</p>  <p style="color: orange; font-weight: bold; font-size: 1.2em;">BAJAS PRECIOS</p> <p style="font-size: 0.8em;">Solo \$999 de Enganche</p>
<p>NUEVO 2016 TOYOTA CAMRY 0% DE INTERESES POR 72 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: green; font-weight: bold; font-size: 1.2em;">\$199/MES</p> <p style="font-size: 0.8em;">Solo \$1,999 de Enganche</p>	<p>NUEVO 2016 TOYOTA COROLLA 0% DE INTERESES POR 72 MESES CCA 2 Años de Mantenimiento Incluidos</p>  <p style="color: green; font-weight: bold; font-size: 1.2em;">\$179/MES</p> <p style="font-size: 0.8em;">Solo \$999 de Enganche</p>

Complaint

This ad section was excerpted from Exhibit A, Respondent's Hispanic Heritage Month ad in *Al Día* in October 2016.

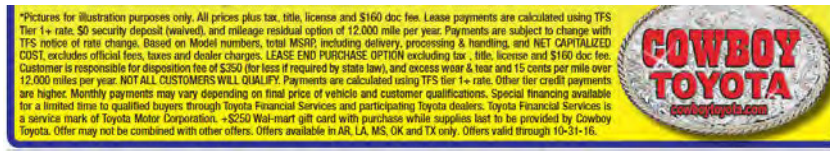
This section of the advertisement translates to English as follows:

<p>NEW 2016 TOYOTA TUNDRA 0% INTEREST FOR 60 MONTHS CCA 2 Years Maintenance Included \$250 Gift Card with your purchase! \$379/MONTH* Only \$999 down payment</p>	<p>NEW 2016 TOYOTA TACOMAS AVAILABLE 2 Years Maintenance Included \$250 Gift Card with your purchase! LOW PRICES</p>
<p>NEW 2016 TOYOTA CAMRY 0% INTEREST FOR 72 MONTHS CCA 2 Years Maintenance Included \$250 Gift Card with your purchase! \$199/MONTH* Only \$1,999 down payment</p>	<p>NEW 2016 TOYOTA COROLLA 0% INTEREST FOR 72 MONTHS CCA 2 Years Maintenance Included \$250 Gift Card with your purchase! \$179/MONTH* Only \$999 down payment</p>

10. In Paragraph 8 above, Respondent prominently stated that there were no down payments (“Sin Engache”) in large print on the top of its full-page newspaper ads. The section of the advertisement reproduced in Paragraph 9 contains fine print disclaimers revealing that the featured vehicles require down payments of either \$999 or \$1,999, thus contradicting the advertisement's prominent statements that no down payments were required.

11. Additionally, in the advertisement section excerpted in Paragraph 9 above, Respondent placed asterisks next to the monthly payment amounts. These asterisks appear to refer to a lengthy disclaimer buried in fine print at the bottom of the ad. Although the more prominent representations in Paragraphs 8 and 9 appeared in Spanish, this fine print disclaimer was written only in English. As shown in Exhibit A, the disclaimer stated the following:

Complaint



As reproduced in larger font, the disclaimer states:

*Pictures for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 1+ rate, \$0 security deposit (waived), and mileage residual option of 12,000 mile per year. Payments are subject to change with TFS notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET CAPITALIZED COST, excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION excluding tax, title, license and \$160 doc fee. Customer is responsible for disposition fee of \$350 (for less if required by state law), and excess wear & tear and 15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS tier 1+ rate. Other tier credit payments are higher. Monthly payments may vary depending on final price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. +\$250 Wal-mart gift card with purchase while supplies last to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 10-31-16.

Virtually identical English disclaimers appeared in each of Respondent's ads through at least August 2017.

12. The buried fine print disclaimer in Paragraph 11 reveals that Respondent was including a leasing term with its financing offers shown in Paragraph 9 above. Specifically, the low monthly payment amounts prominently touted in Respondent's advertisements were only available to consumers who lease the advertised motor vehicles, and not to consumers who finance to purchase the motor vehicles. The ads included other finance terms such as "0% INTEREST."

Complaint

13. Additionally, the buried fine print disclaimer in Paragraph 11 contradicts Respondent's more prominent representations, in Paragraph 8 above, that its offers were available to consumers with bad credit. Specifically, the disclaimer reveals that the advertised offer terms were only available to consumers eligible for the "TFS Tier 1+ rates." TFS Tier 1+ rates are available only to consumers with very good or excellent credit, such as those with Auto FICO scores of 720 or higher. Further, even if Spanish-speaking consumers were able to notice and read this fine print English statement, a reasonable consumer would be unlikely to understand the term "TFS Tier 1+ rates."

14. Respondent also advertised new 2016 Toyota Tundras, Tacomas, Camrys, and Corollas for sale in its January and early February 2017 *Al Día* advertisements. However, despite these representations, during this time period Respondent did not have any 2016 Toyota Tundras, Tacomas, Camrys, or Corollas available for sale.

15. Respondent's advertisements contained TILA triggering terms, such as "0% INTEREST FOR 60 MONTHS," but did not disclose, or did not disclose clearly and conspicuously, certain required TILA information, such as:

- a. The amount or percentage of down payment required;
- b. The terms of repayment, reflecting the repayment obligations over the full term of the loan, including any balloon payment; or
- c. The "annual percentage rate," using that term, and, if the rate may be increased after consummation, that fact.

16. Similarly, Respondent's advertisements contained CLA triggering terms, such as the low advertised monthly payment amounts, but did not disclose, or did not disclose clearly and conspicuously, certain required CLA information, such as:

- a. Whether the transaction advertised is a lease;

Complaint

- b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
- c. Whether or not a security deposit is required;
- d. The number, amount, and timing of scheduled payments; or
- e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

**VIOLATION OF THE FEDERAL TRADE COMMISSION
ACT****Count I****Misrepresentations Regarding Offers**

17. Through the means described in Paragraphs 5 through 16, Respondent has represented, directly or indirectly, expressly or by implication, the following regarding the vehicles it advertised for sale or lease:

- a. No down payment was required;
- b. The advertised low monthly payments were available to those who financed automobile purchases;
- c. The advertised interest rates, monthly payments, and other terms were available to consumers with bad credit; and
- d. New 2016 model year Toyota Tundras, Tacomas, Camrys, and Corollas were available for purchase at the time of the ads in 2017.

18. In fact, in numerous instances:

- a. A down payment was required;

Complaint

- b. The advertised low monthly payments were available only for automobile leases;
- c. The advertised interest rates, monthly payments, and other terms were available only to consumers with very good to excellent credit; and
- d. New 2016 model year Toyota Tundras, Tacomas, Camrys, and Corollas were not available for purchase at the time of the ads in 2017.

19. Therefore, the representations set forth in Paragraph 17 were false or misleading.

20. Respondent's practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATION OF THE TRUTH IN LENDING ACT AND
REGULATION Z**

21. Under Section 144 of the TILA and Section 226.24(d) of Regulation Z, as amended, advertisements promoting closed-end credit in consumer credit transactions are required to make certain disclosures ("TILA additional terms") if they state any of several terms, such as the monthly payment ("TILA triggering terms").

22. To the extent that Respondent's automobile sales advertisements promote closed-end credit, such as those described in Paragraphs 5 through 16, Respondent is subject to the requirements of the TILA and Regulation Z.

Count II

**Failure to Disclose or to Disclose Clearly and Conspicuously
Required Credit Information**

23. Respondent's automobile sales advertisements promoting closed-end credit, such as those described in Paragraphs 5 through 16, included TILA triggering terms, but failed to disclose, or to disclose clearly and conspicuously, additional terms required by

Complaint

the TILA and Regulation Z, including one or more of the following:

- a. The amount or percentage of the down payment;
- b. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment; and
- c. The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

24. Therefore, the practices set forth in Paragraph 23 of this Complaint violated Section 144 of the TILA, 15 U.S.C. § 1664, and Section 226.24(d) of Regulation Z, 12 C.F.R. § 226.24(d), as amended.

**VIOLATION OF THE CONSUMER LEASING ACT AND
REGULATION M**

25. Under Section 184 of the CLA and Section 213.7 of Regulation M, advertisements promoting consumer leases are required to make certain disclosures (“additional terms”) if they state any of the several terms, such as the amount of any payment (“CLA triggering terms”). 15 U.S.C. § 1667c; 12 C.F.R. § 213.7.

26. To the extent that Respondent’s automobile advertisements promote consumer leases, such as those described in Paragraph 5 through 16, Respondent is subject to the requirements of the CLA and Regulation M.

Count III

**Failure to Disclose or to Disclose Clearly and Conspicuously
Required Lease Information**

27. Respondent’s automobile advertisements promoting consumer leases, such as those described in Paragraphs 5 through 16, included CLA triggering terms, but failed to disclose or to disclose clearly and conspicuously additional terms required by

Complaint

the CLA and Regulation M, including one or more of the following:

- a. That the transaction advertised is a lease;
- b. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
- c. Whether a security deposit is required;
- d. The number, amount, and timing of scheduled payments; and
- e. With respect to a lease in which the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property, that an extra charge may be imposed at the end of the lease term.

28. Therefore, the practices set forth in Paragraph 27 of this Complaint violated Section 184 of the CLA, 15 U.S.C. § 1667c, and Section 213.7 of Regulation M, 12 C.F.R. § 213.7.

THEREFORE, the Federal Trade Commission, this fourth day of January, 2018, has issued this complaint against Respondent.

By the Commission.

Complaint

Exhibit A

6C - AL DÍA EDICIÓN DE FIN DE SEMANA 9/10/2016 www.aidadallas.com

COWBOYTOYOTA.COM

Cowboy Toyota celebra:
MES DE LA HERENCIA
HISPANA!

Te esperamos para ayudarte a comprar tu carro!

Con La mejores ofertas del Metroplex!

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

NUEVO 2016 TOYOTA TUNDRA
0% DE INTERESES POR 60 MESES CCA
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

\$379/MES*

Solo \$999 de Enganche

NUEVO 2016 TOYOTA TACOMAS DISPONIBLES
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

BAJAS PRECIOS

NUEVO 2016 TOYOTA CAMRY
0% DE INTERESES POR 72 MESES CCA
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

\$199/MES*

Solo \$1,299 de Enganche

NUEVO 2016 TOYOTA COROLLA
0% DE INTERESES POR 72 MESES CCA
2 Años de Mantenimiento Incluidos



Tarjeta de Regalo de \$250 con su Compra!

\$179/MES*

Solo \$999 de Enganche

Nuestros Carros Autos Usados - Mejores Precios del Metroplex!

 2012 Chevy Cruze LS 1 Owner, 190k, Mid 100k #19511024 \$7,985	 2010 Toyota Corolla LE 1 Owner, Clean, Mid 100k #175444 \$9,790	 2013 Honda Odyssey LX Full 100k, Mid 100k, Double 100k #1800734 \$12,985	 2007 Toyota Highlander 1 Owner, Roof Rack, Fog, Home Body #7415504 \$13,304	 2014 Ford Escape SE 1 Owner, Low Miles, Mid 100k #1627004 \$14,885	 2015 Dodge Journey SXT 1 Owner, Low Miles, Mid 100k #154455 \$15,985
 2011 Toyota Sienna XLE 1 Owner, Rainy, Fog, Clean #7271154 \$16,985	 2013 Chevy Camaro 2LS 1 Owner, 500k, Mid 150k #1584564 \$18,984	 2015 Toyota Sienna LE 1 Owner, Rainy, Fog, Mid 100k #154442 \$22,985	 2016 Dodge Charger SXT 1 Owner, 21k, Mid, Mid 100k #153473 \$23,444	 2014 BMW 328i 1 Owner, 50k Miles, Looking For Home #1628204 \$23,985	 2016 RAM 1500 SLT 1 Owner, Looking For Home, Low Miles #154454 \$24,495
 2014 Chevy Silverado 1500 1 Owner, Low Miles, Back Home, Body #1611491 \$25,983	 2013 Toyota Tundra 1 Owner, 50k Miles, Mid 150k #1507414 \$26,985	 2009 Cadillac Escalade Low Miles, Lin Bar, Roof Rack #1540249 \$27,799	 2015 Chevy Tahoe 1 Owner, Low Miles, Just In the Today #1515449 \$30,921	 2014 Chevy Silverado 1500 Looking For New Home, Clean #1617004 \$30,885	 2016 GMC Yukon Running Board, Roof Rack, Mid 100k #154459 \$30,977

9525 E. R.L. THORNTON FRWY. DALLAS, TX 75228 866-521-1870

*Pictures for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 1a rate, \$0 security deposit (waived), and 12,000 mile per year. Payments are subject to change with TFS notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET COST (ALREADY COST), excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION (excluding tax, title, license and \$160 doc fee. Customers responsible for disposition fee of \$350 (or less if required by state law), and excess wear & tear and 15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS Tier 1a rate. Other tier credit payments are higher. Monthly payments may vary depending on final price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. \$250 100-mart gift card with purchase while supplies last to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 10-31-16.



Complaint

Exhibit B

6C - ALDÍA EDICIÓN DE FIN DE SEMANA 6/11/2016 www.aldiadallas.com

COWBOYTOYOTA.COM











COWBOY TOYOTA TE REGALA: *Tarjeta de \$250 de regalo con su compra! A comer pavo y ahorrar con Cowboy Toyota 866-521-1870

"Cena" de Accion de Gracias para toda tu familia*

Sin Engache

Con Buen o Mal Credito

Sin Seguro Social

Sin Licencia de conducir

Financiamos

Aceptamos Tax ID

NUEVO 2016 TOYOTA TUNDRA
0% DE INTERESES POR 60 MESES CCA
2 Años de Mantenimiento Incluidos



\$379/MES*

Solo \$959 de Enganche

NUEVO 2016 TOYOTA TACOMAS DISPONIBLES
2 Años de Mantenimiento Incluidos



BAJAS PRECIOS

NUEVO 2016 TOYOTA CAMRY
0% DE INTERESES POR 72 MESES CCA
2 Años de Mantenimiento Incluidos



\$199/MES*

Solo \$1,999 de Enganche

NUEVO 2016 TOYOTA COROLLA
0% DE INTERESES POR 72 MESES CCA
2 Años de Mantenimiento Incluidos



\$179/MES*

Solo \$999 de Enganche

Nuestros Carros Autos Usados - Mejores Precios del Metroplex!

 \$11,499 2012 Ford Fusion SE Tubo catalítico, Antena Condensadora, Rayos Que Ven #1000024	 \$11,876 2009 Hyundai Tucson SE 1 Puerta, Bata, Tapete Millage #1379424	 \$13,304 2007 Toyota Highlander Doble, Bata, Tapete, Bata, Bata, Bata #7419536	 \$14,985 2014 Ford Escape SE 1 Puerta, Rayos Que Ven, Rayos Que Ven #1627004	 \$16,499 2009 GMC Yukon XL XL, Bata, Bata, Bata #1671144	 \$18,968 2013 Chevy Camaro 2LS 1 Puerta, Bata, Bata, Rayos Que Ven #1090264
 \$19,995 2007 Mercedes Benz CLS V6, Bata, Bata, Bata #1305004	 \$23,444 2016 Dodge Charger SXT 1 Puerta, 21 KM Millage, Rayos Que Ven #151473	 \$23,985 2014 BMW 328i 1 Puerta, 32K Millage, Bata, Bata, Bata #1000004	 \$24,250 2014 Toyota Tacoma PreRunner Fibra, acceso a Bata, Auto, Aluminio con Llanta #1487198	 \$24,499 2016 RAM 1500 SLT 1 Puerta, Bata, Bata, Rayos Que Ven #15454	 \$26,897 2014 Toyota Tacoma PreRunner Cable, Bata, Bata, Bata #1514223
 \$27,799 2009 Cadillac Escalade Rayos Millage, Bata, Bata, Bata #1000004	 \$27,888 2015 Toyota Tundra SR Cable, Bata, Bata, Bata #1000004	 \$28,921 2015 Chevy Tahoe 1 Puerta, Rayos Que Ven, Bata, Bata #1000004	 \$29,777 2013 Toyota Tundra V6, Bata, Bata, Bata, Bata #1000004	 \$29,985 2014 Chevy Silverado 1500 Bata, Bata, Bata, Rayos Que Ven #1000004	 \$29,977 2016 GMC Yukon E1 Bata, Bata, Rayos Que Ven #1514223

9525 E. R.L. THORNTON FRWY. DALLAS, TX 75228 866-521-1870

*Picture for illustration purposes only. All prices plus tax, title, license and \$160 doc fee. Lease payments are calculated using TFS Tier 14 rate. \$3.99 security deposit (refund) and mileage residual option of 12,000 miles per year. Payments are subject to change with TFS notice of rate change. Based on Model numbers, total MSRP, including delivery, processing & handling, and NET CAPITALIZED COST, excludes official fees, taxes and dealer charges. LEASE END PURCHASE OPTION excluding tax, title, license and \$160 doc fee. Gas taxes are not possible for disposal fees of \$350. Fuel fees are required by state law, and excess wear \$3 per year and .15 cents per mile over 12,000 miles per year. NOT ALL CUSTOMERS WILL QUALIFY. Payments are calculated using TFS Tier 14 rate. Other tier credit payments are higher. Monthly payments may vary depending on retail price of vehicle and customer qualifications. Special financing available for a limited time to qualified buyers through Toyota Financial Services and participating Toyota dealers. Toyota Financial Services is a service mark of Toyota Motor Corporation. +\$250 Wash net gift card with purchase. White supplies, not to be provided by Cowboy Toyota. Offer may not be combined with other offers. Offers available in AR, LA, MS, OK and TX only. Offers valid through 11-30-16.



Decision and Order

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 (“FTC Act”); the Truth in Lending Act (“TILA”) and its implementing Regulation Z; and the Consumer Leasing Act (“CLA”) and its implementing Regulation M.

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 FTC Act; the TILA and its implementing Regulation Z; and the CLA and its implementing Regulation M; 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 Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Cowboy AG LLC, is a Texas limited liability company, also doing business as Cowboy Toyota and Cowboy Scion, with its principal office or place of business at 9325 East R.L. Thornton Freeway, Dallas, Texas 75228.

Decision and Order

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 shall apply:

- A. “Advertisement” shall mean a commercial message in any medium that directly or indirectly, expressly or by implication, promotes a consumer transaction.
- B. “Clearly and conspicuously” means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
 1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be made visually or audibly.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

Decision and Order

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
- C. “Consumer credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes, as set forth in Section 226.2(a)(12) of Regulation Z, 12 C.F.R. § 226.2(a)(12), as amended.
- D. “Consumer lease” shall mean a contract in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months and for a total contractual obligation not exceeding the applicable threshold amount, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, as set forth in Section 213.2 of Regulation M, 12 C.F.R. § 213.2, as amended.
- E. “Lease inception” shall mean prior to or at consummation of the lease or by delivery, if delivery occurs after consummation.
- F. “Material” shall mean likely to affect a person’s choice of, or conduct regarding, goods or services.
- G. “Motor vehicle” shall mean:
1. Any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road;

Decision and Order

2. Recreational boats and marine equipment;
 3. Motorcycles;
 4. Motor homes, recreational vehicle trailers, and slide-in campers; and
 5. Other vehicles that are titled and sold through dealers.
- H. “Respondent” means Cowboy AG LLC, also doing business as Cowboy Toyota and Cowboy Scion, and its successors and assigns.

I.

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 advertising, promotion, offering for sale, or sale of motor vehicles, must not make any representation, expressly or by implication, that:

- A. Misrepresents the cost of:
1. Purchasing a motor vehicle with financing, including but not limited to the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment; or
 2. Leasing a motor vehicle, including but not limited to the total amount due at lease inception, amount down, down payment, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments.

Decision and Order

- B. Misrepresents any qualification or restriction on the consumer's ability to obtain represented financing or leasing terms, including but not limited to any qualification or restriction based on a consumer's credit score or credit history.
- C. Represents any financing or leasing term, unless the representation is non-misleading, and the advertisement clearly and conspicuously discloses all qualifications or restrictions on the consumer's ability to obtain the represented financing or leasing term, including but not limited to any qualifications or restrictions that Respondent's lender, lessor, or any other entity may impose based on a consumer's credit score or credit history. *Provided, further,* that, if a majority of consumers likely will not be able to meet a stated credit score or credit history qualification or restriction, the advertisement must clearly and conspicuously disclose that fact.
- D. Misrepresents the number of vehicles, makes, or models that are available for purchase or lease.
- E. Misrepresents any other material fact about the price, sale, financing, or leasing of any motor vehicle.

II.

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 advertisement for any extension of consumer credit, shall not in any manner:

- A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:

Decision and Order

1. The amount or percentage of the down payment;
 2. The terms of repayment; and
 3. The annual percentage rate, using the term “annual percentage rate” or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term; or
- C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667.

III.

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 advertisement for any consumer lease, shall not in any manner:

- A. State the amount of any payment or that any or no initial payment is required prior to or at consummation or by delivery, if delivery occurs after consummation, without disclosing clearly and conspicuously:
1. That the transaction advertised is a lease;
 2. The total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
 3. The number, amounts, and timing of scheduled payments;

Decision and Order

4. Whether or not a security deposit is required; and
 5. That an extra charge may be imposed at the end of the lease term where the consumer's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term; or
- B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.

IV.

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 15 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 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 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 Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

Decision and Order

V.

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. For 15 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: (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 14 days of its filing.

Decision and Order

- 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 Cowboy AG LLC, Docket No. C-4639.*

VI.

IT IS FURTHER ORDERED that Respondent must create certain records for 15 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent, for any business that Respondent is a majority owner or controls directly or indirectly, 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 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;
- C. Copies or records of all written consumer complaints concerning the subject matter of the Order, whether received directly or indirectly, such as through a third party, and any response;

Decision and Order

- D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;
- E. All materials that were relied upon in disseminating the representation;
- F. All evidence in its possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;
- G. For 5 years from the date received, copies of all subpoenas and other communications with law enforcement, if such communication relates to Respondent's compliance with this Order;
- H. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that tend to show any lack of compliance by Respondent with this Order; and
- I. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission.

VII.

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

Decision and Order

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.

VIII.

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 January 4, 2038, 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; and
- B. 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 to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (FTC) has accepted, subject to final approval, an agreement containing a consent order from Cowboy AG LLC, doing business as Cowboy Toyota and Cowboy Scion. The proposed consent 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 FTC 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.

The respondent is a motor vehicle dealer that engaged in substantial Spanish-language advertising, but only provided disclosures in fine-print English. According to the FTC complaint, respondent advertised that consumers could purchase or lease advertised vehicles at certain favorable terms prominently stated in its advertisements. The complaint alleges that respondent violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), because it misrepresented in its Spanish-language advertisements that (1) consumers could purchase new 2016 automobiles with no down payments, (2) that advertised low monthly payments were available to those who financed automobile purchases, (3) that advertised interest rates, monthly payments, and other terms were available to consumers with bad credit, and (4) that certain new 2016 model year Toyotas were available for purchase in 2017. This information would be material to consumers in deciding whether to visit respondent's dealership and whether to purchase or lease an automobile from respondent.

The complaint also alleges that respondent's credit sale advertisements violated the Truth in Lending Act (TILA) and Regulation Z by failing to disclose or to disclose clearly and conspicuously required terms. Specifically, respondent's advertisements prominently stated the amount of the finance charge and the number of payments or period of repayment for certain vehicles—all triggering terms under the TILA—but failed to disclose, or unclearly and inconspicuously disclosed at the bottom of the ad in much smaller type, the required information

Analysis to Aid Public Comment

set forth by the TILA. Finally, the complaint alleges that respondent's leasing advertisements violated the Consumer Leasing Act (CLA) and Regulation M by failing to disclose or to disclose clearly and conspicuously required terms. Specifically, respondent's advertisements prominently stated the monthly payment amounts for certain vehicles—a triggering term under the CLA—but failed to disclose, or unclearly and inconspicuously disclosed at the bottom of the ad in much smaller type, the required information set forth by the CLA.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future.

- Definition B. of the order defines “clearly and conspicuously” to mean that required disclosures must be difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including that disclosures must appear in the same language as the representation requiring the disclosure is made (*e.g.* Spanish advertisement → Spanish disclosure).
- Part I.A.1. provides that respondent shall not misrepresent the cost of financing the purchase of an automobile, including by misrepresenting the amount or percentage of the down payment, the number of payments or period of repayment, the amount of any payment, and the repayment obligation over the full term of the loan, including any balloon payment.
- Part I.A.2. provides that respondent shall not misrepresent the cost of leasing an automobile, including by misrepresenting the total amount due at lease inception, the down payment, amount down, acquisition fee, capitalized cost reduction, any other amount required to be paid at lease inception, and the amounts of all monthly or other periodic payments.
- Part I.B. provides that respondent shall not misrepresent any qualification or restriction on the consumer's ability to obtain the represented financing or leasing terms, including any qualification or restriction based on the consumer's credit score or credit history.

Analysis to Aid Public Comment

- Part I.C. provides that respondent shall not represent any financing or leasing term, unless the representation is non-misleading, and the advertisement clearly and conspicuously discloses all qualifications or restrictions on the consumer's ability to obtain the represented financing or leasing term, including any qualifications or restrictions that respondent's lender, lessor, or any other entity may impose based on a consumer's credit score or credit history. Additionally, if a majority of consumers likely will not be able to meet a credit score qualification or restriction stated in the advertisement, respondent must clearly and conspicuously disclose that fact.
- Part I.D. provides that respondent shall not misrepresent the number of vehicles, makes, or models that are available for purchase or lease.
- Part I.E. provides that respondent shall not misrepresent any other material fact about the price, sale, financing, or leasing of any automobile.
- Part II of the order addresses the TILA and Regulation Z allegations by prohibiting credit sale advertisements that:
 - A. State the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the following terms:
 - The amount or percentage of the down payment;
 - The terms of repayment; and
 - The annual percentage rate, using the term "annual percentage rate" or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed; or

Analysis to Aid Public Comment

- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term; or
 - C. Fail to comply in any respect with Regulation Z, 12 C.F.R. Part 226, as amended, and the Truth in Lending Act, as amended, 15 U.S.C. §§ 1601-1667f.
- Part III of the order addresses the CLA and Regulation M allegations by prohibiting lease advertisements that:
 - A. State the amount of any payment or that any or no initial payment is required at lease inception, without disclosing clearly and conspicuously the following terms:
 - that the transaction advertised is a lease;
 - the total amount due prior to or at consummation or by delivery, if delivery occurs after consummation;
 - the number, amounts, and timing of scheduled payments;
 - whether or not a security deposit is required; and
 - that an extra charge may be imposed at the end of the lease term where the consumer’s liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.
 - B. Fail to comply in any respect with Regulation M, 12 C.F.R. Part 213, as amended, and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f, as amended.
 - Part IV requires respondent to provide copies of the order to certain personnel and to obtain acknowledgments of receipt.

Analysis to Aid Public Comment

- Part V requires respondent to file compliance reports with the Commission, including notices regarding changes in corporate structure that might affect compliance obligations under the order. Part VI requires respondent to create certain records for 15 years and to retain them for 5 years. Part VII provides the Commission certain mechanisms to monitor respondent's compliance with the order. Part VIII is a provision that "sunsets" the order after 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

**ALIMENTATION COUCHE-TARD INC.
AND
CROSSAMERICA PARTNERS LP**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-4631; File No. 171 0207
Complaint, November 21, 2017 – Decision, January 5, 2018*

This consent order addresses the \$130 million acquisition by Alimentation Couche-Tard Inc. (“ACT”) and CrossAmerica Partners LP (“CAPL”) of certain assets of Jet-Pep, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the retail sale of gasoline and diesel in three local markets in Alabama. The consent order requires ACT and CAPL must divest to a Commission-approved buyer (or buyers) certain Jet-Pep retail fuel outlets and related assets in three local markets in Alabama.

Participants

For the *Commission: Ashley Masters, Christina Shackelford, and Kara Todd.*

For the *Respondents: Brian Byrne and David I. Gelfand, Cleary Gottlieb Steen & Hamilton 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 Alimentation Couche-Tard Inc. and CrossAmerica Partners LP have entered into agreements to acquire certain assets of Jet-Pep, Inc., that such acquisitions, 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, and that a

Complaint

proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS**ACT**

1. Respondent Alimentation Couche-Tard Inc. (“ACT”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of Quebec, Canada, with its office and principal place of business located at 4204 Industriel Boulevard, Laval, Quebec H7L OE3, Canada. Circle K Stores, Inc. (“Circle K”) is a wholly owned subsidiary of ACT.

2. Respondent ACT is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

3. Respondent ACT and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

CAPL

4. Respondent CrossAmerica Partners LP (“CAPL”) is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania, 18101. Circle K indirectly owns all of the membership interests in CrossAmerica GP LLC, CAPL’s general partner.

5. Respondent CAPL is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

6. Respondent CAPL and the corporate entities under its control are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton

Complaint

Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

7. Pursuant to two Asset Purchase Agreements dated August 4, 2017, Circle K proposes to acquire 18 retail fuel outlets in addition to a fuel terminal and associated trucking assets. Pursuant to a third Asset Purchase Agreement dated August 4, 2017, CAPL proposes to acquire 102 Jet-Pep retail fuel outlets. All three Asset Purchase Agreements are collectively referred to as the “Acquisition.” As a result of the Acquisition, ACT will acquire ownership or operation of all Jet-Pep retail fuel outlets.

8. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

9. Relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. No economic or practical alternative to the retail sale of gasoline or diesel at retail fuel outlets exists.

10. Relevant geographic markets in which to analyze the effects of the Acquisition include three local markets within: Brewton, Alabama; Monroeville, Alabama; and Valley, Alabama.

11. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting the commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

Complaint

IV. MARKET STRUCTURE

12. The Acquisition, if consummated, would result in a highly concentrated market in each of the three local markets. The Acquisition, if consummated, would reduce the number of competitively constraining independent market participants to no more than three in each local market.

V. BARRIERS TO ENTRY

13. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Barriers to entry include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

VI. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant markets 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, by:

- a. increasing the likelihood that Respondent ACT would unilaterally exercise market power in the relevant markets; and
- b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in the relevant markets.

VII. VIOLATIONS CHARGED

15. 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.

Order to Maintain Assets

16. The Asset Purchase Agreements entered into by Jet-Pep and Respondents ACT and CAPL constitute a 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-first day of November, 2017, issues its Complaint against Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondents Alimentation Couche-Tard Inc., through its wholly-owned subsidiary, Circle K Stores Inc., and CrossAmerica Partners LP (collectively “Respondents”) of certain assets of Jet-Pep, Inc., and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and

Order to Maintain Assets

waivers and other provisions as required by the Commission's Rules; and

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 thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 4204 Industriel Blvd., Laval, Quebec H7L 0E3, Canada, and its United States address for service of process and of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Circle K Stores Inc., 1130 W. Warner Road, Tempe, Arizona 85284.
2. Respondent CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents and the proceeding is in the public interest.

I.

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, which are

Order to Maintain Assets

incorporated herein by reference and made a part hereof, shall apply:

- A. “ACT” means Alimentation Couche-Tard Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by ACT (including Circle K Stores Inc. and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by CAPL, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Circle K Stores” means Circle K Stores Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its directors, officers, employees, agents, representatives, successors, and assigns. Circle K Stores is a wholly-owned subsidiary of ACT and the general partner of CAPL.
- D. “Jet-Pep” means Jet-Pep, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 9841 Highway 278, Holly Pond, Alabama 35083.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to the Decision and Order.
- G. “Acquisition” means the proposed acquisitions described in (i) the Asset Purchase Agreement

Order to Maintain Assets

between CrossAmerica Partners LP, Jet-Pep, Inc. and other signatories thereto, dated August 4, 2017; (ii) the Asset Purchase Agreement between Circle K Stores Inc., Jet-Pep, Inc., and other signatories thereto, dated August 4, 2017; and (iii) the Terminal Purchase Agreement between Circle K Stores, Inc., Bama Terminaling and Trading, LLC, Clean Fuels, Inc., C.S.E. Properties, LLC, and Robert G. Norris, dated August 4, 2017.

- H. “Acquisition Date” means the date the Acquisition is consummated.

- I. “Books and Records” means all originals and all copies of any operating, financial, environmental, governmental compliance, regulatory, or other information, documents, data, databases, printouts, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, 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, relating to the Retail Fuel Assets, including, but not limited to, real estate files; environmental reports; environmental liability claims and reimbursement data, information, and materials; underground storage tank (UST) system registrations and reports; registrations, licenses, and permits (to the extent transferable); regulatory compliance records, data, and files; applications, filings, submissions, communications, and correspondence with Governmental Entities; inventory data, records, and information; purchase order information and records; supplier, vendor, and procurement files, lists, and related data and information; credit records and information; account information; marketing analyses and research data; service and warranty records; warranties and guarantees; equipment logs, operating guides and manuals; employee lists and contracts, salary and

Order to Maintain Assets

benefits information, and personnel files and records (to the extent permitted by law); financial statements and records; accounting records and documents; telephone numbers and fax numbers; and all other documents, information, and files of any kind that are necessary for an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of the Decision and Order.

- J. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). The term “Confidential Business Information” excludes the following:
1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Retail Fuel Assets or that is exclusively related to the Respondents’ retained businesses; and
 2. Information that: (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of the Orders; (b) is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be included in Respondents’ mandatory regulatory filings; (d) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Orders; (g) the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Governmental Entities; or (h) is disclosed in obtaining legal advice.

Order to Maintain Assets

- K. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- L. “Contract(s)” means all agreements, contracts, licenses, leases (including, but not limited to, ground leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.
- M. “Decision and Order” means the:
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 issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- N. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to the Decision and Order, including all amendments, exhibits, agreements, and schedules thereto.
- O. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.
- P. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of the Decision and Order.

Order to Maintain Assets

- Q. “Fuel Products” means refined petroleum gasoline and diesel products.
- R. “Governmental Entity” means any federal, state, local, or non-U.S. government, or any court, legislature, governmental agency or commission, or any judicial or regulatory authority of any government.
- S. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.
- T. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out of date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.
- U. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph IV. of this Order to Maintain Assets.
- V. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.
- W. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.

Order to Maintain Assets

- X. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).
- Y. “Respondents’ Brands” means all of Respondents’ trademarks, trade dress, logos, service marks, trade names, brand names, and all associated intellectual property rights, including rights to the name “Circle K” and “Jet-Pep.”
- Z. “Retail Fuel Assets” means the assets defined in Paragraph I.CC. of the Decision and Order.
- AA. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by Jet-Pep as of August 4, 2017, or by Respondents at the time of the divestiture required by Paragraph II of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.
- BB. “Retail Fuel Outlet Business” means all business activities conducted by Jet-Pep prior to the Acquisition Date at or relating to each of Jet-Pep’s locations identified in Appendix A of this Order, including but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, and other fuels, automotive products, and related services; and (2) the operation of associated convenience stores and related businesses and services, including but not limited to the retail sale, promotion, marketing and provision of food and grocery products (including dairy and bakery items, snacks, gum, and candy), foodservice and quick-serve restaurant items, beverages (including alcoholic beverages), tobacco products, general merchandise, ATM services, gaming and lottery tickets and services, money order services, car wash services, and all other businesses and services associated with the business operated or to be operated at each location identified in Appendix A of this Order.

Order to Maintain Assets

- CC. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents’ Brands for transitional purposes, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.
- DD. “Transition Services Agreement(s)” means any agreements that receive the prior approval of the Commission between Respondents and an Acquirer to provide, at the option of the Acquirer, Transition Services (or training for an Acquirer to provide services for itself), necessary to transfer the Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of the Orders.

II.

IT IS FURTHER ORDERED that from the date Respondents execute the Consent Agreement until the Divestiture Date:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Retail Fuel Assets, and shall not cause the wasting or deterioration of any of the Retail Fuel Assets. Respondents shall not cause the Retail Fuel Assets to be operated in a manner inconsistent with applicable laws, nor shall

Order to Maintain Assets

they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Retail Fuel Assets.

- B. Respondents shall conduct or cause the business of the Retail Fuel Assets to be conducted in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice.
- C. Respondents shall not terminate the operation of any of the Retail Fuel Assets, and shall continue to maintain the Inventory of each of the Retail Fuel Assets at levels and selections in the regular and ordinary course of business, in accordance with past practice.
- D. Respondents shall maintain the organization and properties of each of the Retail Fuel Assets, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Retail Fuel Assets. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:
 - 1. Maintain all operations at each of the Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice, including maintaining customary hours of operation and departments;
 - 2. Use best efforts to retain employees at each of the Retail Fuel Assets; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not

Order to Maintain Assets

transfer any employees from any of the Retail Fuel Assets;

3. Provide each employee of the Retail Fuel Assets with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Retail Fuel Assets;
4. Not transfer Inventory from any Retail Fuel Asset, other than in the ordinary course of business, in accordance with past practice;
5. Make all payments required to be paid under any Contract when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Retail Fuel Assets, in each case in a manner in accordance with past practice;
6. Maintain the Books and Records of each of the Retail Fuel Assets;
7. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at any Retail Fuel Asset to another location, or that indicates a Retail Fuel Asset will close;
8. Not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any Retail Fuel Asset;
9. Continue existing pricing or advertising practices, including marketing programs and policies, merchandising programs and policies, and price zones for or applicable to any of the Retail Fuel Assets, other than changes or modifications in the regular and ordinary course of business, in

Order to Maintain Assets

accordance with past practices and business strategy;

10. Provide each of the Retail Fuel Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such businesses, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Retail Fuel Assets;
11. Continue, at least at their scheduled pace, any additional expenditures for each of the Retail Fuel Assets authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;
12. Provide such resources as may be necessary to respond to competition and to prevent any diminution in sales at each of the Retail Fuel Assets;
13. Make available for use by each of the Retail Fuel Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Retail Fuel Assets;
14. Provide support services to each of the Retail Fuel Assets at least at the level as were being provided to such Retail Fuel Assets by Respondents as of the date the Consent Agreement was signed by Respondents; and
15. Maintain, and not terminate or permit the lapse of, any Governmental Permits necessary for the operation of any Retail Fuel Asset;

Provided, however, that it shall not be a violation of Paragraph II.D. if Respondents take actions that have

Order to Maintain Assets

been requested or agreed to by the 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 Retail Fuel Assets and consistent with the purposes of the Orders.

- E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Assets as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is disclosed to or received, accessed, or used by Respondents or Respondents' employees except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Retail Fuel Assets,

- A. Respondents shall not, and shall assure that its employees, agents, and representatives shall not:
1. Receive, access, have access to, or use, directly or indirectly, any Confidential Business Information, other than as is necessary to:
 2. Comply with the requirements of the Orders;
 3. Perform their obligations to the Acquirer under the terms of any Divestiture Agreement, including providing Transition Services pursuant to a Transition Services Agreement; or

Order to Maintain Assets

4. Comply with financial reporting requirements, defend legal claims, or as otherwise required by applicable law; and
 5. Disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed).
- B. Respondents shall institute appropriate procedures and requirements to ensure that the above-described employees, agents, and representatives do not (1) use, disclose, or convey, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets, or (2) solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- C. As part of the procedures and requirements that Respondents are required to implement to comply with Paragraphs III.A. and B., not later than (i) thirty (30) days after the date Respondents execute the Consent Agreement or (ii) fifteen (15) days after the date this Order to Maintain Assets is issued by the Commission, whichever is earlier, Respondents shall:
1. Implement and maintain a process and procedures pursuant to which Confidential Business Information may be disclosed and used only by Respondents' employees, agents, and representatives who (i) require access to such Confidential Business Information in order to provide Transition Services or as otherwise required by the Divestiture Agreement or permitted by the Orders, (ii) only to the extent such Confidential Business Information is required; and (iii) only after such employees, agents, and representatives have signed an appropriate

Order to Maintain Assets

agreement in writing to maintain the confidentiality of such Confidential Business Information; and

2. Monitor the implementation and enforce the terms of Paragraph III. as to any of Respondents' employees, agents, and representatives, and take such actions as are necessary to cause each such Person to comply with the terms of Paragraph III, including training of Respondents' employees, and all other corrective actions that Respondents would take for the failure of their employees and other personnel to comply with such restrictions, and to protect their own confidential and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Anthony P. Bartys to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.
- B. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the

Order to Maintain Assets

obligations set forth in the Orders, and shall act in a fiduciary capacity for the benefit of the Commission;

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with the Orders 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 the Orders;
3. The Monitor (i) shall serve at the expense of Respondents, 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 Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondents 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. 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

Order to Maintain Assets

Monitor from providing any information to the Commission.

- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order to Maintain Assets is issued and (ii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order to Maintain Assets and the Decision and Order.
- D. 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.
- E. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue pursuant to the Decision and Order, or at such other time as directed by the Commission.
- 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 Respondents, which consent shall not be unreasonably withheld:
 - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 - 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor,

Order to Maintain Assets

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 to Maintain Assets on the same terms and conditions as provided in Paragraph V.

- 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 to Maintain Assets.

V.

IT IS FURTHER ORDERED that within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until this Order to Maintain Assets terminates, 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 all provisions of this Order to Maintain Assets; *provided, however*, that 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 reports required to be submitted by the Respondents pursuant to the Decision and Order. Respondents shall submit at the same time a copy of their reports concerning compliance with this Order to Maintain Assets to the Monitor. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order to Maintain Assets.

VI.

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

Order to Maintain Assets

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondents at its expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate:

- 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;

Order to Maintain Assets

- B. The day after Respondents complete the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however*, that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate the day after the Decision and Order becomes final; or
- C. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Appendix A
Retail Fuel and Convenience Store Properties To Be Divested

State	Area	Property Name & Address
Alabama	Brewton	Jet-Pep 13 13288 Highway 113 Brewton, Alabama 36426
Alabama	Monroeville	Jet-Pep 65 3781 S. Alabama Avenue Monroeville, Alabama 36460
Alabama	Valley	Jet-Pep 63 608 Fob James Drive Valley, Alabama 36854

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Alimentation Couche-Tard Inc., through its wholly-owned subsidiary, Circle K Stores Inc., and Respondent CrossAmerica Partners LP (collectively “Respondents”) of certain assets of Jet-Pep, Inc. and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued and served its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

Decision and Order

1. Respondent Alimentation Couche-Tard Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 4204 Industriel Blvd., Laval, Quebec H7L 0E3, Canada, and its United States address for service of process and of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Corporate Secretary, Circle K Stores Inc., 1130 W. Warner Road, Tempe, Arizona 85284.
2. Respondent CrossAmerica Partners LP is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 515 Hamilton Street, Suite 200 Allentown, Pennsylvania 18101.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents and the proceeding is in the public interest.

ORDER**I.**

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

- A. “ACT” means Alimentation Couche-Tard Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by ACT (including Circle K Stores Inc. and CrossAmerica Partners LP), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CAPL” means CrossAmerica Partners LP, its partners, directors, officers, employees, agents,

Decision and Order

representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by CAPL, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Circle K Stores” means Circle K Stores Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, and its directors, officers, employees, agents, representatives, successors, and assigns. Circle K Stores is a wholly-owned subsidiary of ACT and controls the general partner of CAPL.
- D. “Jet-Pep” means Jet-Pep, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 9841 Highway 278, Holly Pond, Alabama 35083.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means any Person that acquires any of the Retail Fuel Assets pursuant to this Order.
- G. “Acquisition” means the proposed acquisitions described in (i) the Asset Purchase Agreement between CrossAmerica Partners LP, Jet-Pep, Inc. and other signatories thereto, dated August 4, 2017; (ii) the Asset Purchase Agreement between Circle K Stores Inc., Jet-Pep, Inc., and other signatories thereto, dated August 4, 2017; and (iii) the Terminal Purchase Agreement between Circle K Stores, Inc., Bama Terminating and Trading, LLC, Clean Fuels, Inc., C.S.E. Properties, LLC, and Robert G. Norris, dated August 4, 2017.
- H. “Acquisition Date” means the date the Acquisition is consummated.

Decision and Order

- I. “Books and Records” means all originals and all copies of any operating, financial, environmental, governmental compliance, regulatory, or other information, documents, data, databases, printouts, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, 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, relating to the Retail Fuel Assets, including, but not limited to, real estate files; environmental reports; environmental liability claims and reimbursement data, information, and materials; underground storage tank (UST) system registrations and reports; registrations, licenses, and permits (to the extent transferable); regulatory compliance records, data, and files; applications, filings, submissions, communications, and correspondence with Governmental Entities; inventory data, records, and information; purchase order information and records; supplier, vendor, and procurement files, lists, and related data and information; credit records and information; account information; marketing analyses and research data; service and warranty records; warranties and guarantees; equipment logs, operating guides and manuals; employee lists and contracts, salary and benefits information, and personnel files and records (to the extent permitted by law); financial statements and records; accounting records and documents; telephone numbers and fax numbers; and all other documents, information, and files of any kind that are necessary for an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of this Order.
- J. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection

Decision and Order

with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). The term “Confidential Business Information” excludes the following:

1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Retail Fuel Assets or that is exclusively related to the Respondents’ retained businesses; and
 2. Information that (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of this Order; (b) is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be included in Respondents’ mandatory regulatory filings; (d) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Order; (g) the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Governmental Entities; or (h) is disclosed in obtaining legal advice.
- K. “Consent” means any approval, consent, ratification, waiver, or other authorization.
- L. “Contract(s)” means all agreements, contracts, licenses, leases (including, but not limited to, ground leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.
- M. “Cost” means costs not to exceed the actual cost of labor, goods and material, travel, third party vendors,

Decision and Order

and other expenditures that are directly incurred by Respondents to provide and fulfill any Transition Services; *provided, however*, that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, RIN sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents. With respect to the transitional supply of Fuel Products, Respondents shall charge, separately for gasoline and diesel, no more than the daily OPIS reported Birmingham, Alabama, terminal “Low Rack” price plus a common carrier fee to transport the fuel from the Jet-Pep terminal at 2529 and 2605 28th Street SW and 2430 Nabors Road, Birmingham, Alabama 35211 to the respective Retail Fuel Outlet Business.

- N. “Divestiture Agreement” means any agreement between Respondents (or between a Divestiture Trustee) and an Acquirer to divest the Retail Fuel Assets and any ancillary agreements relating to the divestiture of the relevant assets (such as for the provision of Transition Services) that has been approved by the Commission pursuant to this Order, including all amendments, exhibits, agreements, and schedules thereto.
- O. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Retail Fuel Assets.
- P. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- Q. “Equipment” means all tangible personal property (other than Inventory(ies)) of every kind owned or leased by Respondents in connection with the operation of the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order , including, but

Decision and Order

not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof, to the extent such warranty is transferrable, and all maintenance records and other documents relating thereto.

- R. “Fuel Products” means refined petroleum gasoline and diesel products.
- S. “Governmental Entity” means any federal, state, local, or non-U.S. government, or any court, legislature, governmental agency or commission, or any judicial or regulatory authority of any government.
- T. “Governmental Permit(s)” means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.

Decision and Order

- U. “Inventories” means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out of date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.
- V. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of this Order or Paragraph IV. of the Order to Maintain Assets.
- W. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- X. “Person” means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.
- Y. “Prior Notice Outlet” means any existing retail fuel facility (including any successors) identified in Non-Public Appendix B.
- Z. “Products” means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).
- AA. “Proposed Acquirer” means any proposed acquirer of any of the Retail Fuel Assets that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order.
- BB. “Respondents’ Brands” means all of Respondents’ trademarks, trade dress, logos, service marks, trade

Decision and Order

names, brand names, and all associated intellectual property rights, including rights to the name “Circle K,” “Kangaroo Express,” and “Jet-Pep.”

- CC. “Retail Fuel Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to, used in, or reserved for use in, the Retail Fuel Outlet Business, including, but not limited to:
1. All real property interests (including fee simple interests and real property leases and leasehold interests), including all easements and rights-of-way, together with all buildings and other structures, facilities, appurtenances, and improvements located thereon or affixed thereto (including all attached machinery, fixtures, and heating, plumbing, electrical, lighting, ventilating and air-conditioning equipment), whether owned, leased, or otherwise held;
 2. All Equipment, including any Equipment removed from any location of the Retail Fuel Outlet Business since the date of the announcement of the Acquisition and not replaced;
 3. All Inventories;
 4. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto, to the extent transferable, and at the Acquirer’s option;
 5. All Governmental Permits, and all pending applications therefor or renewals thereof, to the extent transferable;
 6. All intangible rights and property, including intellectual property, owned or licensed (as licensor or licensee) by Respondents (to the extent

Decision and Order

transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and

7. Books and Records; *provided, however*, that in cases in which Books and Records included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets and to other, retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Retail Fuel Assets, or (b) where Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies of the materials containing such information with appropriate redactions to the Acquirer. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes;

Provided, however, that the Retail Fuel Assets need not include the Retained Assets.

- DD. “Retail Fuel Employee” means any full-time, part-time, or contract individual employed by Jet-Pep as of August 4, 2017, or by Respondents at the time of the divestiture required by Paragraph II of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.
- EE. “Retail Fuel Location” means: (1) any facility engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services; and (2) any property site where construction of a retail facility to be engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services is planned or underway.

Decision and Order

- FF. “Retail Fuel Outlet Business” means all business activities conducted by Jet-Pep prior to the Acquisition Date at or relating to each of Jet-Pep’s locations identified in Appendix A of this Order, including but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, and other fuels, automotive products, and related services; and (2) the operation of associated convenience stores and related businesses and services, including but not limited to the retail sale, promotion, marketing and provision of food and grocery products (including dairy and bakery items, snacks, gum, and candy), foodservice and quick-serve restaurant items, beverages (including alcoholic beverages), tobacco products, general merchandise, ATM services, gaming and lottery tickets and services, money order services, car wash services, and all other businesses and services associated with the business operated or to be operated at each location identified in Appendix A of this Order.
- GG. “Retained Assets” means:
1. Respondents’ Brands, except with respect to any purchased Inventories (including private label inventory);
 2. Tangible assets that are not located at any site of the Retail Fuel Outlet Business (unless included in the Retail Fuel Assets pursuant to Paragraph I.CC.2.); and
 3. Intellectual property; *provided, however*, that the Retained Assets shall not include software that cannot readily be purchased or licensed from sources other than Respondents or that has been materially modified (other than through user preference settings).
- HH. “Third Party(ies)” means any Person other than the Respondents or an Acquirer.

Decision and Order

- II. “Transition Services” means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents’ Brands for transitional purposes, operating permits and licenses, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.
- JJ. “Transition Services Agreement(s)” means any agreements that receive the prior approval of the Commission between Respondents and an Acquirer to provide, at the option of the Acquirer, Transition Services (or training for an Acquirer to provide services for itself), necessary to transfer the Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of this Order.

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

- A. No later than 120 days from the date this Order is issued, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, at no minimum price, as an on-going business, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

Decision and Order

- B. No later than the Divestiture Date of the Retail Fuel Assets, Respondents shall obtain, at their sole expense, all Consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from Third Party(ies) by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) that are acceptable to the Commission, or has otherwise obtained all necessary consents and waivers; and
2. With respect to any Governmental Permits relating to the Retail Fuel Assets that are not transferable, allow the Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

- C. Respondents shall:

1. At the option of the Acquirer, and pursuant to a Transition Services Agreement and in a manner that receives the prior approval of the Commission, provide Transition Services to the Acquirer for a period of twelve (12) months from the Divestiture Date;
2. Provide the Transition Services at a price not to exceed Cost and of a quality and quantity sufficient for the Acquirer to operate the Retail Fuel Outlet Business(es) in substantially the same manner as

Decision and Order

Jet-Pep prior to the Acquisition Date (including the ability to develop new services and products and increase sales of current services and products);

Provided, however, that Respondents shall give priority to the Acquirer's requirements for Transition Services over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transition Services;

Provided further that (i) Acquirer may terminate any Transition Services at any time upon commercially reasonable notice to the Respondents and without cost or penalty to the Acquirer and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transition Services needed to achieve the purposes of this Order, so long as the total duration of any Transition Services does not exceed eighteen (18) months (including the initial twelve (12) month term); and

Provided further that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) that Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transition Services.

- D. At the Acquirer's option, Respondents shall grant a worldwide, royalty-free, fully paid-up license to the Acquirer to use any of Respondents' Brands as are applicable to the Retail Fuel Assets as part of any Transition Services Agreement that Respondents may enter into with the Acquirer, or as may otherwise be allowed pursuant to any Remedial Agreement(s).
- E. The purpose of the divestiture of the Retail Fuel Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of

Decision and Order

competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Retail Fuel Assets and Retail Fuel Outlet Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- B. Respondents shall:
 - 1. No later than twenty (20) days before the Divestiture Date (i) identify each Retail Fuel Employee, (ii) allow a Proposed Acquirer to inspect the personnel files and other documentation of each Retail Fuel Employee, to the extent permissible under applicable laws; and (iii) allow a Proposed Acquirer an opportunity to meet with any Retail Fuel Employee outside the presence or hearing of Respondents, and to make an offer of employment;
 - 2. Remove any contractual impediments that may deter any Retail Fuel Employee from accepting employment with an Acquirer, including, any non-compete or confidentiality provision of an employment contract;
 - 3. Vest all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with an Acquirer for any Retail Fuel Employee who accepts an offer of employment from an Acquirer; and provide each Retail Fuel Employee with a financial incentive as

Decision and Order

necessary to accept an offer of employment with an Acquirer; and

4. Not offer any incentive to any Retail Fuel Employee to decline employment with an Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Retail Fuel Employee by an Acquirer.
- C. For a period of one (1) year after Divestiture Date, Respondents shall not solicit or induce any Retail Fuel Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however*, that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Retail Fuel Employees; (ii) hire Retail Fuel Employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such Retail Fuel Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Retail Fuel Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Retail Fuel Employee, or where such an offer has been made and the Retail Fuel Employee has declined the offer.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Retail Fuel Assets, Retail Fuel Outlet Business, and the post-divestiture Retail Fuel Outlet Business; *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:

Decision and Order

1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreement; or
 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Retail Fuel Assets, Retail Fuel Outlet Business or the post-divestiture Retail Fuel Outlet Business, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents 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 IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. 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 IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

V.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Anthony P. Bartys to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and

Decision and Order

perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreement, including any Transition Services Agreement approved by the Commission.

- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
1. The Monitor shall have the power and authority to monitor Respondents' compliance with the obligations set forth in this Order and the Order to Maintain Assets, and shall act in a fiduciary capacity for the benefit of the Commission;
 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order and the Order to Maintain Assets 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 and the Order to Maintain Assets;
 3. The Monitor (i) shall serve at the expense of Respondents, 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 Respondents, such consultants, accountants, attorneys, and other representatives and assistants

Decision and Order

as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents 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. 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.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after this Order is issued, (ii) no later than ten (10) days after Respondents have completed their obligations as required by Paragraph II. of this Order ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order and/or the Order to Maintain Assets.
- D. 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.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his

Decision and Order

final report pursuant to Paragraph V.C.(ii) of this Order, or at such other time as directed by the Commission.

- 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 Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 2. Respondents shall, no later than five (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 V.
- 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.

Decision and Order

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

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of 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 the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be

Decision and Order

deemed to have consented to the selection of the proposed Divestiture Trustee.

- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;
 2. The Divestiture Trustee shall have twelve (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 twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

Decision and Order

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than 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 Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

Decision and Order

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by 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 or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons

Decision and Order

retained by the Divestiture Trustee pursuant to Paragraph VI.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 Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require 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 VI.
- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

Decision and Order

VII.**IT IS FURTHERED ORDERED** that:

- A. For a period of ten (10) years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Prior Notice Outlet.
- B. With respect to the notification:
1. The prior notification required by this Paragraph VII. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction.
 2. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material.

Decision and Order

3. Early termination of the waiting periods in this Paragraph VII. may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VIII.**IT IS FURTHERED ORDERED** that:

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondents shall comply with all terms of the agreement. Any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order. In the event of a conflict between the terms of this Order and a Divestiture Agreement, or any ambiguity in the language used in a Divestiture Agreement, the terms of this Order shall govern to resolve such conflict or ambiguity.
- B. Respondents shall not modify, replace, or extend the terms of the 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).

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

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which its intends to comply, is complying, and has complied with this Order:

Decision and Order

1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order; and
 2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission or its staff may request.
- B. With respect to the divestiture required by Paragraph II.A. of this Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of any of the Retail Fuel Assets; (ii) a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents have completed such divestiture and the date the divestiture was accomplished.

X.

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

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

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and

Decision and Order

upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on January 5, 2028.

By the Commission.

Decision and Order

Appendix A**Retail Fuel and Convenience Store Properties To Be Divested**

State	Area	Property Name & Address
Alabama	Brewton	Jet-Pep 13 13288 Highway 113 Brewton, Alabama 36426
Alabama	Monroeville	Jet-Pep 65 3781 S. Alabama Avenue Monroeville, Alabama 36460
Alabama	Valley	Jet-Pep 63 608 Fob James Drive Valley, Alabama 36854

Non-Public Appendix B**Prior Notice Outlets**

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

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Alimentation Couche-Tard Inc. (“ACT”) and CrossAmerica Partners LP (“CAPL”) (collectively, the “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from the proposed acquisition of Jet-Pep, Inc. (“Jet-Pep”) assets.

Under the terms of the proposed Consent Agreement, ACT and CAPL must divest to a Commission-approved buyer (or buyers) certain Jet-Pep retail fuel outlets and related assets in three local markets in Alabama. ACT must complete the divestiture no later than 120 days after the closing of ACT’s acquisition of Jet-Pep. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business until a Commission-approved buyer acquires the outlet.

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 the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent ACT, a publicly traded company headquartered in Laval, Quebec, Canada, operates convenience stores and retail fuel outlets throughout the United States and the world. ACT is the parent of wholly owned subsidiary, Circle K Stores Inc. (“Circle K”). ACT’s current U.S. network consists of approximately 7,200 stores located in 42 states, making ACT the

Analysis to Aid Public Comment

second-largest retail fuel chain in the country. ACT convenience store locations operate primarily under the Circle K and Kangaroo Express banners, while its retail fuel outlets provide a variety of company unbranded and third-party branded fuels. ACT owns 158 retail fuel outlets in Alabama.

Respondent CAPL, a publicly traded master limited partnership headquartered in Allentown, Pennsylvania, markets fuel at wholesale, and owns and operates convenience stores and retail fuel outlets. ACT, via Circle K, acquired CST Brands, Inc. (“CST”) in June 2017, which gave Circle K operational control and management of CAPL. CAPL supplies fuel to nearly 1,200 sites across 29 states, but it does not operate in Alabama.

III. The Proposed Acquisition

Through three separate agreements (collectively “the Acquisition”), ACT will acquire ownership or operation of 120 Jet-Pep retail fuel outlets with attached convenience stores. Circle K intends to acquire 18 retail fuel outlets and Jet-Pep’s terminal and related assets. CAPL will acquire the remaining 102 Jet-Pep retail fuel outlets. The Acquisition is not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“HSR Act”). The Acquisition would extend ACT’s position as one of the largest operators of retail fuel outlets in the United States.

The proposed Complaint alleges 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and diesel in three local markets in Alabama. The proposed Complaint further alleges that Acquisition agreements constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IV. The Complaint

As alleged in the proposed Complaint, the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel. The retail sale of gasoline

Analysis to Aid Public Comment

and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets.

The proposed Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Acquisition are three local areas in Brewton, Monroeville, and Valley, Alabama. Each particular geographic market is unique, with factors such as commuting patterns, traffic flows, and outlet characteristics playing important roles in determining the scope of the geographic market. Retail fuel markets are highly localized and can range in size up to a few miles.

According to the proposed Complaint, the Acquisition would reduce the number of independent market participants in each market to three or fewer. The Acquisition would thereby substantially lessen competition in these local markets by increasing the likelihood that ACT will unilaterally exercise market power and by increasing the likelihood of successful coordination among the remaining firms. Absent relief, the Acquisition would likely result in higher prices in each of the three local markets.

The proposed Complaint alleges that entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Barriers to entry include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring ACT to divest certain Jet-Pep retail fuel outlets and related assets in three local markets.

Analysis to Aid Public Comment

The proposed Consent Agreement requires that the divestiture occur no later than 120 days after ACT consummates the Acquisition. This Agreement protects the Commission's ability to obtain complete and effective relief in light of the non-reportable nature of the Acquisition and the small number of outlets to be divested. Further, based on Commission staff's investigation, the Commission believes that ACT can identify an acceptable buyer (or buyers) within 120 days.

The proposed Consent Agreement further requires ACT to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the Commission approves a buyer (or buyers) and the divestiture is complete. For up to twelve months following the divestiture, ACT must make available transitional services, as needed, to assist the buyer of each divestiture asset.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires ACT to provide the Commission notice before acquiring designated outlets in the three local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date the Respondents' complete divestiture of the outlet. During this period, and until such time as the buyer (or buyers) no longer requires transitional assistance, the Order to Maintain Assets authorizes the Commission to appoint an independent third party as a Monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

VICTORY MEDIA, INC.
D/B/A
G.I. JOBS AND MILITARY FRIENDLY

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4640; File No. 162 3210
Complaint, January 11, 2018 – Decision, January 11, 2018

This consent order addresses Victory Media, Inc.’s operation of the search tool School Matchmaker at gijobs.com to help service members find educational institutions in their fields of interest. The complaint alleges that the respondent made claims that its Matchmaker tool searched schools that met respondent’s “military friendly” criteria. The complaint further alleges that the respondent, in certain of its articles, emails, and social media posts, misrepresented that its endorsements were independent and not paid advertising, and failed to adequately disclose that the content recommended schools that paid the respondent specifically to be promoted therein. The consent order prohibits the respondent from making any misrepresentations regarding the scope of any search tool, including whether the tool only searches “military friendly” schools, material connections between it and any schools, and that paid commercial advertising is independent content.

Participants

For the *Commission: Stephanie Cox and Nikhil Singhvi.*

For the *Respondent: Spencer Elg, Ilunga Kalala, William MacLeod, and Sharon Schiavetti, Kelley Drye & Warren LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Victory Media, Inc., d/b/a Jobs and also d/b/a Military Friendly, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Victory Media, Inc. (“Victory Media”), also doing business as G.I. Jobs, also doing business as Military Friendly, is a Pennsylvania corporation with its principal place of

Complaint

business at 420 Rouser Road, Suite 101, Moon Township, PA 15108.

2. Victory Media offers nationally recognized media brands, survey and ratings programs, reporting services and training.

3. Respondent creates and prepares advertising, marketing, and promotional content for educational institutions. Respondent disseminates this content to consumers through a variety of mediums, including the magazines *G.I. Jobs* (published monthly), the *Guide to Military Friendly Schools* (published annually), and *Military Spouse* (published monthly). According to Victory Media's website, "Since 2001, G.I. Jobs® has been the premier brand and resource in military recruitment, offering articles, tips and online tools to help military transitioners and veterans explore different employment, education and entrepreneurship opportunities. We give specific, 'how-to advice' on everything from choosing a college to writing a resume to interviewing to industry and career highlights."

4. These magazines typically contain articles on topics related to employment and education, as well as features on specific post-secondary schools and advertisements for educational institutions. Respondent places these magazines on military bases, in military hospitals, and in centers where the military's Transitional Assistance Programs ("TAP") are being held. TAP is a mandatory program that all service members who are separating from the military must attend. Respondent's monthly magazines have a combined print circulation of over 145,000.

5. Respondent also owns and operates several websites directed at military consumers, including militaryfriendly.com, militaryspouse.com, and gijobs.com. As part of its education outreach, Respondent often posts articles, lists, and other information on educational topics and about educational institutions on these websites. Respondent also maintains active profiles on social media platforms, including Facebook, Twitter, LinkedIn, and YouTube, on which it posts information about educational topics and educational institutions.

Complaint

6. Respondent has described itself as an advisor to military consumers. For example, on the G.I. Jobs Facebook page, <https://www.facebook.com/pg/GIJobsMagazine/about/>, Respondent describes itself as “the number one choice of service members for advice on career and education opportunities,” explaining that “new veterans look to us for advice and tools to help them find the right jobs, education, and vocational training during and after leaving the military.”

7. 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.

The Matchmaker Search Tool

8. Respondent’s School Matchmaker tool (“Matchmaker”) has been a search function on Respondent’s gijobs.com website that consumers could use to search for post-secondary schools based on name, location, or subject area of study.

9. Respondent has represented to military consumers that the Matchmaker searches through schools that are “military friendly” – a designation Respondent created based on publicly available data and a voluntary survey it sends to schools with questions related to the educational needs and interests of military students. For example, the following advertisement for the Matchmaker tool appeared in Respondent’s G.I. Jobs magazine, representing that the tool searches “military friendly” schools.

Complaint

**MAXIMIZE YOUR
GI BILL MONEY
WITH THE
#1
COLLEGE TOOL
FOR VETERANS**

It's a big decision ... and an important one. We understand. With so much to consider, where do you even begin your search for the perfect school? The answer is simple: with the **G.I. Jobs School Matchmaker!**

With a few simple clicks you can quickly search hundreds of Military Friendly® Schools that have the exact degree you're looking for, provide the most credit hours for your military service and give you the highest BAH!

It's never been easier to find the perfect school that meets your post-military needs, exceeds your expectations and makes your transition from service member to student that much easier.

GI JOBS
SCHOOL MATCHMAKER

Visit the G.I. Jobs School Matchmaker today and take the guesswork out of finding the perfect school:

GIJOBS.COM/SCHOOLS

10. Similarly, Respondent has represented:

- “To help ease your stress, we publish an annual Military Friendly Schools list that’s augmented by the digital School Matchmaker tool at GIJobs.com.” (*G.I. Jobs*, February 2016)

Complaint

- “School Matchmaker. Find the best Military Friendly Schools.” (*G.I. Jobs*, May 2016)
- “Check out our new School Matchmaker – tell us what you’re looking for in post- military education and we’ll match you with a Military Friendly School that exceeds your expectations.” (www.gijobs.com)
- “For a full list of military friendly schools, check out the G.I. Jobs School Matchmaker.” (www.militaryspouse.com)

11. Beginning in mid-2015, Respondent has included schools as possible search results for its Matchmaker tool only if the schools paid Respondent to be included, and regardless of whether Respondent has designated them as “military friendly” under Respondent’s criteria. Indeed, schools that Respondent’s internal documents state did not receive a high enough score on Respondent’s survey to be designated as “military friendly” have been included in the Matchmaker search if they paid to be included.

Articles, Emails, And Posts Promoting Paying Schools

12. Respondent has endorsed individual schools in certain articles, emails, and social media posts it creates discussing educational opportunities. Unbeknownst to consumers, in many cases, these schools have paid Respondent to be endorsed in those specific materials.

13. For example, Respondent has annually created and posted an article designated as “Hot Degrees” on its website gijobs.com. These articles list college degrees or certifications that Respondent asserts are in high demand. For each listed degree or certification, the articles then list, under the heading, “Find Your School,” schools that offer the degree or certification and that specifically paid to be promoted in such articles.

14. Respondent has created and included a list identifying specific schools Respondent recommended to be considered in an article on its website gijobs.com in May 2016 entitled “2016 Hot

Complaint

Jobs, Cool Degrees.” The following is a screenshot of a portion of one page of the article:



Unbeknownst to consumers, the schools listed in this article are only those that have paid Respondent to be featured in such articles.

15. Indeed, Respondent’s sales documents solicit schools to pay for advertising in the Hot Degrees articles. The following is a screenshot of one such document:

16. The document shows that Respondent specifically places “Advertisers” under the “Find Your School” heading at the end of these articles. The document also encourages schools to purchase this promotion by saying, “Make sure you don’t miss the opportunity to advertise your programs in this issue.”

Complaint

Second Annual AMERICA'S HOT DEGREES FOR VETERANS

BE A PART OF OUR SECOND ANNUAL LIST OF AMERICA'S TOP DEGREES FOR VETERANS

Derived from data submitted for the annual Military Friendly® Employment list, the May 2015 issue of G.I. Jobs® will showcase the second annual list of America's hottest degrees for veterans. Hot Degrees are areas of study that map to in-demand jobs for veterans. All of these educational paths can lead to one of the 2015 Top 20 Hot Jobs for Veterans®.

Our special May issue will include descriptions of our top fields of study, plus schools that offer degrees in these fields.

As a school seeking high-caliber students, you know the value student veterans can bring to your classrooms. Make sure you don't miss the opportunity to advertise your programs in this issue.

• Deadline for space is Friday, 3/29
• Deadline for artwork is Tuesday, 3/24
• See advertising rates below

When you book your ad, be sure to let us know for which fields of study you are recruiting.

FIELDS OF STUDY

4-YEAR DEGREES OR MORE
 Business Admin/Finance
 Construction Management
 Engineering

Healthcare
 Information Technology
 Operations & Logistics

POST-TRAINING TWO YEARS OR LESS
 (degrees, certifications, licenses)

CDL
 Health Care
 Information Technology
 Military Trainer

G.I. JOBS' RATES

SIZE	GUARANTEED POSITIONING	4 TO 2.5 ADS	3 TO 2 ADS	2 TO 1.5 ADS	12 ADS
Full Page 4x					
Two Third 4x					
Half Page 4x					
Third Page 4x					
Third Page 8x					

Business Administration/Finance

Getting a bachelor's degree in business administration or finance will give you many options for transferring your education. Depending on your major, you may be able to transfer into a variety of careers. These degrees can give you the skills you need to succeed in a variety of careers. You may also be able to transfer into a variety of careers. You may also be able to transfer into a variety of careers.

SELECTED HOT JOBS

- Business Administration
- Financial Services Advisor
- Operations Manager
- Construction Project Manager
- Customer Service Manager/Rep
- Quality Assurance
- Junior Executive Trainee
- Account Manager

TECHNICIAN

Technician training is a technical career field that is in high demand. These are plenty of jobs that will be available to you. You may also be able to transfer into a variety of careers. You may also be able to transfer into a variety of careers.

SELECTED HOT JOBS

- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician
- Biotechnology Technician

17. Respondent also has created and distributed information to military consumers via regular emails (a service described internally as “Incoming Email”) and on its social media accounts, and Respondent has included in this information lists of specific schools Respondent endorsed. For example, the following is an excerpt of an email that Respondent sent to military and veteran consumers in August 2016:



Complaint

Unbeknownst to consumers, all schools listed in this email have paid Respondent to be featured.

18. Since at least May 2016, all schools promoted in “Incoming Email” have paid to be included. Beginning in August 2016, the following disclaimer, which consumers could reach only by scrolling down through several screens, has appeared at the bottom of such emails in smaller, dense print:

Disclaimer

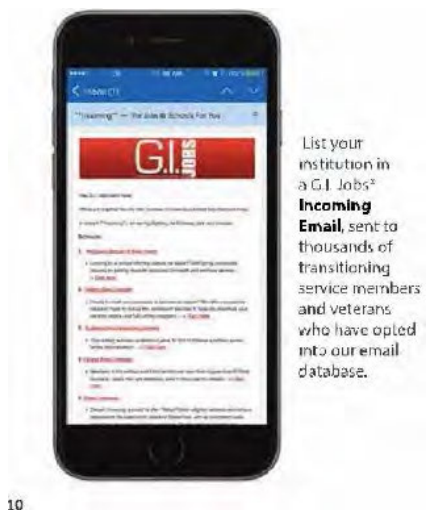
Our email communication may contain advertising and sponsorships from time to time. Advertisers and sponsors are responsible for ensuring that material submitted for inclusion in our email is accurate and complies with applicable laws. We are not responsible for the illegality or any error, inaccuracy or problem in the advertiser's or sponsor's materials.

THE INCLUSION OF THIRD PARTY ADVERTISEMENTS DOES NOT CONSTITUTE AN ENDORSEMENT, GUARANTEE, WARRANTY, OR RECOMMENDATION BY VICTORY MEDIA, INC. BRANDS AND WE MAKE NO REPRESENTATIONS OR WARRANTIES ABOUT ANY INSTITUTION, EMPLOYER, PRODUCT OR SERVICE CONTAINED THEREIN.

You should always perform proper due diligence when making important decisions.

The disclaimer does not disclose clearly and prominently to consumers that the specific schools promoted in the email have, in fact, paid Respondent for that promotion.

19. Respondent's sales documents solicit schools to pay to be included as endorsed schools in these emails Respondent sends to consumers. The following is an excerpt of one such document:



Complaint

Count I Misrepresentations About Matchmaker

20. Through the means described in Paragraphs 8 through 11, Respondent has represented, directly or indirectly, expressly or by implication, that the School Matchmaker tool searches schools Respondent has designated as “military friendly” to find the right educational choice for the consumer.

21. In fact, in numerous instances in which Respondent has made the representations set forth in Paragraph 20 of this Complaint, it included schools that the Respondent had not designated as military friendly, and only included schools that paid to be included. Therefore, the representations set forth in Paragraph 20 are false or misleading.

Count II**Misrepresentations About Independence Of Endorsements**

22. Through the means described in Paragraphs 12 through 19, Respondent has represented, directly or indirectly, expressly or by implication, that specific endorsements in content it prepared promoting post-secondary schools were independent sources of information regarding those schools and not paid advertising.

23. In fact, in many instances, the specific endorsements described in Paragraph 22 were not independent sources of information and were paid advertising. Therefore, the representation set forth in Paragraph 22 of this complaint is false or misleading.

Count III**Deceptive Failure To Disclose Material Connections**

24. Through the means described in Paragraphs 12 through 19, Respondent has represented, directly or indirectly, expressly or by implication, that it recommends specific post-secondary schools for consumers in specific articles, social media posts, and emails it prepared.

25. In many instances in which Respondent has made the representation set forth in Paragraph 24 of this Complaint,

Decision and Order

Respondent has failed to disclose or disclose adequately that many of the specific post-secondary schools paid Respondent to be recommended. This fact would be material to consumers in evaluating Respondent's claims concerning these schools as well as in considering whether to consult additional sources of information about these and other schools.

26. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 25, in light of the representation made in Paragraph 24, is a deceptive act or practice.

THEREFORE, the Federal Trade Commission this eleventh day of January, 2018, 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 violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondent that Respondent neither admits nor denies any of the allegations in the draft Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the

Decision and Order

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 Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. Respondent Victory Media, Inc. is a Pennsylvania corporation, also doing business as G.I. Jobs, also doing business as Military Friendly, with its principal office or place of business at 420 Rouser Road, Building 3, Suite 101, Moon Township, Pennsylvania 15108.
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. Unless otherwise specified, "Respondent" shall mean Victory Media, Inc., a corporation, also doing business as G.I. Jobs, and also doing business as Military Friendly, its successors and assigns (including but not limited to Neptune Holdings, Inc. and M2V, Inc.), and its officers, agents, representatives, and employees.

Decision and Order

- B. “Clearly and conspicuously” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure (“triggering representation”) is made through only one means.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
 5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

Decision and Order

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- C. “Close proximity” means that the disclosure is very near the triggering endorsement or representation. In an interactive electronic medium (such as a mobile app or other computer program), a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering endorsement or representation, on the technology used by ordinary consumers, is not in close proximity. A disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering endorsement or representation. A disclosure made on a different printed page than the triggering endorsement or representation is not in close proximity.
- D. “Material Connection” means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.
- E. “Post-Secondary School[s]” means an academic, vocational, technical, home study, business, professional, or other school, college, or university, or other organization or person, offering educational credentials or offering instruction or educational services (primarily to persons who have completed or terminated their secondary education or who are beyond the age of compulsory school attendance) for attainment of educational, professional, or vocational objectives.

Decision and Order

Provisions**I. Prohibited Misleading Representations Regarding Paid Promotional Content**

IT IS ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with paid promotional content regarding post-secondary schools, must not make, or assist others in making, any misrepresentation, expressly or by implication:

- A. Regarding the scope of the search conducted by any search tool, including, but not limited to whether any such tool searches only through schools Respondent or others have designated as military friendly;
- B. Regarding any material connection between Respondent and any school; or
- C. That paid commercial advertising is independent content.

II. Required Disclosure Regarding Paid Endorsements

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with an endorsement of any post-secondary school that Respondent makes, or a third-party endorsement of any post-secondary school that Respondent prepares, must disclose, clearly and conspicuously, and in close proximity to that representation, all material connections between Respondent or the other endorser and the school. *Provided that*, for the purposes of this Provision, an “endorsement” means “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the school, even if the views expressed by that party are identical to those of the school.”

Decision and Order

III. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtains 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 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, agents, and representatives who participate in paid promotion of Post-Secondary Schools; 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 Respondent delivered a copy of this Order, that 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 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: (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;

Decision and Order

- (c) describe the activities of each business; (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 the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.
- B. For ten 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:
1. Respondent must submit notice of any change in:
 - (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 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

Decision and Order

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 Victory Media, Inc.

V. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent must create and retain the following records:

- A. accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;
- B. 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;
- C. 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 unique advertisement or other marketing material making a representation subject to this Order; and
- E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

Decision and Order

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 January 11, 2038, 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:

Analysis to Aid Public Comment

- A. Any Provision in this Order that terminates in less than 20 years; and
- B. 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 (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Victory Media, Inc. The proposed consent 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 FTC 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 agreement’s proposed order.

The respondent publishes print and online magazines and guides for servicemembers transitioning from military service to the civilian workforce. The respondent does business under the names G.I. Jobs and Military Friendly. Its websites include gijobs.com, militaryfriendly.com, and militaryspouse.com.

Analysis to Aid Public Comment

Victory Media also maintains active social media accounts, including on Twitter, Facebook, YouTube, and LinkedIn, under handles such as “Military Friendly” or “G.I. Jobs” that attract military consumers.

The respondent operates a search tool, School Matchmaker, at gijobs.com to help servicemembers find educational institutions in their fields of interest. The proposed complaint in this matter alleges that the respondent made claims that its Matchmaker tool searched schools that met respondent’s “military friendly” criteria. In fact, the tool searches only schools that pay to be included, whether respondent has designated them as “military friendly” or not. Thus, several schools not designated by the respondent as “military friendly” are included in the Matchmaker search results. The proposed complaint alleges that the respondent’s misrepresentations regarding the scope of the Matchmaker search tool constitute a deceptive act or practice under Section 5 of the FTC Act.

Additionally, the FTC complaint alleges that the respondent, in certain of its articles, emails, and social media posts, misrepresented that its endorsements were independent and not paid advertising, and failed to adequately disclose that the content recommended schools that paid the respondent specifically to be promoted therein. The proposed complaint alleges that those misrepresentations and undisclosed paid recommendations constitute deceptive acts or practices under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future.

Part I prohibits the respondent from making any misrepresentations regarding the scope of any search tool, including whether the tool only searches “military friendly” schools. Part I further prohibits the respondent from making any misrepresentations about material connections between it and any schools, and from making any misrepresentations that paid commercial advertising is independent content.

Analysis to Aid Public Comment

Part II requires the respondent, when endorsing schools (or preparing third-party endorsements of schools), to clearly and conspicuously disclose, in close proximity to the endorsement, any payments or other material connections between the respondent or the other endorser and the school. This disclosure requirement applies where consumers are likely to believe that such endorsements reflect the beliefs of the respondent or other endorser (and not the schools themselves).

Parts III through VII of the proposed order are reporting and compliance provisions. Part III is an order distribution provision. Part IV requires the respondent to submit a compliance report one year after the issuance of the order, and to notify the Commission of corporate changes that may affect compliance obligations. Part V requires the respondent to create, for 10 years, accounting, personnel, complaint, and advertising records, and to maintain each of those records for 5 years. Part VI requires the respondent to submit additional compliance reports within 10 business days of a written request by the Commission, and to permit voluntary interviews with persons affiliated with the respondent. Part VII “sunsets” the order after twenty 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

BECTON, DICKINSON AND COMPANY
AND
C. R. BARD, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4637 File No. 171 0140*
Complaint, December 22, 2017 – Decision, January 19, 2018

This consent order addresses the \$24 billion acquisition by Becton, Dickinson and Company (“BD”) of certain assets of C. R. Bard, Inc. The complaint alleges that the proposed 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. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The consent order requires the respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc.

Participants

For the *Commission*: *Kenneth A. Libby*.

For the *Respondents*: *Michael Sheerin, Lindsey Strang, and Steve Sunshine, Skadden; Nelson Fitts, Wachtell*.

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 Becton, Dickinson and Company (“BD”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the issued and outstanding shares of Respondent C. R. Bard, Inc. (“Bard”) by means of a merger, 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, 15 U.S.C. § 45, and it appearing to the Commission that

Complaint

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

I. RESPONDENTS

1. Respondent BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 1 Becton Drive, Franklin Lakes, New Jersey, 07417.

2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 730 Central Avenue, Murray Hill, New Jersey 07974.

3. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a 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 PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, proposed to acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, marketing, distribution, and sale of tunneled home drainage catheter systems and soft tissue core needle biopsy devices.

Complaint

- a. Tunneled home drainage catheter systems treat recurrent fluid buildup in the lungs or the abdomen of patients suffering from certain diseases, such as cancer. These systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. Once a medical doctor places the indwelling catheter into a patient, fluid drainage can take place in a patient's home or in a hospice setting.
- b. Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-assisted biopsy devices which are used only for breast biopsies and employ a vacuum to remove larger tissue samples.

6. For the purposes of this Complaint, the United States is the relevant geographic market in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

IV. STRUCTURE OF THE MARKET

7. Respondents BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States. BD and Bard have the number one and number two market share positions, respectively. Post-merger, the Respondents would have a combined market share of approximately 98% in the United States. Two other firms comprise the small balance of the relevant market. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for tunneled home drainage catheter systems.

8. Respondents BD and Bard are the two largest manufacturers of soft tissue core needle biopsy devices in the United States. Bard and BD have the number one and number two market share positions, respectively. Post-merger, the

Complaint

Respondents would have a combined market share of approximately 60% or greater in the United States. Other firms in this market have considerably smaller shares than the Respondents combined. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for soft tissue core needle biopsy devices.

V. EFFECTS OF THE ACQUISITION

9. The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between BD and Bard in the markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition, if consummated, would increase the likelihood that (1) a combined BD and Bard would be able to unilaterally exercise market power, (2) customers would be forced to pay higher prices, and (3) customers would experience lower levels of innovation for each relevant product.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. *De novo* entry would be costly and not take place in a timely manner because of the time required for product development, U.S. Food and Drug Administration approval, establishment of a sales and marketing infrastructure, and market adoption. No entry is likely to occur that would deter or counteract the competitive harm likely to result from the Acquisition.

VII. VIOLATIONS CHARGED

11. The Agreement and Plan of Merger described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

Order to Maintain Assets

12. The Acquisition described in Paragraph 4, 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, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of December 2017, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint (“Complaint”) that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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 thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.
2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
3. 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.**

IT IS 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. “BD” means Becton, Dickinson and Company; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Becton, Dickinson and Company ,

Order to Maintain Assets

and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, BD shall include Bard.

- B. “Bard” means C. R. Bard, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means BD and Bard, individually and collectively.
- E. “Decision and Order” means the:
 - 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.
- F. “Divestiture Product(s)” means the following, individually and collectively:
 - 1. the Tunneled Home Drainage Catheter System Products; and
 - 2. the Soft Tissue Core Needle Biopsy Products.
- G. “Divestiture Product Assets” means the following, individually and collectively:
 - 1. the Tunneled Home Drainage Catheter System Assets To Be Divested; and

Order to Maintain Assets

2. the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- H. “Divestiture Product Business(es)” means the Business of a Respondent (as that Respondent is specified in the definition of each Divestiture Product) related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondent and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to the Respondent.
- I. “Manufacturing Technology” means the following, individually and collectively:
1. the Tunneled Home Drainage Catheter System Manufacturing Technology; and
 2. the Soft Tissue Core Needle Biopsy Manufacturing Technology.
- J. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- K. “Transition Period” means, for each Divestiture Product, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the relevant Acquirer directs the Respondent(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date four (4) months after the Closing Date for such Divestiture Product(s).
- L. “Orders” means the Decision and Order and this Order to Maintain Assets.

Order to Maintain Assets

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

- A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such 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 related Divestiture Product Businesses.

- B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related 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/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: suppliers; vendors and distributors; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

Order to Maintain Assets

1. providing each of the respective 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 such Divestiture Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;
3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition);
5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such Divestiture Product Business; and

Order to Maintain Assets

6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such Divestiture Product Business by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force that is (i) substantially as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- D. For each Acquirer of a Divestiture Product, Respondents shall:
1. no later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:
 - a. name, job title or position, date of hire by the relevant Respondent, and effective service date;
 - b. specific description of the employee's responsibilities and primary work location;
 - c. the base salary or current wages;

Order to Maintain Assets

- d. most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
 - e. employment and leave status (i.e., active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
 - f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
 - g. at the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
2. no later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;
 3. not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere

Order to Maintain Assets

with the recruitment or employment of an Employee by the Proposed Acquirer;

4. remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; provided, however, that Respondents may:
 - a. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
 - b. hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.D.

provided, however, that this Paragraph II.D. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended

Order to Maintain Assets

for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

6. until the Closing Date, provide all Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market 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(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).
- E. During the Transition Period, with respect to each Divestiture Product that is marketed or sold before the Closing Date for that Divestiture Product, Respondents, in consultation with the relevant Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:
1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Divestiture Products by the Acquirer is not delayed or impaired by the Respondents;
 2. designate employees of Respondents knowledgeable about the marketing, distribution, and sale 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 purposes of assisting in the transfer to the Acquirer of the Business related to the Divestiture Products;

Order to Maintain Assets

3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;
 4. continue to market, distribute, and sell the Divestiture Products;
 5. allow the Acquirer access at reasonable business hours to all Confidential Business Information related to the Divestiture Products 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 Divestiture Products that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;
 6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) on a regular basis and in a timely manner;
 7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer on a regular basis and in a timely manner; and
 8. establish projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.
- F. Pending divestiture of the Divestiture Product Assets, Respondents shall:

Order to Maintain Assets

1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, (iv) the Monitor (if any has been appointed), *except* to the extent necessary to comply with applicable law; and
 3. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees of the Respondents and institute procedures and requirements to ensure that the Respondents employees:
 - a. do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain

Order to Maintain Assets

Assets is issued by the Commission, Respondents 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.

- H. Respondents 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 Closing Date. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at that Respondent'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 acknowledgment program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.
- I. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.
- J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through their 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

Order to Maintain Assets

impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

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

- A. Mazars LLP shall serve as Monitor to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Decision and Order and the Order to Maintain Assets (collectively “Orders”), and the Remedial Agreements, pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix I and Confidential Appendix I-1 to the Order to Maintain Assets. The Monitor Agreement shall become effective on the date the Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the rights and powers necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:
1. The Monitor shall have the power and authority to monitor Respondents’ 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 a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve until the latter of:
 - a. the date the Respondents complete the transfer of all Divestiture Product Assets, and the transfer and delivery of the related

Order to Maintain Assets

Manufacturing Technology, Divestiture
Product IP and Divestiture Product IP License;
or

- b. the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s);

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- B. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' 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 the Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents 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 the Respondents' compliance with the Orders.
- C. 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.
- D. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages,

Order to Maintain Assets

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.

- E. 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 information submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.
- F. 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.
- G. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the

Order to Maintain Assets

Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

- I. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- J. 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.
- K. 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.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every thirty (30) 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. Respondents shall submit at the same time a copy of its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Respondents shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by the relevant Respondent to the relevant Acquirer; and
- B. a detailed description of the timing for the completion of such obligations;

Order to Maintain Assets

provided, however, that, 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 reports of compliance required to be submitted by Respondents pursuant to the Decision and Order.

V.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger, or consolidation of a Respondent; 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 the Orders.

VI.

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 any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondents 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 books, ledgers, accounts, correspondence, memoranda, and all other records and documents 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

Order to Maintain Assets

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.

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 the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed; *provided, however,* that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final;
- C. the day after the Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer and the Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the Manufacturing Technology are complete; or
- D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, 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, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Becton, Dickinson and Company is a corporation organized, existing and doing business

Decision and Order

under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.

2. Respondent C. R. Bard, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “BD” means Becton, Dickinson and Company, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BD, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, BD will include Bard.
- B. “Bard” means C. R. Bard, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means BD and Bard, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

Decision and Order

- E. “Acquirer” means the following:
1. Merit; or
 2. Any other Person that receives the prior approval of the Commission to acquire the Assets To Be Divested.

Provided, however, that if Merit is not approved by the Commission as the Acquirer, the Soft Tissue Core Needle Biopsy Assets To Be Divested and the Tunneled Home Drainage Catheter System Assets To Be Divested may, in the Commission’s sole discretion, be divested to two different Acquirers that receive the prior approval of the Commission.

- F. “Acquisition” means BD’s acquisition of Bard through a series of transactions as contemplated by and pursuant to the Agreement and Plan of Merger dated April 23, 2017, among BD, Bard, and Lambda Corp. that was submitted by the Respondents to the Commission.

- G. “Acquisition Date” means the date on which the Acquisition is consummated.

- H. “Actual Cost” means the actual cost incurred to provide the relevant goods or services, including the cost of direct labor and direct material used and allocation of overhead that is consistent with past custom and practice.

Provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order; and (ii) an agreement becomes a Remedial Agreement for the Assets to be Divested, “Actual Cost” means such cost as is provided in such Remedial Agreement.

- I. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for

Decision and Order

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 the Tunneled Home Drainage Catheter System Products and Soft Tissue Core Needle Biopsy Products, as the case may be. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).

- J. “Application(s)” means all submissions and applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Parts 800 to 898, including all premarket notifications (Section 510(k) submissions) and premarket approvals (“PMA”), and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto.
- K. “Assets To Be Divested” means the Tunneled Home Drainage Catheter System Assets To Be Divested and the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- L. “Business” means the research, Development, manufacture, commercialization, distribution, marketing, promotion, importation, exportation, advertisement, and/or sale of a Product.
- M. “Business Records” means all books, records, files, databases, printouts, and all other documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: customer files, customer lists, customer purchasing histories, supplier and vendor files, vendor lists, correspondence, advertising and marketing materials, marketing analyses, sales materials, price lists, cost information, employee lists and contracts,

Decision and Order

salary and benefits information, personnel files, financial and accounting records and documents, financial statements, financial plans and forecasts, operating plans, studies, reports, regulatory materials, Applications, Agency filings and submissions, Agency correspondence, operating guides, technical information, manuals, policies and procedures, service and warranty records, maintenance logs, equipment logs, registrations, and permits.

- N. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- O. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a product, and includes, without limitation, such clinical trials as are designed to satisfy the requirements of an Agency in connection with any product and any other human study used in research and Development of a product.
- P. “Closing Date” means the date Respondents (or a Divestiture Trustee) consummate a transaction to divest any of the Assets To Be Divested to an Acquirer pursuant to this Order.
- Q. “Confidential Business Information” means competitively sensitive, proprietary, and all information owned by, or in the possession or control of, any Respondent that is not in the public domain and to the extent that it is directly related to the conduct of the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business. The term “Confidential Business Information” excludes the following:
1. Information relating to any Respondent’s general business strategies or practices that does not discuss with particularity the Tunneled Home

Decision and Order

Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business;

2. Information that is contained in documents, records or books of any Respondent that are provided to an Acquirer by a Respondent that is unrelated to either the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business or that is exclusively related to the Retained Business;
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;
4. Information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality and non-disclosure agreement with respect to such information by Respondents;
5. Information that is required by Law to be disclosed;
6. Information that does not directly relate to the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business; and
7. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:
 - a. Is necessary to be included in Respondents' mandatory regulatory filings, *provided, however,* that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

Decision and Order

- b. Is information the disclosure of which is consented to by the Acquirer;
 - c. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement; or
 - d. Is disclosed in complying with this Order.
- R. “Contract Manufacturing Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, sufficient quantities of Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture the Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products in commercial quantities, and in a manner consistent with cGMP, independently of Respondents.
- S. “Development” means all preclinical and clinical medical device development activities, including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a product, product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- T. “Divestiture Product IP” means (a) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date

Decision and Order

(other than trademarks or trade dress), that are used in or would otherwise be infringed by the Soft Tissue Core Needle Biopsy Business as of the Closing Date but that are not included in the Soft Tissue Core Needle Biopsy Assets To Be Divested; and (b) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date (other than trademarks or trade dress), that are used in or would otherwise be infringed by the Tunneled Home Drainage Catheter System Business as of the Closing Date but that are not included in the Tunneled Home Drainage Catheter System Assets To Be Divested.

- U. “Divestiture Product IP License” means a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license to the Acquirer under any Divestiture Product IP to operate the Soft Tissue Core Needle Biopsy Business, including the research, Development, manufacture, distribution, marketing or sale of Soft Tissue Core Needle Biopsy Products anywhere in the world, and the Tunneled Home Drainage Catheter System Business, including the research, Development, manufacture, distribution, marketing or sale of Tunneled Home Drainage Catheter System Products anywhere in the world.
- V. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- W. Employee(s)” means:
 1. If Merit is approved by the Commission to be the Acquirer, the employees identified in the Merit Agreement; or
 2. If the Acquirer(s) is not Merit, any individual employed on a full-time, part-time, or contract basis as of, and at any time after, April 23, 2017,

Decision and Order

the date of the announcement of the Acquisition, by:

- a. BD, where such employee's job responsibilities relate or related primarily to the Soft Tissue Core Needle Biopsy Business; and
 - b. Bard, where such employee's job responsibilities relate or related primarily to the Tunneled Home Drainage Catheter System Business.
- X. "Exclusive Supplier Contract" means any contract for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products where under the terms of the contract with Respondents, the Acquirer would be prevented from entering into a contract for the supply of such finished goods, inputs, or instrumentation with such Supplier.
- Y. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, Agency, or government commission, or any judicial or regulatory authority of any government.
- Z. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- AA. "Merit" means Merit Medical Systems, Inc., a corporation organized under the laws of the state of Utah with its principal place of business at 1600 West Merit Parkway, South Jordan, Utah 64095.
- BB. "Merit Agreement" means the "Asset Purchase Agreement" by and between BD and Merit, dated as of November 15, 2017, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated thereby, related to the Assets

Decision and Order

To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The Merit Agreement is attached to this Order as Non-Public Appendix A.

- CC. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- DD. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- EE. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention, applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date, and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.
- FF. “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.
- GG. “Product(s)” means any medical device or system regulated by the FDA as a Class II (Special Controls) or Class III (PMA) medical device pursuant to 21 C.F.R. Parts 800 to 898, *i.e.*, an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory, which is:

Decision and Order

1. recognized in the official National Foundry, or the United States Pharmacopoeia, or any supplement to them:
 2. intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or
 3. intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.
- HH. “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 Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any Application related to that Product.
- II. “Proposed Acquirer” means any proposed acquirer of the Assets To Be Divested that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order. “Proposed Acquirer” includes Merit.
- JJ. “Remedial Agreement(s)” means the following:
1. The Merit Agreement;
 2. Any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer that has received the prior approval of the

Decision and Order

Commission) to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

KK. “Retained Business” means:

1. All right, title and interest in and to the names “BD” and “Bard,” together with all variations thereof and all trademarks and trade dress containing, incorporating or associated with any of the foregoing, and any trademark and trade dress other than what is included in the Tunneled Home Drainage Catheter System Assets To Be Divested or the Soft Tissue Core Needle Biopsy Assets To Be Divested;
2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products or that are not related to the Assets to be Divested; and
3. Cash and cash equivalents; tax assets; stock in any entity; corporate and tax records of any entity; insurance policies; benefit plans; and accounts receivable arising prior to the Closing Date.

LL. “Retained Products” means any Product researched, Developed, manufactured, marketed, sold or distributed by Respondents other than the Tunneled Home Drainage Catheter System Products and the Soft Tissue Core Needle Biopsy Products.

MM. “Soft Tissue Core Needle Biopsy Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Soft Tissue Core Needle Biopsy Business, including any improvements as of the Closing Date, and all such products under

Decision and Order

Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:

1. Finished product inventory;
2. Advertising, marketing and promotional materials for the Soft Tissue Core Needle Biopsy Products;
3. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Soft Tissue Core Needle Biopsy Products;
4. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Soft Tissue Core Needle Biopsy Products;
5. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Soft Tissue Core Needle Biopsy Products;
6. Copies of all Soft Tissue Core Needle Biopsy Products Manufacturing Technology;
7. All equipment and machinery (including all molds) and the spare parts held by BD as of the Closing Date for use in such equipment and machinery;
8. Copies of all Soft Tissue Core Needle Biopsy Scientific and Regulatory Material;
9. Soft Tissue Core Needle Biopsy Intellectual Property;

Decision and Order

10. A list of existing and past customers for the Soft Tissue Core Needle Biopsy Products;
11. Copies of customer credit and other records for the Soft Tissue Core Needle Biopsy Products;
12. Copies of all books, ledgers and other business records for the Soft Tissue Core Needle Biopsy Products;
13. Copies of clinical, regulatory, and customer sales databases for the Soft Tissue Core Needle Biopsy Products; and
14. All licenses, permits and authorizations related to the Soft Tissue Core Needle Biopsy Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Soft Tissue Core Needle Biopsy Products.

provided, however, that “Soft Tissue Core Needle Biopsy Business” does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Soft Tissue Core Needle Biopsy Business that contain information (a) that relates both to Soft Tissue Core Needle Biopsy Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Soft Tissue Core Needle Biopsy Products.

Decision and Order

- NN. “Soft Tissue Core Needle Biopsy Business” means the Business conducted by BD as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Soft Tissue Core Needle Biopsy Products.
- OO. “Soft Tissue Core Needle Biopsy Intellectual Property” means all of the following to the extent owned by BD and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products:
1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
 2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).
- PP. “Soft Tissue Core Needle Biopsy Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent related exclusively or predominantly to the manufacture of Soft Tissue Core Needle Biopsy Products for sale, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions,

Decision and Order

annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

- QQ. “Soft Tissue Core Needle Biopsy Products” means BD’s soft tissue core needle biopsy devices as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the following Trademarks: Achieve™, Pink Achieve™, Temno™, Original Temno™, Temno Evolution™, Adjustable Coaxial Temno™ and Tru-Cut™, and all such Products under Development, including but not limited to Sontina.
- RR. “Soft Tissue Core Needle Biopsy Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are related to the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products.
- SS. “Supplier” means any Third Party provider of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products.
- TT. “Transition Services” means technical services, personnel, assistance, training, and other logistical, administrative and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Assets To Be Divested from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and

Decision and Order

repair of facilities and equipment, manufacturing, purchasing, quality control, R&D support, technology transfer, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

- UU. “Transition Services Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for the Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.
- VV. “Third Party(ies)” means any non-governmental Person other than the Respondents, or the Acquirer.
- WW. “Tunneled Home Drainage Catheter System Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Tunneled Home Drainage Catheter System Business, including any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:
1. Finished product inventory;
 2. Instrumentation inventory for the Tunneled Home Drainage Catheter System Products;
 3. Advertising, marketing and promotional materials for the Tunneled Home Drainage Catheter System Products;
 4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation,

Decision and Order

packaging specifications, quality control standards and regulatory records for the Tunneled Home Drainage Catheter System Products;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Tunneled Home Drainage Catheter System Products;
6. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Tunneled Home Drainage Catheter System Products;
7. Copies of all Tunneled Home Drainage Catheter System Products Manufacturing Technology;
8. All equipment and machinery (including all molds) and the spare parts held by Bard at the Closing Date for use in such equipment and machinery;
9. Copies of all Tunneled Home Drainage Catheter System Scientific and Regulatory Material;
10. Tunneled Home Drainage Catheter System Intellectual Property;
11. A list of existing and past customers for the Tunneled Home Drainage Catheter System Products;
12. Copies of customer credit and other records for the Tunneled Home Drainage Catheter System Products;
13. Copies of all books, ledgers and other business records for the Tunneled Home Drainage Catheter System Products;

Decision and Order

14. Copies of clinical, regulatory, and customer sales databases for the Tunneled Home Drainage Catheter System Products; and
15. All licenses, permits and authorizations related to the Tunneled Home Drainage Catheter System Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Tunneled Home Drainage Catheter System Products.

provided, however, that “Tunneled Home Drainage Catheter System Business” does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Tunneled Home Drainage Catheter System Business that contain information (a) that relates both to Tunneled Home Drainage Catheter System Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Tunneled Home Drainage Catheter System Products.

- XX. “Tunneled Home Drainage Catheter System Business” means the Business conducted by Bard as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Tunneled Home Drainage Catheter System Products.
- YY. “Tunneled Home Drainage Catheter System Intellectual Property” means all of the following to the

Decision and Order

extent owned by Bard and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter Products:

1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).

ZZ. “Tunneled Home Drainage Catheter System Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent exclusively or predominantly related to the manufacture of Tunneled Home Drainage Catheter System Products for sale, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

AAA. “Tunneled Home Drainage Catheter System Products” means Bard’s tunneled home drainage catheter

Decision and Order

systems used to reduce symptoms associated with malignant pleural effusion or malignant ascites as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the trademark Aspira, and all such Products under Development.

- BBB. “Tunneled Home Drainage Catheter System Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are exclusively or predominantly related to the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter System Products.

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

- A. Not later than the earlier of: (a) February 14, 2018, or (b) three (3) days after Respondents receive all regulatory approvals necessary for the divestiture of the Assets To Be Divested, Respondents shall divest the Assets To Be Divested and grant the Divestiture Product IP License, absolutely and in good faith, to Merit pursuant to, and in accordance with, the Merit Agreement(s) (which agreement(s) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondents under such agreement(s)), and each such agreement, if it becomes a Remedial Agreement, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Assets To Be Divested to Merit prior to the Order Date, and if, at the time the Commission determines to

Decision and Order

make this Order final and effective, the Commission notifies Respondents that Merit is not an acceptable purchaser of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Merit, in whole or in part, as directed by the Commission, and shall divest the Assets To Be Divested within one hundred eighty (180) days from 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;

provided further, however, that if Respondents have divested the Assets To Be Divested to Merit 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 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 Assets To Be Divested to Merit (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;

provided further, however, that subject to the approval of the Commission, Respondents may obtain a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license from the Acquirer to the Tunneled Home Drainage Catheter System Intellectual Property and the Soft Tissue Core Needle Biopsy Intellectual Property for use in the research, Development, manufacture, distribution, marketing or sale of Retained Products, anywhere in the world, to the extent and only to the extent that the Tunneled Home Drainage Catheter System Intellectual Property or the Soft Tissue Core Needle Biopsy Intellectual Property was used in or would otherwise be infringed by the Retained Products as of the Closing Date.

Decision and Order

- B. Prior to the Closing Date, Respondents shall, at their sole expense, obtain all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Assets To Be Divested to the Acquirer(s), and to permit the Acquirer(s) to continue to operate the Businesses related to the Assets To Be Divested in a manner that will achieve the purposes of this Order; *provided, however*, that the Respondents may satisfy this requirement by certifying that the Acquirer(s) has executed agreements or entered into equivalent arrangements directly with the relevant Third Party(ies).
- C. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for a period of thirty (30) months from the Closing Date; *provided, however*, that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of a Transition Services Agreement as provided in this Paragraph. The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Actual Costs for such personnel, technical support, assistance, training, and other services as are necessary to transfer the Assets To Be Divested to the Acquirer and enable the Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.
- D. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, enter into a Contract Manufacturing Agreement to supply the Acquirer with the Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products for a period of two (2) years from the Closing Date; *provided, however*, that such Agreement

Decision and Order

shall provide that the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents. The Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products supplied by Respondents to the Acquirer pursuant to such Contract Manufacturing Agreement shall be at no greater than Respondents' Actual Costs.

- E. Respondents shall:
1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Assets To Be Divested;
 2. deliver all Confidential Business Information related to the Assets To Be Divested to the Acquirer:
 - 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;
 3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor (if any has been appointed) 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 Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

Decision and Order

4. Not use, directly or indirectly, any Confidential Business Information, other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Assets to be Divested; or (iii) applicable Law, including mandatory regulatory filings;
5. Not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, and (iv) the Monitor, if any, and the Divestiture Trustee, if any; and
6. No later than thirty (30) days after the Closing Date, provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacture, distribution, sale, or marketing of the Assets to be Divested or who may have or have access to Confidential Business Information ("Designated Employees"); Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for at least one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records at its principal place of business regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Designated Employees.

Decision and Order

provided however, that this Paragraph II.E. shall not apply:

- a. To any Confidential Business Information related to the Tunneled Home Drainage Catheter System Business that Respondents can demonstrate to the Commission that BD obtained other than in connection with the Acquisition;
- b. To any Confidential Business Information related to the Soft Tissue Core Needle Biopsy Business that Respondents can demonstrate to the Commission that Bard obtained other than in connection with the Acquisition;
- c. To any Confidential Business Information to the extent related to Retained Products or the Retained Business; and
- d. To the use of Confidential Business Information by Respondents to defend against legal claims brought by any Third Party, or investigations or enforcement actions by Government Entities.

F. Respondents shall:

1. No later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:

Decision and Order

- a. Name, job title or position, date of hire by the relevant Respondent, and effective service date;
 - b. Specific description of the employee's responsibilities and primary work location;
 - c. The base salary or current wages;
 - d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
 - e. Employment and leave status (*i.e.*, active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
 - f. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
 - g. At the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
2. No later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;

Decision and Order

3. Not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere with the recruitment or employment of an Employee by the Proposed Acquirer;
4. Remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. Not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:
 - a. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
 - b. Hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.F.

Decision and Order

Provided, however, that this Paragraph II.F. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

- G. Until the Closing Date, Respondents shall take such actions as are necessary to:
1. maintain the full economic viability and marketability of the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
 2. minimize any risk of loss of competitive potential for the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
 3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business; and
 4. not sell, transfer, encumber, or otherwise impair the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business.

Decision and Order

Provided, however, that Respondents are required to maintain, for the term of the Contract Manufacturing Agreement, the full economic viability and marketability, other than ordinary wear and tear, of any equipment or machinery included in the Assets To Be Divested that remain in any facility of Respondents during the term of the Contract Manufacturing Agreement.

- H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Acquirer from entering into a contract with the Supplier for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.
- I. The purpose of the divestiture of the Assets To Be Divested to an Acquirer is to create an independent, viable and effective competitor in the markets for the Development, license, manufacture, marketing, distribution, and sale of (1) tunneled home drainage catheter systems and (2) soft tissue core needle biopsy devices, and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Mazars LLP shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of

Decision and Order

their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement(s).

- B. The Monitor Agreement shall require that, not later than three (3) days after the Commission accepts the Order for comment, Respondents 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, and Respondents shall effectuate such transfer.
- 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 Respondents' compliance with the divestiture and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. The Monitor shall serve at least until Respondents have fulfilled all their obligations under Paragraphs II.A., II.B., II.C., II.D., and II.E. of this Order.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, including, but not limited

Decision and Order

to, their obligations related to the Assets To Be Divested. Respondents 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 Respondents' compliance with this Order.

- E. 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.
- F. 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 the willful default, recklessness, gross negligence or bad faith of the Monitor, its employees, agents or advisors.
- G. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer, with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.

Decision and Order

- H. 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.
- I. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- J. 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 same manner as provided in this Paragraph.
- K. 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.
- L. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not fully complied with the obligations to divest the Assets To Be Divested as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Assets To Be Divested. 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,

Decision and Order

Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the Assets To Be Divested. 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 Respondents to comply with this Order.

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

Decision and Order

power and authority to divest the Assets To Be Divested.

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 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; 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 Assets To Be Divested, and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph 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

Decision and Order

minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring 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 reasonably 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 the Assets To Be Divested.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or

Decision and Order

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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested; *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.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be

Decision and Order

necessary or appropriate to accomplish the Divestiture required by this Order.

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement 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. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Assets To Be Divested, 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 Remedial 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 Remedial Agreement(s), any modification or amendment of any Remedial 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.

Decision and Order

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

- B. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.E., of this Order, and every sixty (60) days thereafter until Respondents have fully complied with the Paragraphs II.C. and II.D. of this Order, 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 this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time:
 - 1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;
 - 2. A detailed plan to deliver all Confidential Business Information required to be delivered to the Acquirer pursuant to Paragraph II.E., and agreed upon by the relevant Acquirer and the Monitor (if applicable) and any updates or changes to such plan;
 - 3. A description of all Confidential Business Information delivered to the Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;
 - 4. A description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and

Decision and Order

5. A description of all technical assistance provided to the Commission-Approved Acquired during the reporting period.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of a Respondent; (2) acquisition, merger or consolidation of Respondents; or (3) other change in the Respondents; in each case that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, and the creation or dissolution of subsidiaries.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 19, 2028.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. INTRODUCTION**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Becton, Dickinson and Company (“BD”) and C. R. Bard, Inc. (“Bard”) (collectively, the “Respondents”) that is designed to remedy the anticompetitive effects that would likely result from BD’s proposed acquisition of Bard. The proposed Decision and Order (“Order”) requires the Respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc. (“Merit”). The Order To Maintain Assets requires Respondents to maintain the viability and competitiveness of the businesses pending divestiture.

Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, will acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 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. markets for tunneled home

Analysis to Aid Public Comment

drainage catheter systems and soft tissue core needle biopsy devices. The Consent Agreement is designed to remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

The Commission has placed the 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 Consent Agreement, along with any comments received, and decide whether it should withdraw from the Consent Agreement, modify the Consent Agreement or Order, or make the Order final.

II. THE RESPONDENTS

BD, headquartered in Franklin Lakes, New Jersey, is a medical technology company that manufactures and sells a broad range of medical supplies, devices, laboratory equipment, and diagnostic products throughout the world. Its operations consist of two business segments: BD Medical and BD Life Sciences. BD Medical provides a broad array of medical technologies and devices to hospitals, clinics, physicians' office practices, pharmacies, pharmaceutical companies, and healthcare workers.

Bard, headquartered in Murray Hill, New Jersey, is a medical technology company that manufactures medical, surgical, diagnostic, and patient care devices sold to hospitals, healthcare professionals, extended care facilities, and other medical facilities throughout the world. Its operations consist of four principal divisions: Bard Access Systems, Inc., Bard Medical Division, Bard Peripheral Vascular, Inc., and Bard Biopsy Systems.

III. THE RELEVANT MARKETS AND STRUCTURE OF THE MARKETS

A. Tunneled Home Drainage Catheter Systems

Tunneled home drainage catheter systems are medical devices used to treat recurrent fluid buildup in the lungs and abdomen,

Analysis to Aid Public Comment

conditions known as pleural effusions and malignant ascites, respectively. Patients suffering from these conditions, often due to cancer or other serious illnesses, commonly require frequent fluid drainage. Tunneled home drainage catheter systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. After a medical doctor places the indwelling catheter, the device allows fluid drainage to take place conveniently in a patient's home or in a hospice setting where the patient or a caregiver can attach, remove, replace, and dispose of the drainage receptacle as frequently as needed. Although patients requiring pleural or peritoneal drainage can undergo an outpatient medical procedure when fluid build-up becomes severe, such procedures are not suitable alternatives to tunneled home drainage catheter systems, because they require a patient to make repeated trips to a healthcare facility to see a doctor. Customers likely would not substitute outpatient medical procedures in response to a small but significant increase in the price of tunneled home drainage catheter systems.

BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States, with a combined market share of approximately 98%. The remaining market share is divided between Rocket Medical plc ("Rocket Medical") and B. Braun Medical Inc. ("B. Braun"). Rocket Medical is a new entrant to the U.S. market, and both Rocket Medical and B. Braun, in addition to having a much smaller share of the market than BD and Bard, have far less recognition among U.S. customers.

B. Soft Tissue Core Needle Biopsy Devices

Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. There are no practical alternatives to soft tissue core needle biopsy devices for clinicians seeking to perform a soft tissue biopsy. Other biopsy devices, such as bone or bone marrow biopsy devices, are not approved or intended to be used for soft tissue biopsies. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-

Analysis to Aid Public Comment

assisted biopsy (“VAB”) devices which employ a vacuum to remove larger tissue samples. VAB devices are used for breast biopsies involving lesions that are difficult to locate and are not used to perform biopsies of other soft tissues and organs. VAB devices are more complex devices that are sold at a significantly higher price than soft tissue core needle biopsy devices. Accordingly, customers likely would not switch to VAB devices in response to a small but significant increase in the price of soft tissue core needle biopsy devices.

Bard and BD are the two largest manufacturers of soft tissue core needle biopsy devices in the United States, with a combined market share of 60% or greater. Other participants in the market include Cook Medical, Argon Medical Devices, Inc., and Hologic, Inc., but each of these manufacturers has a smaller market share than either Bard or BD. In addition, there is a fringe of other manufacturers with very small market shares.

C. The Relevant Geographic Market

The relevant geographic market for both tunneled home drainage catheter systems and soft tissue core needle biopsy devices is the United States. These relevant products are medical devices regulated by the U.S. Food and Drug Administration (“FDA”). Medical devices sold outside of the United States, but not approved for sale in the United States, are not viable competitive alternatives for U.S. consumers.

IV. COMPETITIVE EFFECTS OF THE TRANSACTION

The proposed Acquisition would likely substantially lessen competition in the U.S. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition would combine the largest and second-largest suppliers of both products in the United States and would substantially increase concentration in already highly concentrated markets. Under the *Horizontal Merger Guidelines*, the Acquisition would presumptively create or enhance market power. By eliminating direct and substantial competition between Respondents, the proposed Acquisition likely would

Analysis to Aid Public Comment

allow the combined firm to exercise market power unilaterally, resulting in higher prices and/or reduced innovation.

V. ENTRY

Entry in the relevant markets 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 into the markets for each of these devices is difficult, time-consuming, and expensive, requiring a significant investment of time and money for product research and development, regulatory approval by the FDA, and the establishment of a sales and marketing infrastructure sufficient to develop customer awareness and acceptance of the products.

VI. THE PROPOSED CONSENT AGREEMENT

The Consent Agreement remedies the competitive concerns raised by the proposed Acquisition by requiring the Respondents to divest all of the assets, facilities, and resources relating to Bard's tunneled home drainage catheter systems business and BD's soft tissue core needle biopsy devices business to Merit. The provisions of the Consent Agreement will enable Merit to become an independent, viable, and effective competitor in the respective relevant markets and maintain the competition that currently exists.

Merit, headquartered in South Jordan, Utah, is a global company with 30 years of experience in the development, manufacture, and distribution of medical devices used in interventional, diagnostic, and therapeutic procedures. Merit offers a portfolio of products that is highly complementary to the tunneled home drainage catheter systems being acquired. Merit also recently introduced its first soft tissue core needle biopsy device product. Merit possesses substantial industry expertise in these product areas and sells its products to similar customers as BD and Bard. For these reasons, Merit is well positioned to restore the benefits of competition that would be lost due to the Acquisition.

Analysis to Aid Public Comment

Pursuant to the Order, Merit will receive all rights and assets related to Bard's tunneled home drainage catheter system business and BD's soft tissue core needle biopsy device business, including all of the confidential business information used in those businesses. Merit will own or receive a license to all intellectual property necessary to run the businesses. It will also acquire the equipment used in the manufacturing of the products and all documentation and other information related to the products. Respondents will also contract manufacture products for Merit until it is able to manufacture them itself, and Respondents will provide transitional services to Merit to assist the company in establishing manufacturing capabilities for the divested products.

The Respondents must accomplish the divestitures no later than 10 days after the consummation of the proposed Acquisition. If the Commission determines that Merit is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the Respondents to unwind the sale of assets to Merit and then divest the assets to a Commission-approved acquirer(s) within 180 days of the date the Order becomes final. Pursuant to the Order To Maintain Assets, Respondents must maintain the businesses pending divestiture.

The Commission has agreed to appoint a Monitor to ensure that the Respondents comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of assets to Merit. The Commission has appointed Mazars LLP as the Monitor in this matter. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

VII. OPPORTUNITY FOR PUBLIC COMMENT

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Order final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

**AGRIUM INC.,
POTASH CORPORATION OF SASKATCHEWAN
INC.,
AND
NUTRIEN LTD.**

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-4638; File No. 161 0232
Complaint, December 27, 2017 – Decision, February 5, 2018*

This consent order addresses the merger of Potash Corporation of Saskatchewan Inc. and Agrium Inc. whereby each such entity shall become a subsidiary of Nutrien Ltd. The complaint alleges that the Merger, 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 markets for: (1) superphosphoric acid (“SPA”) in North America, and (2) 65%-67% concentration nitric acid in the region near and to the east of PotashCorp’s Lima, Ohio and Agrium’s North Bend, Ohio nitric acid plants. The consent order requires the respondents to divest Agrium’s Conda, Idaho facility and related assets to Itafos and Agrium’s North Bend, Ohio facility and related assets to Trammo, Inc.

Participants

For the *Commission*: James Abell, Elizabeth Arens, Peggy Bayer Femenella, Daniel Freer, Frances Anne Johnson, Jon Nathan, and Kristian Rogers.

For the *Respondents*: Michael Egge, Latham & Watkins LLP; Phillip Proger, Jones Day.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Potash Corporation of Saskatchewan Inc. (“PotashCorp”), a corporation

Complaint

subject to the jurisdiction of the Commission, and Respondent Agrium Inc. (“Agrium”), a corporation subject to the jurisdiction of the Commission, have agreed to merge, such that each shall become a subsidiary of Respondent Nutrien Ltd. (“Nutrien”), a corporation, 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, 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. RESPONDENTS

1. Respondent PotashCorp is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its headquarters and principal place of business located at 122 1st Avenue South, Saskatoon, Saskatchewan, Canada S7K 7G3.

2. Respondent Agrium is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its headquarters and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8.

3. Respondent Nutrien is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.

II. JURISDICTION

4. Respondents PotashCorp and Agrium, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

Complaint

III. THE PROPOSED MERGER

5. Pursuant to an Arrangement Agreement (the “Merger Agreement”) dated September 11, 2016, PotashCorp and Agrium have agreed to a merger (the “Merger”) in which PotashCorp and Agrium shareholders will own 52% and 48% of Nutrien, respectively.

IV. THE RELEVANT PRODUCT MARKETS**A. Superphosphoric Acid**

6. Superphosphoric acid (“SPA”) is a relevant product market in which to analyze the effects of the Merger. SPA is a highly concentrated form of phosphoric acid that contains phosphate, an essential crop nutrient. SPA is purchased by agricultural wholesalers and retailers, who use it to produce the liquid phosphate fertilizer known as ammonium polyphosphate, which is sold to farmers.

7. A small but significant and non-transitory increase in the price of SPA would not induce customers to switch to dry phosphate fertilizer. Many farmers perceive advantages, including higher crop yield and quality, to using liquid rather than dry phosphate fertilizer, particularly in the early stages of crop development. In addition, liquid phosphates can be applied more directly to the seed than dry phosphates and can more easily be combined with other nutrients. Consistent with these perceived advantages, SPA typically garners a premium price over dry phosphates. This premium has at times expanded significantly without prompting customers to shift their purchases from liquid to dry phosphate fertilizers.

B. 65%-67% Concentration Nitric Acid

8. Nitric acid of 65%-67% concentration is a relevant product market in which to analyze the effects of the Merger. Nitric acid is a chemical compound produced through the interaction of ammonia, water, and a catalyzing agent. Nitric acid is used as a feedstock for nitrogen-based fertilizers and explosives and also is sold on the market for a variety of industrial uses,

Complaint

including in the production of stainless steel, metal-based specialty chemicals, and water-treatment and cleaning products. Nitric acid of 65%-67% concentration is the preferred concentration for most such industrial uses.

9. A small but significant and non-transitory increase in the price of 65%-67% concentration nitric acid would not induce customers to switch to other nitric acid concentrations or other chemical products. For most customers, there are no functionally equivalent chemical substitutes for 65%-67% concentration nitric acid. Purchasing lower-concentration nitric acid and increasing its concentration is not an economical alternative because the customer would have to pay both higher shipping costs to transport more diluted acid and the costs of constructing evaporation equipment. Purchasing 98% concentration nitric acid and diluting it down also is not an economical alternative due to the significant environmental and safety hazards associated with transporting and storing highly concentrated nitric acid.

V. THE RELEVANT GEOGRAPHIC MARKETS

10. The relevant geographic market in which to analyze the effects of the Merger with respect to SPA is no broader than North America. Transporting SPA overseas is logistically challenging and expensive, thus offshore imports of SPA are negligible.

11. The relevant geographic market in which to analyze the effects of the Merger with respect to 65%-67% concentration nitric acid encompasses customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants, including customer locations in Ohio, Kentucky, Pennsylvania, Maryland, West Virginia, and New Jersey. Because freight costs for nitric acid are high, and to ensure more reliable and flexible deliveries, customers strongly prefer to purchase nitric acid from more proximate suppliers. Customers near and to the east of PotashCorp's and Agrium's Ohio nitric acid plants lack viable alternative suppliers for 65%-67% concentration nitric acid.

Complaint

VI. MARKET STRUCTURE

12. PotashCorp and Agrium are two of only three suppliers of SPA in North America.

13. PotashCorp and Agrium are the primary suppliers of 65%-67% concentration nitric acid to customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants. Other producers of 65%-67% concentration nitric acid have minimal sales into this region.

14. For both relevant markets, the Merger would result in highly concentrated markets under standards set forth in the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and the relevant case law, and the Merger is therefore presumptively unlawful.

VII. ENTRY CONDITIONS

15. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the expected anticompetitive effects of the Merger. Producers of SPA or 65%-67% concentration nitric acid outside the relevant geographic markets are unlikely to defeat a price increase within the relevant geographic markets. Construction of new production facilities within the relevant geographic markets would entail significant capital costs.

VIII. EFFECTS OF THE MERGER

16. The Merger, if consummated, is likely to substantially lessen competition in the relevant lines of commerce in the following ways, among others:

- a. by eliminating direct and substantial competition between PotashCorp and Agrium;
- b. by increasing the likelihood that the merged entity will unilaterally exercise market power; and

Complaint

- c. for SPA, by increasing the likelihood of coordinated interaction among the remaining competitors in the relevant market.

17. The ultimate effects of the Merger would be to increase the likelihood that prices of SPA and 65%-67% concentration nitric acid will rise and that quality, selection, service, and innovation will be lessened.

IX. VIOLATIONS CHARGED

18. The allegations contained in Paragraphs 1 through 17 above are hereby incorporated by reference as though fully set forth here.

19. The Merger described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

20. The Merger described in Paragraph 5, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of December, 2017, issues its complaint against said Respondents.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Agrium Inc. (“Agrium”) and Potash Corporation of Saskatchewan Inc. (“PCS”) whereby each such entity shall become a subsidiary of Nutrien Ltd. (“Nutrien”) and Respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement (“Consent Agreement”) containing consent orders, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, 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 enters the following Order to Maintain Assets:

1. Respondent Agrium Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium’s

Order to Maintain Assets

principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.

2. Respondent Potash Corporation of Saskatchewan Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3. PCS's principal subsidiary in the United States is located at 1101 Skokie Blvd., Suite 400, Northbrook, Illinois 60062.
3. Respondent Nutrien Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER**I.**

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Maintain Assets is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

- A. "Agrium" means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and

Order to Maintain Assets

assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agrium, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “PCS” means Potash Corporation of Saskatchewan Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by PCS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Nutrien” means Nutrien Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Nutrien, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person that acquires either the Nitrogen Assets or the Phosphate Assets pursuant to this Order.
- F. “Confidential Information” means any and all of the following information:
 - 1. all information that is a trade secret under applicable trade secret or other law;
 - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and

Order to Maintain Assets

computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel, and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order to Maintain Assets; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

G. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and
2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.

Order to Maintain Assets

- H. “Divestiture Agreement” means the Nitrogen Acquisition Agreement, Phosphate Acquisition Agreement, or any other agreement between Respondents or a Divestiture Trustee and an Acquirer to divest the Nitrogen Assets or the Phosphate Assets that has been approved by the Commission pursuant to Paragraph VII.A. of the Decision and Order, including any ancillary agreements relating to the divestiture, all amendments, exhibits, agreements, and schedules thereto.
- I. “Effective Date” means the date the Nutrien Arrangement is completed.
- J. “Itafos” means Itafos Conda LLC a limited liability company organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 109 Post Oak Lane, Suite 145, Houston, Texas 77024.
- K. “Nitrogen Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s North Bend, Ohio, facility, including but not limited to researching, developing, manufacturing, and selling nitric acid and other products.
- L. “Nitrogen Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Nitrogen Assets.
- M. “Nitrogen Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Nitrogen Business.
- N. “Nutrien Arrangement” means the arrangement pursuant to section 192 of the Canada Business Corporations Act involving Agrium, Inc., Potash Corporation of Saskatchewan Inc. and Nutrien Ltd. as

Order to Maintain Assets

described in the Arrangement Agreement between Agrium Inc. and Potash Corporation of Saskatchewan Inc. dated September 11, 2016, whereby Agrium Inc. and Potash Corporation of Saskatchewan Inc. will become subsidiaries of Nutrien Ltd. on the date shown in the certificate of arrangement issued by the director appointed pursuant to section 260 of the Canada Business Corporations Act.

- O. “Orders” means this Order to Maintain Assets and the Decision and Order.
- P. “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 governmental body.
- Q. “Phosphate Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s Conda, Idaho facility, including but not limited to mining, researching, developing, manufacturing, and selling super phosphoric acid, mono-ammonium phosphate, and merchant grade acid.
- R. “Phosphate Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Phosphate Assets.
- S. “Phosphate Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Phosphate Business.
- T. “Trammo” means Trammo, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Rockefeller Plaza, 9th Floor, New York, New York 10020.

Order to Maintain Assets

II.

IT IS FURTHER ORDERED that from the time that Respondents execute the Consent Agreement until the Nitrogen Divestiture Date:

- A. Respondents shall operate the Nitrogen Business and Nitrogen Assets in the ordinary course of business consistent with past practices, including but not limited to:
1. Maintaining the (i) Nitrogen Business and Nitrogen Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Nitrogen Business and Nitrogen Assets, and (iii) viability, competitiveness, and marketability of the Nitrogen Business and Nitrogen Assets;
 2. Providing the Nitrogen Business with sufficient financial and other resources to (i) operate the Nitrogen Business and Nitrogen Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the Effective Date; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Nitrogen Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and

Order to Maintain Assets

3. Preserving the Nitrogen Business and Nitrogen Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Nitrogen Business and Nitrogen Assets would be diminished.
- B. No later than the Nitrogen Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
 2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- C. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Nitrogen Assets and Nitrogen Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- D. Respondents shall:
1. No later than twenty (20) days before the Nitrogen Divestiture Date (i) identify each Nitrogen Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Nitrogen Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an

Order to Maintain Assets

opportunity to meet with any Nitrogen Employee outside the presence or hearing of Respondents, and to make an offer of employment;

2. Remove any contractual impediments that may deter any Nitrogen Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
3. Provide each Nitrogen Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Nitrogen Employee who accepts an offer of employment from Acquirer; and
4. Not offer any incentive to any Nitrogen Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Nitrogen Employee by Acquirer.

For purposes of this Paragraph II.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

III.

IT IS FURTHER ORDERED that from the time that Respondents execute the Consent Agreement until the Phosphate Divestiture Date:

- A. Respondents shall operate the Phosphate Business and Phosphate Assets in the ordinary course of business consistent with past practices, including but not limited to:

Order to Maintain Assets

1. Maintaining (i) the Phosphate Business and Phosphate Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Phosphate Business and Phosphate Assets, and (iii) the viability, competitiveness, and marketability of the Phosphate Business and Phosphate Assets;
 2. Providing the Phosphate Business with sufficient financial and other resources to (i) operate the Phosphate Business and Phosphate Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the Effective Date; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Phosphate Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and
 3. Preserving the Phosphate Business and Phosphate Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Phosphate Business and Phosphate Assets would be diminished.
- B. No later than the Phosphate Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided*,

Order to Maintain Assets

however, that in the event that Respondents are unable to obtain any:

1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
 2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- C. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Phosphate Assets and Phosphate Business, including but not limited to access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.
- D. Respondents shall:
1. No later than twenty (20) days before the Phosphate Divestiture Date (i) identify each Phosphate Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Phosphate Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Phosphate Employee outside the presence or hearing of Respondents, and to make an offer of employment;
 2. Remove any contractual impediments that may deter any Phosphate Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;

Order to Maintain Assets

3. Provide each Phosphate Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Phosphate Employee who accepts an offer of employment from Acquirer; and
4. Not offer any incentive to any Phosphate Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Phosphate Employee by Acquirer.

For purposes of this Paragraph III.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business, and the post-divestiture Nitrogen Business and Phosphate Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
 1. Performing its obligations or as permitted under the Orders 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 Nitrogen Assets, Nitrogen

Order to Maintain Assets

Business, Phosphate Assets, Phosphate Business or the post-divestiture Nitrogen Business and Phosphate Business, or as required by law.

- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order to Maintain Assets, Respondents 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 IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Richard Gilmore to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and any Divestiture Agreement.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the

Order to Maintain Assets

Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order to Maintain Assets and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in the Orders and (ii) act in a fiduciary capacity for the benefit of the Commission;
2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with the Orders 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 the Orders;
3. The Monitor (i) shall serve at the expense of Respondents, 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 Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondents 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

Order to Maintain Assets

expenses result from the Monitor's gross negligence or willful misconduct; and

5. 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.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after the Effective Date and (ii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with the Orders.
 - D. 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.
 - E. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue as set forth under the Decision and Order, or at such other time as directed by the Commission.
 - 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 Respondents, which consent shall not be unreasonably withheld:
 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to

Order to Maintain Assets

Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than five (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 to Maintain Assets on the same terms and conditions as provided in this Paragraph V.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

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

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders within thirty (30) days from the date Respondents sign the Consent Agreement (as set forth in the Consent Agreement) and every thirty (30) days thereafter until this Order to Maintain Assets terminates.
- B. With respect to any divestiture required by Paragraphs II. and III. of the Decision and Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Nitrogen Assets and the Phosphate Assets; (ii) a description of all substantive contacts with a proposed acquirer (in the event that the Nitrogen Assets are not divested to

Order to Maintain Assets

Trammo or the Phosphate Assets are not divested to Itafos); and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

VII.

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) preserve the Nitrogen Business and Phosphate Business and the Nitrogen Assets and Phosphate Assets as a viable, competitive, and ongoing business until the divestitures required by the Decision and Order are achieved; (ii) prevent interim harm to competition pending the divestitures and other relief; and (iii) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

VIII.

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

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

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with the Orders, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall,

Order to Maintain Assets

without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents related to compliance with the Orders, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate:

- A. Three (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. Three (3) business days after the date that Respondents complete the divestiture required by Paragraphs II. and III. of the Decision and Order; *provided, however*, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed merger of Respondent Agrium Inc. (“Agrium”) and Respondent Potash Corporation of Saskatchewan Inc. (“PCS”) whereby each such entity shall become a subsidiary of Respondent Nutrien Ltd. (“Nutrien”), and Respondents having been furnished thereafter with a copy of a draft of the complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued and served its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

Decision and Order

1. Respondent Agrium Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium's principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.
2. Respondent Potash Corporation of Saskatchewan Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3. PCS's principal subsidiary in the United States is located at 1101 Skokie Blvd., Suite 400, Northbrook, Illinois 60062.
3. Respondent Nutrien Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its registered office located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada S7K 7G3, and its principal places of business to be located at 122 1st Avenue South, Suite 500, Saskatoon, Saskatchewan, Canada, S7K 7G3 and at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7EK.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER**I.**

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

Decision and Order

- A. “Agrium” means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agrium, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “PCS” means Potash Corporation of Saskatchewan Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by PCS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Nutrien” means Nutrien Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Nutrien, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means the Person that acquires either the Nitrogen Assets or the Phosphate Assets pursuant to this Order.
- F. “Confidential Information” means any and all of the following information:
1. all information that is a trade secret under applicable trade secret or other law;
 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and

Decision and Order

anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

- G. "Consent" means any approval, consent, ratification, waiver, or other authorization.
- H. "Contract" means any agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.

Decision and Order

- I. “Divestiture Agreement” means the Nitrogen Acquisition Agreement, Phosphate Acquisition Agreement, or any other agreement between Respondents or a Divestiture Trustee and an Acquirer to divest the Nitrogen Assets or the Phosphate Assets that has been approved by the Commission pursuant to Paragraph VII.A. of this Order, including any ancillary agreements relating to the divestiture, all amendments, exhibits, agreements, and schedules thereto.
- J. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- K. “Effective Date” means the date the Nutrien Arrangement is completed.
- L. “Governmental Authorization” means any consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.
- M. “Gyp-0” means the stack of phosphogypsum stored at Agrium’s Conda, Idaho, facility, described as Gyp-0.
- N. “Intellectual Property” means all intellectual property, including (i) commercial names, all assumed fictional business names, trade names, “doing business as” (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (vi) and all rights in internet web sites and internet domain names presently used.

Decision and Order

- O. “Itafos” means Itafos Conda LLC a limited liability company organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 109 Post Oak Lane, Suite 145, Houston, Texas 77024.
- P. “MAP” means mono-ammonium phosphate.
- Q. “Nitrogen Acquisition Agreement” means the Asset Purchase Agreement between Agrium U.S. Inc. and Trammo Nitrogen Products, Inc., and Trammo, Inc., dated November 5, 2017, including all ancillary agreements, amendments, schedules, exhibits, and attachment thereto.
- R. “Nitrogen Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to the Nitrogen Business, including, but not limited to:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 2. all Tangible Personal Property, including any Tangible Personal Property removed from any location of the Nitrogen Business since the date of the announcement of the Nutrien Arrangement and not replaced;
 3. all inventories;
 4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

Decision and Order

5. all Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;
6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law); and
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Nitrogen Assets need not include (i) Nitrogen Retained Assets or (ii) any assets that would otherwise be part of the Nitrogen Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- S. “Nitrogen Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s North Bend, Ohio, facility, including but not limited to researching, developing, manufacturing, and selling nitric acid or other products.
- T. “Nitrogen Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Nitrogen Assets.

Decision and Order

- U. “Nitrogen Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Nitrogen Business.
- V. “Nitrogen Retained Assets” means:
1. corporate or regional offices operated by Respondents that are not primarily related to the Nitrogen Business;
 2. corporate, business, or other names of Agrium, or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof of Agrium;
 3. software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);
 4. enterprise software that Respondents used primarily to manage and account for businesses other than the relevant business to be divested;
 5. the portion of any Record that contains information about any business that Agrium operated prior to the Effective Date that it is not required to divest; and
 6. any Record of which Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the Record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.
- W. “Nutrien Arrangement” means the arrangement pursuant to section 192 of the Canada Business Corporations Act involving Agrium, Inc., Potash

Decision and Order

Corporation of Saskatchewan Inc. and Nutrien Ltd. as described in the Arrangement Agreement between Agrium Inc. and Potash Corporation of Saskatchewan Inc. dated September 11, 2016, whereby Agrium Inc. and Potash Corporation of Saskatchewan Inc. will become subsidiaries of Nutrien Ltd. on the date shown in the certificate of arrangement issued by the director appointed pursuant to section 260 of the Canada Business Corporations Act.

- X. “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 governmental body.
- Y. “Phosphate Acquisition Agreement” means the Asset Purchase Agreement by and among Itafos Conda LLC, Itafos, and Nu-West Industries, Inc., Nu-West Mining, Inc., and Agrium Inc., dated November 6, 2017, including all ancillary agreements, amendments, schedules, exhibits, and attachment thereto.
- Z. “Phosphate Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to the Phosphate Business, including, but not limited to:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 2. all Tangible Personal Property, including any Tangible Personal Property removed from the Phosphate Business since the date of the announcement of the Nutrien Arrangement and not replaced;

Decision and Order

3. all inventories;
4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;
5. all Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;
6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law); and
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Phosphate Assets need not include (i) Phosphate Retained Assets or (ii) any assets that otherwise would be part of the Phosphate Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- AA. “Phosphate Business” means all business activities conducted by Agrium prior to the Effective Date at or relating to Agrium’s Conda, Idaho facility, including but not limited to mining, researching, developing, manufacturing, and selling super phosphoric acid, mono-ammonium phosphate, and merchant grade acid.

Decision and Order

- BB. “Phosphate Divestiture Date” means the date on which Respondents or the Divestiture Trustee close on a transaction to divest the Phosphate Assets.
- CC. “Phosphate Employee” means any full-time, part-time, or contract individual employed by Agrium at any time and whose job responsibilities primarily relate or related to the Phosphate Business.
- DD. “Phosphate Products” means any products or services relating to the Phosphate Business manufactured or provided by Agrium from a property or facility that is not included in the Phosphate Assets, including but not limited to, ammonia, SPA processing, and storage.
- EE. “Phosphate Retained Assets” means:
1. corporate or regional offices operated by Respondents that are not primarily related to the Phosphate Business;
 2. Agrium facilities located at or near the Homestead distribution terminal in Nebraska or near Standard, Alberta, Granum, Alberta and Watson, Saskatchewan;
 3. Gyp-0, North Rasmussen Ridge Mine, and other mines that no longer actively produce phosphate ore;
 4. corporate, business, or other names of Agrium, or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof of Agrium with respect to, or associated with, the foregoing other than “Conda Phosphate Operations.”
 5. software that can readily be purchased or licensed from sources other than Respondents and that has

Decision and Order

not been materially modified (other than through user preference settings);

6. enterprise software that Respondents primarily use to manage and account for businesses other than the relevant business to be divested;
 7. the portion of any Record that contains information about any business that Agrium operated prior to the Effective Date that it is not required to divest; and
 8. any Record of which Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the Record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.
- FF. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- GG. “Respondents” means Agrium, PCS, and Nutrien, individually and collectively.
- HH. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- II. “Trammo” means Trammo, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of the State of Delaware, with its

Decision and Order

office and principal place of business located at One Rockefeller Plaza, 9th Floor, New York, New York 10020.

- JJ. “Transitional Services” means administrative, operational, and technical assistance, consultation, services, or training with respect to the operation of the relevant business.
- KK. “UAN” means urea ammonium nitrate.

II.**(Divestiture of the Nitrogen Assets)****IT IS FURTHER ORDERED** that:

- A. No later than ten (10) business days from the Effective Date, Respondents shall divest the Nitrogen Assets, absolutely and in good faith, to Trammo pursuant to the Nitrogen Acquisition Agreement; *provided, however,* that if Respondents have divested the Nitrogen Assets to Trammo prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Trammo is not acceptable as the Acquirer of the Nitrogen Assets, then Respondents shall immediately rescind the Nitrogen Acquisition Agreement, and shall divest the Nitrogen 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 to Trammo was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Nitrogen

Decision and Order

Acquisition Agreement) to the manner of divestiture of the Nitrogen Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondents shall:

1. At the option of the Acquirer of the Nitrogen Assets and in a manner that receives the prior approval of the Commission:
 - a. Provide Transitional Services to the Acquirer for twelve (12) months from the Nitrogen Divestiture Date; and
 - b. Purchase (i) ammonia as a customer from the Acquirer for five (5) years from the Nitrogen Divestiture Date and (ii) UAN terminaling services as a customer from the Acquirer for three (3) years from the Nitrogen Divestiture Date;
2. Provide the assistance set forth in Paragraph II.B.1. (collectively “Transitional Assistance”) in quality and quantity and on terms and conditions sufficient for an Acquirer to operate the Nitrogen Business post-divestiture in substantially the same manner as Agrium prior to the Effective Date (including the ability to develop new products, increase sales of current products, and maintain the competitiveness of the Nitrogen Business);

Provided, however, that Respondents shall give priority to Acquirer’s requirements for Transitional Assistance over Respondents’ own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transitional Assistance;

Provided further that (i) Acquirer may terminate any Transitional Services at any time upon commercially reasonable notice and without cost or penalty and (ii)

Decision and Order

at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transitional Services needed to achieve the purposes of this Order; and

Provided further that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transitional Services.

- C. No later than the Nitrogen Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
 2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- D. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Nitrogen Assets and Nitrogen Business, including but not limited to, access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process. For purposes of this Paragraph II.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

Decision and Order

- E. Respondents shall:
1. No later than twenty (20) days before the Nitrogen Divestiture Date (i) identify each Nitrogen Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Nitrogen Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Nitrogen Employee outside the presence or hearing of Respondents, and to make an offer of employment;
 2. Remove any contractual impediments that may deter any Nitrogen Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
 3. Provide each Nitrogen Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Nitrogen Employee who accepts an offer of employment from Acquirer; and
 4. Not offer any incentive to any Nitrogen Employee to decline employment with Acquirer or otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Nitrogen Employee by Acquirer.

For purposes of this Paragraph II.E., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Nitrogen Assets.

- F. For a period of two (2) years after the Nitrogen Divestiture Date, Respondents shall not solicit or induce any Nitrogen Employee who has accepted an offer of employment with an Acquirer to terminate

Decision and Order

such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees or (ii) hire employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.

- G. Notwithstanding any other provision of this Order, Respondents shall allow an Acquirer to use any of the names and marks referenced in Paragraph I.V.2. on a temporary basis during the removal and replacement of signage and replacement of other business items and materials.
- H. The purpose of the divestiture of the Nitrogen Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Nutrien Arrangement by Respondents and to remedy the lessening of competition resulting from the Nutrien Arrangement as alleged in the Commission's Complaint.

III.**(Divestiture of the Phosphate Assets)****IT IS FURTHER ORDERED** that:

- A. No later than ten (10) business days from the Effective Date, Respondents shall divest the Phosphate Assets, absolutely and in good faith, to Itafos pursuant to the Phosphate Acquisition Agreement; *provided, however,* that if Respondents have divested the Phosphate Assets to Itafos prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
 - 1. Itafos is not acceptable as the Acquirer of the Phosphate Assets, then Respondents shall

Decision and Order

immediately rescind the Phosphate Acquisition Agreement, and shall divest the Phosphate 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 to Itafos was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications (that shall be incorporated into a revised Phosphate Acquisition Agreement) to the manner of divestiture of the Phosphate Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondents shall:

1. At the option of the Acquirer of the Phosphate Assets and in a manner that receives the prior approval of the Commission:
 - a. Provide Transitional Services to the Acquirer for twelve (12) months from the Phosphate Divestiture Date;
 - b. Provide Phosphate Products to the Acquirer for six (6) years from the Phosphate Divestiture Date; and
 - c. Purchase MAP as a customer from the Acquirer for six (6) years from the Phosphate Divestiture Date;
2. Provide the assistance set forth in Paragraph III.B.1. (collectively “Transitional Assistance”) in quality and quantity and on terms and conditions sufficient for an Acquirer to operate the Phosphate Business post-divestiture in substantially the same

Decision and Order

manner as Agrium prior to the Effective Date (including the ability to develop new products, increase sales of current products, and maintain the competitiveness of the Phosphate Business);

Provided, however, that Respondents shall give priority to Acquirer's requirements for Transitional Assistance over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transitional Assistance;

Provided further that (i) Acquirer may terminate any Transitional Services at any time upon commercially reasonable notice and without cost or penalty and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transitional Services needed to achieve the purposes of this Order; and

Provided further that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transitional Services.

- C. No later than the Phosphate Divestiture Date, Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer the relevant assets; *provided, however,* that in the event that Respondents are unable to obtain any:
1. Governmental Authorization, Respondents shall provide such assistance as Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and
 2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

Decision and Order

- D. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of the Phosphate Assets and Phosphate Business, including but not limited to, access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process. For purposes of this Paragraph III.D., "Acquirer" shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.
- E. Respondents shall:
1. No later than twenty (20) days before the Phosphate Divestiture Date (i) identify each Phosphate Employee, (ii) allow Acquirer to inspect the personnel files and other documentation of each Phosphate Employee, to the extent permissible under applicable laws; and (iii) allow Acquirer an opportunity to meet with any Phosphate Employee outside the presence or hearing of Respondents, and to make an offer of employment;
 2. Remove any contractual impediments that may deter any Phosphate Employee from accepting employment with Acquirer, including, any non-compete or confidentiality provision of an employment contract;
 3. Provide each Phosphate Employee with a financial incentive as necessary to accept an offer of employment with Acquirer, including vesting all current and accrued benefits under Respondents' retirement plans as of the date of transition of employment with Acquirer for any Phosphate Employee who accepts an offer of employment from Acquirer; and
 4. Not offer any incentive to any Phosphate Employee to decline employment with Acquirer or

Decision and Order

otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Phosphate Employee by Acquirer.

For purposes of this Paragraph III.E., “Acquirer” shall include any Person with whom Respondents engage in negotiations to acquire the Phosphate Assets.

- F. For a period of two (2) years after the Phosphate Divestiture Date, Respondents shall not solicit or induce any Phosphate Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees or (ii) hire employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.
- G. Notwithstanding any other provision of this Order, Respondents shall allow an Acquirer to use any of the names and marks referenced in Paragraph I.EE.4. on a temporary basis during the removal and replacement of signage and replacement of other business items and materials.
- H. The purpose of the divestiture of the Phosphate Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Nutrien Arrangement by Respondents and to remedy the lessening of competition resulting from the Nutrien Arrangement as alleged in the Commission’s Complaint.

Decision and Order

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

- A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business and the post-divestiture Nitrogen Business and Phosphate Business; *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:
1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, 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 Nitrogen Assets, Nitrogen Business, Phosphate Assets, Phosphate Business or the post-divestiture Nitrogen Business and Phosphate Business, or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents 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 IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of its

Decision and Order

employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Richard Gilmore to serve as Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and any Divestiture Agreement.
- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
 - 1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
 - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' 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

Decision and Order

ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, 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 Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
 4. Respondents 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. 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.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days after the Effective Date for a period of two (2) years after the Effective Date and thereafter every ninety (90) days, (ii) no later than ten (10) days after Respondents have completed their obligations required by Paragraphs II. and III. of this Order ("Final Report"), and (iii) at any other time as

Decision and Order

requested by the staff of the Commission, concerning Respondents' compliance with this Order.

- D. 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.
- E. The Monitor's power and duties shall terminate ten (10) business days after the Monitor has completed his Final Report, or at such other time as directed by the Commission.
- 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 Respondents, which consent shall not be unreasonably withheld:
 - 1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 - 2. Respondents shall, no later than five (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 V.

Decision and Order

- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

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

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraphs II. and III. of this Order, the Commission may appoint a Divestiture Trustee to divest any of the Nitrogen Assets or the Phosphate Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of 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 the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise

Decision and Order

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.

- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Nitrogen Assets or the Phosphate Assets, as the case may be, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;
 - 2. The Divestiture Trustee shall have twelve (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

Decision and Order

end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, 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. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall

Decision and Order

divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by 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

Decision and Order

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 VI.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.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 Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require 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 VI.

Decision and Order

- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

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

- A. If Trammo does not acquire the Nitrogen Assets or Itafos does not acquire the Phosphate Assets, then Respondents shall set forth the manner in which they will accomplish the relevant divestiture and other obligations under this Order in one or more agreements with the Acquirer and submit such agreements to the Commission for the prior approval required by this Order.
- B. Respondents shall comply with all terms of the Divestiture Agreement, which is incorporated into this Order and made a part hereof; *provided, however*, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. In the event of a conflict between the terms of this Order and the Divestiture Agreement, such that Respondents cannot fully comply with both, the terms of this Order shall govern.
- C. Respondents shall not modify, replace, or extend the terms of the 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).

Decision and Order

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

- A. Respondents shall notify the Commission via email to bccompliance@ftc.gov of the Effective Date no later than five (5) days after the Effective Date.
- B. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:
 - 1. Thirty (30) days from the date this Order is issued and every thirty (30) days thereafter for a period of one (1) year (for a total of twelve reports) and every ninety (90) days thereafter for a second period of one (1) year (for a total of four reports); and
 - 2. No later than one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.
- C. With respect to any divestiture required by Paragraphs II. and III. of this Order, Respondents shall include in their compliance reports (i) the status of the divestiture and transfer of the Nitrogen Assets and the Phosphate Assets; (ii) if Trammo does not acquire the Nitrogen Assets or Itafos does not acquire the Phosphate Assets, a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

Decision and Order

IX.

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

- A. Any proposed dissolution of any Respondents;
- B. Any proposed acquisition, merger, or consolidation of any Respondents (other than the Nutrien Arrangement or internal consolidation of subsidiaries of Nutrien Ltd.); or
- C. Any other change in any Respondents, 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.

X.

IT IS FURTHER ORDERED that, for the purpose 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 Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 5, 2028.

By the Commission.

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) with Potash Corporation of Saskatchewan Inc. (“PotashCorp”), Agrium Inc. (“Agrium”), and Nutrien Ltd. (“Nutrien”). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would otherwise result from the proposed merger of PotashCorp and Agrium. Under the Consent Agreement, the merging parties must divest Agrium’s Conda, Idaho facility and related assets to Itafos or another buyer approved by the Commission and must divest Agrium’s North Bend, Ohio facility and related assets to Trammo, Inc. (“Trammo”) or another buyer approved by the Commission. The Consent Agreement provides the acquirers with the manufacturing plants and other tangible and intangible assets needed to compete effectively in the markets for the manufacture and sale of superphosphoric acid (“SPA”) and 65%-67% concentration nitric acid.

On September 11, 2016, PotashCorp and Agrium agreed to a merger (the “Merger”) in which PotashCorp and Agrium shareholders will own 52% and 48% of the combined firm, respectively. The Commission’s Complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal

Analysis to Aid Public Comment

Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the markets for (1) SPA in North America and (2) 65%-67% concentration nitric acid in the region near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants.

The 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 a part of the public record. After 30 days, the Commission will again review the Consent Agreement, along with the comments received, and will decide whether it should withdraw the Consent Agreement, modify it, or make final the Decision and Order.

II. The Parties

PotashCorp, headquartered in Saskatoon, Saskatchewan, Canada, and Agrium, headquartered in Calgary, Alberta, Canada, are both large producers of crop nutrients, including potash, phosphate, and nitrogen products. PotashCorp and Agrium are two of only three firms in North America that manufacturer SPA, a key input for liquid phosphate fertilizers. PotashCorp and Agrium are also two of a small number of firms that make 65%-67% concentration nitric acid, a nitrogen product sold for industrial uses, in North America, and both PotashCorp and Agrium own nitric acid plants in Ohio.

III. The Relevant Markets

A. Superphosphoric Acid

Phosphate is an essential plant nutrient that farmers apply to crops on a seasonal basis. SPA, a highly concentrated form of phosphoric acid, is used to produce the liquid phosphate fertilizer known as ammonium polyphosphate ("APP"). SPA is purchased by agricultural wholesalers and retailers, who convert it to APP and sell APP to farmers.

The relevant product market does not include dry phosphate fertilizers such as monoammonium phosphate ("MAP") or diammonium phosphate ("DAP"). Many farmers perceive

Analysis to Aid Public Comment

advantages, including higher crop yield and quality, to using liquid rather than dry phosphate fertilizer, particularly in the early stages of crop development. In addition, liquid phosphates can be applied more directly to the seed than dry phosphates and can easily be combined with other nutrients. Consistent with these perceived advantages, SPA typically garners a premium price over dry phosphates. This premium has at times expanded significantly without prompting customers to shift their purchases substantially from liquid to dry phosphate fertilizers.

The relevant geographic market in which to analyze the effects of the Merger for SPA is no broader than North America. SPA is caustic, requires special handling and equipment, and is perishable outside certain temperature ranges. As a result, importing offshore SPA is logistically challenging and expensive, and imports of SPA are rare and do not constrain the prices of SPA produced in North America.

Currently, three firms – PotashCorp, Agrium, and J.R. Simplot Company (“Simplot”) – manufacture all the SPA produced in North America. PotashCorp has two SPA plants, located in Aurora, North Carolina and White Springs, Florida. Agrium’s sole SPA plant is located in Conda, Idaho. Simplot has SPA plants in Rock Springs, Wyoming and Pocatello, Idaho. Absent the proposed remedy, the Merger would result in the merged entity controlling more than 75% of SPA production capacity in North America.

B. 65%-67% Concentration Nitric Acid

Nitric acid is a chemical compound produced through the interaction of ammonia, water, and a catalyzing agent. Nitric acid is used as a feedstock for nitrogen-based fertilizers and explosives and is also sold for a variety of industrial uses, including the production of stainless steel, metal-based specialty chemicals, and water-treatment and cleaning products. Nitric acid is produced at different concentration levels, which reflect the amount of water present together with the pure nitric acid. Both PotashCorp’s plant in Lima, Ohio and Agrium’s plant in North Bend, Ohio produce nitric acid at 65%-67% concentration, which is the preferred concentration for most industrial uses.

Analysis to Aid Public Comment

Customers could not quickly or easily switch from 65%-67% concentration nitric acid to other nitric acid concentrations or other chemical products. For most customers, there are no chemical substitutes that are functionally equivalent to nitric acid. Purchasing lower-concentration nitric acid and increasing its concentration is not an economical alternative because customers would need to invest in constructing an evaporation tower, which few if any nitric acid customers have today. Additionally, buying lower-concentration nitric acid requires customers to pay to ship and store more water to receive the same amount of acid. Purchasing 98% concentration nitric acid and diluting it down is also not an economical alternative due to the significant environmental and safety hazards associated with transporting and storing highly concentrated nitric acid. The relevant product market is therefore limited to 65%-67% concentration nitric acid.

The relevant geographic market in which to analyze the effects of the Merger with respect to 65%-67% concentration nitric acid encompasses customer locations near and to the east of PotashCorp's and Agrium's nitric acid plants in Lima, Ohio and North Bend, Ohio, respectively. The relevant geographic market includes customer locations in Ohio, Kentucky, Pennsylvania, Maryland, West Virginia, and New Jersey. These customers are vulnerable to a price increase on nitric acid sold by the merged entity for several reasons. Nitric acid is a corrosive chemical requiring special care in handling and storage. As a result, the costs of transporting nitric acid are high, making the relative locations of suppliers and customers critical to the total delivered costs. Most nitric acid customers rely on truck delivery, which further limits their ability to buy from more remote suppliers. Other sellers of 65%-67% concentration nitric acid are far more distant from customers in the relevant geographic market than North Bend and Lima, and therefore these sellers are not viable alternative sources of supply. Finally, the merging parties have the ability to price discriminate on sales of nitric acid by customer location.

PotashCorp and Agrium are the primary suppliers of 65%-67% concentration nitric acid to customer locations near and to the east of PotashCorp's Lima, Ohio and Agrium's North Bend, Ohio nitric acid plants. Other producers of 65%-67%

Analysis to Aid Public Comment

concentration nitric acid, such as Dyno Nobel, Inc. and LSB Industries Inc., have minimal sales into this region. Absent the proposed remedy, the Merger would result in the merged entity having more than 90% of sales of 65%-67% concentration nitric acid into the relevant geographic market.

IV. Effects of the Acquisition

Absent the proposed remedy, the Merger would pose a significant risk of harm to competition in the relevant markets. The Merger would eliminate head-to-head competition between PotashCorp and Agrium on SPA sales and would enhance the merged firm's ability and incentive to raise market prices by reducing SPA output. The Merger would also increase the likelihood of coordination in a market that is already vulnerable to coordination, given that SPA is a commodity and SPA pricing and output information is often disseminated through customers and industry publications. For sales of 65%-67% concentration nitric acid to customers in the relevant geographic market the Merger would also eliminate the vigorous competition on pricing and service that exists today between PotashCorp and Agrium.

V. Entry

Entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the expected anticompetitive effects of the Merger. New entry into SPA production, even of modest capacity, would likely take years and cost at least \$100 million. No entry has occurred into North American SPA production in the past five years, nor is any in progress or anticipated. Although two new nitric acid facilities have been constructed in recent years, those facilities are outside the relevant geographic market and make nitric acid for their internal use at a lower concentration. Existing suppliers of 65%-67% concentration nitric acid are unlikely to expand their sales footprint enough to defeat a price increase by the merged entity in the relevant geographic market.

Analysis to Aid Public Comment

VI. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the Merger by requiring the merging parties to divest Agrium's Conda, Idaho facility to Itafos and Agrium's North Bend, Ohio facility to Trammo. These divestitures will preserve the competition that currently exists in the relevant markets.

Under the proposed Consent Agreement, Agrium's phosphate operations at Conda, Idaho, as well as related phosphate mines, customer and supplier contracts, and intellectual property, will be sold to Itafos. Itafos is an integrated producer of phosphate-based fertilizers with a phosphate mining and manufacturing operation located in Brazil. Itafos also owns other phosphate mining properties, including a mine in Paris Hills, Idaho, located 35 miles from Conda. Paris Hills is expected to become operational in 2019 and will serve as a source of high-grade phosphate ore for the Conda operations. As a new entrant into the sale of SPA in North America, Itafos is well positioned to preserve the SPA competition that would otherwise be lost through the Merger.

The proposed Consent Agreement further provides that Agrium's nitric acid plant and related operations at North Bend, Ohio, as well as customer and supplier contracts and intellectual property, will be sold to Trammo. Trammo is a global trader, distributor, and transporter of commodity chemicals, including anhydrous ammonia, the primary feedstock for nitric acid production. Trammo owns three ammonia terminals in Illinois as well as specialized refrigerated barges for ammonia distribution. Through its trading and storage activities, Trammo expects to realize efficiencies in the supply of anhydrous ammonia to North Bend. Trammo will be a new entrant in the sale of 65%-67% concentration nitric acid and will replace Agrium's position in the market today.

The merged entity must complete the divestiture within ten days of closing the Merger. If the Commission determines that Itafos or Trammo is not an acceptable acquirer, the Decision and Order requires the parties to unwind the sale and accomplish the divestiture to another Commission-approved acquirer within 120

Analysis to Aid Public Comment

days of the date the Decision and Order becomes final. If the merging parties fail to carry out the divestiture in the manner prescribed by the Decision and Order, the Commission may appoint a divestiture trustee to accomplish the divestiture.

The Commission will appoint an interim monitor to ensure the merging parties' compliance with the Decision and Order and to keep the Commission informed about the status of the divestiture. The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.