

Complaint

IN THE MATTER OF

DIAGEO PLC, ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT***Docket C-4032; File No. 0110057**Complaint, December 19, 2001--Decision, February 4, 2002*

This consent order addresses the acquisition by Respondent Diageo plc ("Diageo"), a United Kingdom public limited company that operates a distilled spirits business in the United States through GuinnessUDV North America, Inc., and Pernod Ricard S.A. of the Seagram Wine and Spirits business – with Diageo to acquire, among other distilled spirits brands, Captain Morgan Original Spiced Rum and Captain Morgan's Parrot Bay Rum, and with Pernod Ricard to acquire Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac – from Respondent Vivendi S.A. ("Vivendi"), a French societe anonyme that operates a distilled spirits business in the United States through Joseph E. Seagram & Sons, Inc. The order, among other things, requires Respondent Diageo to divest its Malibu rum business, worldwide, to an acquirer approved by the Commission. The order also prohibits Diageo from obtaining or using any commercially sensitive business information relating to Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, or Martell Cognac. An accompanying Order to Hold Separate and Maintain Assets requires Respondent Diageo to preserve and maintain the Seagram Captain Morgan rum assets as a separate competitive entity pending the divestiture of the Malibu assets, and to preserve and maintain the competitive viability of the Malibu assets, pending their divestiture.

Participants

For the Commission: *Joseph S. Brownman, Stephen Y. Wu, Barbara K. Shapiro, W. Stephen Sockwell, Jr., Karen Mainor-Harris, Elizabeth B. Pelkofski, Anthony Low Joseph, Erika Brown-Lee, Gabe Dagen, Amy Swift, Clifton Smith, David Von Nirschl, Jennifer Lee, Catharine M. Moscatelli, Elizabeth A. Piotrowski, Phillip L. Broyles, Malcolm B. Coate, Elizabeth Callison and Mary T. Coleman.*

For the Respondents: *Ken Logan, David E. Vann, Jr., and Ann Rappley, Simpson Thacher & Bartlett, Raymond E. Jacobsen,*

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James H. Sneed, Jon B. Dubrow, Craig P. Seebald, Christine L. White, Marcia Stuart-Ceplecha, Stefan M. Meisner, Joel R. Grosberg, Saralisa Brau, Sandra Muhlenbeck, and Christopher Ondeck, McDermott, Will & Emery, and Theodore Edelman, Sullivan & Cromwell.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Diageo plc and its subsidiaries ("Diageo") and Vivendi Universal S. A. and its subsidiaries ("Vivendi") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Respondent Diageo

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1A 9AG, England.
2. Among other things, Respondent Diageo produces, distributes, and sells distilled spirits products from facilities that it owns or operates worldwide.
3. In the United States, Diageo operates its distilled spirits business through a wholly-owned subsidiary corporation, Guinness UDV North America, Inc., whose principal business offices are located at Six Landmark Square, Stamford,

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Connecticut 06901.

4. Respondent Diageo had total revenues, from the sale of all products, of about \$19 billion in 2000. Respondent Diageo's United States revenues from the sale of all products were about \$8.5 billion in 2000.

5. Respondent Diageo is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Diageo markets or sells solely or jointly in the United States include Malibu Rum, Gordon's Gin, Johnnie Walker Black Scotch whisky, Hennessy Cognac, and Oban, Lagavulin, Dalwhinnie, Cardhu, Talisker, Cragganmore, Knocando, Glenkinchie, and Glen Ord single malt Scotch whiskies.

6. Respondent Diageo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Respondent Vivendi

7. Respondent Vivendi is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France.

8. Among other things, Respondent Vivendi produces, distributes, and sells distilled spirits products from facilities that it and its subsidiaries own or operate worldwide as part of their Seagram Spirits and Wine Group ("Seagram").

9. In the United States, Respondent Vivendi operates its distilled spirits business principally through Joseph E. Seagram & Sons, Inc., a wholly-owned subsidiary corporation that has its

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principal business offices located at 375 Park Avenue, New York, New York 10152-0192.

10. Respondent Vivendi had total sales, for all products, of about \$39.7 billion in 2000. Respondent Vivendi's United States sales of all products totaled about \$6.7 billion in 2000.

11. Respondent Vivendi is, and at all times relevant herein has been, engaged in the sale and distribution in the United States of various distilled spirits products, including (a) rum, (b) gin, (c) Scotch whisky, and (d) Cognac. The distilled spirits products that Vivendi markets or sells in the United States include Captain Morgan Original Spiced Rum, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet single malt Scotch whisky, and Martell Cognac.

12. Respondent Vivendi is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Third Party Pernod Ricard

13. Third party Pernod Ricard S. A. and its subsidiaries ("Pernod Ricard") is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussmann, 75379 Paris, France.

14. In the United States, Pernod Ricard operates through a wholly-owned subsidiary corporation, Austin, Nichols & Co., Inc., with offices located at 156 East 46th Street, New York, New York 10017. Among other things, Pernod Ricard markets and sells distilled spirits in the United States.

15. Pernod Ricard had total revenues, from the sale of all products, of about \$4 billion in 2000. Pernod Ricard's United

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States sales of all products totaled about \$250 million in 2000.

IV. The Proposed Acquisition and Transaction

16. On or about December 4, 2000, Respondent Diageo and Third Party Pernod Ricard entered into a Framework Agreement jointly to bid for the acquisition of all of Seagram's spirits and wine business. Diageo and Pernod Ricard agreed that if their bid was accepted by Respondent Vivendi, Diageo and Pernod Ricard would split between them the various Seagram companies and assets comprising the Seagram's spirits and wine business.

17. On or about December 19, 2000, Respondents Diageo and Vivendi, and third party Pernod Ricard, executed their Stock and Asset Purchase Agreement. Under this Agreement, Diageo and Pernod Ricard jointly undertook to acquire Seagram from Vivendi for a total of \$8.15 billion. Pursuant to the Framework Agreement previously entered into between Diageo and Pernod Ricard, Respondent Diageo would contribute \$5 billion and Pernod Ricard would contribute the remaining \$3.15 billion for the acquisition of Seagram.

18. Under the terms of the Stock and Asset Purchase Agreement and the Framework Agreement:

- (a) The Seagram businesses acquired by Diageo through purchases of corporations or assets would hold, among other brands and assets, all Seagram rum assets, including Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Myers's Rum;
- (b) The Seagram businesses acquired by Pernod Ricard through purchases of corporations or assets would hold, among other brands and some related assets, Seagram's Gin, Chivas Regal Scotch whisky, The Glenlivet Scotch whisky, and Martell Cognac;

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- (c) Diageo would operate the “back office” operation of Joseph E. Seagram & Sons, Inc., and, for up to one year, provide administrative services to Pernod Ricard for the Seagram brands that Pernod Ricard would be acquiring, including (1) order taking; (2) maintaining accounts receivable files; (3) inventory management, logistics planning, and customer shipping; and (4) the provision of information; and
- (d) Diageo would acquire or have access to confidential commercially sensitive marketing and production material regarding all of the Seagram brands that Pernod Ricard would be acquiring.

19. On or about October 23, 2001, the Federal Trade Commission authorized its staff to file a complaint for temporary restraining order and preliminary injunction in United States District Court for an order blocking the proposed acquisition pending a determination by the Commission, after administrative proceedings, whether the proposed acquisition is anticompetitive.

V. Trade and Commerce

A. Relevant Product Markets

20. The relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are: (a) premium rum, (b) popular gin, (c) deluxe Scotch whisky, (c) single malt Scotch whisky, and (e) Cognac. In addition to these relevant markets, broader or narrower relevant markets may also exist.

a. Premium Rum

21. Rum is a distilled spirit made from cane sugar or its byproducts. Premium rum is rum that is generally advertised, promoted, and available throughout the United States, and sold at retail at prices higher than most other rums. The most popular premium rum products sold in the United States include Bacardi

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Light Rum, Captain Morgan Original Spiced Rum, Captain Morgan's Parrot Bay Rum, and Malibu Rum. Total United States premium rum sales in 2000 were about 12 million 9-liter equivalent cases, which represents about \$1 billion in retail sales.

b. Popular Gin

22. Gin is a distilled spirit made from grain and botanicals, primarily juniper. Popular gin is gin that is principally made and bottled in North America, is generally advertised, promoted, and available throughout the United States, and sold at retail at prices that are lower than the premium gins, which are imported from the United Kingdom, but higher than the gins that are not widely advertised and promoted. The most popular gins sold in the United States include Seagram's Gin and Gordon's Gin. Total United States popular gin sales in 2000 were about 5.2 million 9-liter equivalent case, which represents about \$650 million in retail sales.

c. Deluxe Scotch Whisky

23. Scotch whisky is a distilled spirit made in Scotland from malt, or malt and barley, and aged a minimum of three years. Deluxe Scotch whisky is a blend of malt and grain Scotch whiskies from many distilleries, typically aged at least 12 years, and bottled in Scotland. Deluxe Scotch whisky is generally advertised, promoted, and available throughout the United States, and sold at retail at prices higher than premium Scotch whisky products, but lower than single malt Scotch whiskies. The most popular deluxe Scotch whisky products sold in the United States are Chivas Regal Scotch whisky and Johnnie Walker Black Scotch whisky. Total sales of deluxe Scotch in the United States in 2000 were about 1.1 million 9-liter equivalent cases, which represents about \$450 million in retail sales.

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d. Single Malt Scotch Whisky

24. Single malt Scotch whisky is a Scotch that is produced from the malt of a single distillery, and is normally bottled in Scotland. The most popular single malt Scotch whiskies sold in the United States include The Glenlivet, Glenfiddich, Oban, Lagavulin, Dalwhinnie, Cardhu, and Talisker. Total sales of single malt Scotch whiskies in the United States in 2000 were about 700,000 9-liter equivalent cases, which represents about \$250 million in retail sales.

e. Cognac

25. Cognac is a brandy, which is distilled wine, that is produced and bottled in southwestern France. The most popular Cognacs sold in the United States are Courvoisier, Hennessy, Martell, and Remy Martin. Total sales of Cognac in the United States in 2000 were about 2.8 million 9-liter equivalent cases, which represents about \$1 billion in retail sales.

B. Relevant Geographic Markets

26. The relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition in each relevant market are (a) the United States and (b) individual states and territories of the United States.

C. Conditions of Entry

27. Entry into each of the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects from occurring.

VI. Market Structure

28. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (“HHI”) or by two-firm and four-firm concentration ratios.

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a. Premium Rum

29. In the national premium rum market, Respondent Diageo and or its subsidiaries have about an 8% share and Respondent Vivendi and or its subsidiaries have about a 33% share. The only other significant seller of premium rum is Bacardi USA, which has about a 54% share. The proposed acquisition would increase the HHI by about 550 points, result in market concentration of about 4,600 points, and create a duopoly.

30. Concentration in many premium rum state and territory markets does not vary significantly from the high concentration in the national premium rum market.

b. Popular Gin

31. In the national popular gin market, Respondent Diageo and or its subsidiaries have about a 34% share and Respondent Vivendi and or its subsidiaries have about a 66% share. If Diageo were to acquire or control the marketing of Seagram's Gin, the HHI would increase by about 4,500 points, result in market concentration of about 10,000 points, and create a monopoly.

32. Concentration in many popular gin state and territory markets does not vary significantly from the high concentration in the national popular gin market.

c. Deluxe Scotch Whisky

33. In the national deluxe Scotch whisky market, Respondent Diageo and or its subsidiaries have about a 51% share and Respondent Vivendi and or its subsidiaries have about a 49% share. If Diageo were to acquire or control the marketing of Chivas Regal Scotch whisky, the HHI would increase by about 5,000 points, result in market concentration of about 10,000 points, and create a monopoly.

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34. Concentration in many deluxe Scotch whisky state and territory markets does not vary significantly from the high concentration in the national deluxe Scotch whisky market.

d. Single Malt Scotch Whisky

35. In the national single malt Scotch market whisky, Respondent Diageo and or its subsidiaries have about a 6% share and Respondent Vivendi and or its subsidiaries have about a 26% share. If Diageo were to acquire or control the marketing of The Glenlivet Scotch whisky, the HHI would increase by about 300 points and result in market concentration of about 2,000 points.

36. Concentration in many single malt Scotch whisky state and territory markets does not vary significantly from the high concentration in the national single malt Scotch whisky market.

e. Cognac

37. In the Cognac market, Respondent Diageo and or its subsidiaries have about a 54% share and Respondent Vivendi and or its subsidiaries have about a 9% share. If Diageo were to acquire or control the marketing of Martell Cognac, the HHI would increase by about 900 points and result in market concentration of about 4,600 points.

38. Concentration in many Cognac state and territory markets does not vary significantly from the high concentration in the national Cognac market.

VII. Effects of the Acquisition

39. The proposed acquisition and transaction may substantially lessen competition in each of the relevant markets in the following ways, among others:

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- (a) by eliminating direct competition between Respondent Diageo and Respondent Vivendi;
- (b) by increasing the likelihood that Respondent Diageo will unilaterally exercise market power; and
- (c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction;

each of which may result in higher prices or reduced consumer choice.

VIII. Violations Charged

40. The Stock and Asset Purchase Agreement dated as of December 19, 2000, as amended, entered into between Respondent Diageo (jointly with Third Party Pernod Ricard) and Respondent Vivendi for the sale of Seagram constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

41. If the proposed acquisition were consummated, Respondent Diageo would be in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this nineteenth day of December, 2001, issues its Complaint against Respondents Diageo and Vivendi.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Diageo plc (“Diageo”) and Pernod Ricard S.A. (“Pernod Ricard”) of certain voting securities and assets of the Seagram Spirits and Wine business conducted by various subsidiaries of Respondent Vivendi Universal S.A. (“Vivendi Universal”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents Diageo and Vivendi Universal 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 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 an Order to Hold Separate and 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 finding and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1M 9AG, England. Diageo's principal subsidiary in the United States is headquartered at Six Landmark Square, Stamford, CT 06901.
2. Respondent Vivendi Universal is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France. Vivendi Universal's principal subsidiary in the United States conducting its spirits, wine and beverages business is headquartered at 375 Park Avenue, New York, NY 10152.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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. "Diageo" means Diageo plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Diageo plc (including, but not limited to, Guinness UDV Amsterdam B.V. and Guinness UDV North America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Vivendi Universal" means Vivendi Universal S.A., its directors, officers, employees, agents and representatives,

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predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Vivendi Universal S.A. (including, but not limited to, The Seagram Company Ltd.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means Diageo and Vivendi Universal, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Pernod Ricard” means Pernod Ricard S.A., a societe anonyme, organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussman, 75379 Paris, France; and its subsidiaries and affiliates, including without limitation Austin, Nichols & Co., Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 105 Corporate Park Drive, Suite 200, West Harrison, NY 10604.
- F. “SSWG Acquisition” means the proposed acquisition of voting securities of various entities, as well as certain assets, of the Vivendi Universal SSWG Business, by Diageo and Pernod Ricard pursuant to the Stock and Asset Purchase Agreement.
- G. “SSWG Acquisition Date” means the date on which Diageo and Pernod Ricard acquire the SSWG Business from Vivendi Universal, pursuant to the Stock and Asset Purchase Agreement.
- H. “SSWG Business” means the business operated by Vivendi Universal as the Seagram Spirits and Wines Group that is engaged in, among other things, research, development, production, distribution and sale of distilled spirits, wine and other beverage products.

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- I. “Stock and Asset Purchase Agreement” means the Stock and Asset Purchase Agreement among Vivendi Universal, Diageo and Pernod Ricard, dated as of December 19, 2000, as amended, pursuant to which the SSWG Acquisition is to be accomplished.
- J. “Framework Agreement” means the Framework and Implementation Agreement between Diageo and Pernod Ricard, dated as of December 4, 2000, as amended, which, among other things, defines the manner in which Diageo and Pernod Ricard are separating the businesses and assets of the SSWG Business to be acquired by each of them, and particularly, the allocation of the Non-Rum Overlap Companies and Assets to Pernod Ricard after the closing of the SSWG Acquisition. The Framework Agreement includes all amendments, exhibits, attachments, related agreements and schedules thereto, and is contained in Confidential Appendix III, attached hereto.
- K. “Agreements” means the Trademark Agreement and the Transition Services Agreements.
- L. “Back Office Services Agreement” means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which the JES Back Office will provide certain transitional administrative services to Pernod Ricard after the SSWG Acquisition Date.
- M. “Business Day” means any day excluding Saturday, Sunday and any United States federal holiday.
- N. “Captain Morgan Rum” means “Captain Morgan Original Spiced Rum” and any other brand or product that uses the trade name or trademark “Captain Morgan” in connection with rum or a rum-based beverage product.
- O. “Captain Morgan Rum Business” means all of the operations and businesses related to the research, development,

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production, marketing, advertising, promotion, distribution, sale or after-sales support for Captain Morgan Rum.

P. “Captain Morgan Rum Confidential Business Information” means all information that is not in the public domain relating to the Captain Morgan Rum Business, including the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum.

Q. “Captain Morgan Rum Employee(s)” means:

1. all Persons employed by the JES U.S. Spirits Business with responsibility for, or who directly participated in (irrespective of the portion of working time involved), the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum within the eighteen (18) month period prior to the SSWG Acquisition Date who become employed by Respondent Diageo at any time prior to the divestiture of the Malibu Rum Assets; and
2. all Persons employed by Respondent Diageo or who continue in the employ of JES with responsibility for, or who directly participate in (irrespective of the portion of working time involved), the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Captain Morgan Rum in the United States at any time after the SSWG Acquisition Date and prior to the divestiture of the Malibu Rum Assets.

R. “Chivas” means “Chivas,” “Chivas Regal,” “Chivas Brothers,” and any other product owned or sold by the SSWG Business that uses the trade name or trademark “Chivas” in connection with Scotch whisky or a Scotch whisky product.

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- S. “Chivas Companies and Assets” means all of Respondent Vivendi Universal’s rights, title and interests in and to the businesses and assets of the SSWG Business relating to Chivas that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including, but not limited, to Chivas Brothers Limited and any Scotch whisky distilleries that produce whisky used in the blending of Chivas or exchanged to acquire other whisky used in the blending of Chivas.
- T. “Closing Date” means the date on which Respondent Diageo and a Commission-approved Acquirer close on a transaction to divest the Malibu Rum Assets pursuant to this Order.
- U. “Commission-approved Acquirer” means any entity approved by the Commission to acquire the Malibu Rum Assets that are required to be divested pursuant to this Order.
- V. “Co-packing Agreement” means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which Diageo will provide transitional bottling services to Pernod Ricard for Seagram's Gin products and Seagram’s Scotch Whisky products (as those products are identified in the Co-packing Agreement) in the United States.
- W. “Cost” means direct cash cost of raw materials and labor.
- X. “Diageo Disposals Team” means those individuals selected by Diageo to oversee the process of selling the “Pernod Ricard On-sale Businesses” and the “Seagram Venture Businesses,” as defined in and pursuant to the terms of the Framework Agreement, to third parties, as that team is supplemented or reconstituted by Respondent Diageo from time to time. The individuals, and their titles, on the Diageo Disposals Team as of the date on which Respondent Diageo agreed to this Order are identified in Confidential Appendix VI.

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- Y. “Diageo/Pernod Ricard Supervisory Committee” means the committee of Diageo and Pernod Ricard executives established under the Framework Agreement, and as supplemented or reconstituted by Respondent Diageo and Pernod Ricard from time to time, that is responsible for overseeing the aspects of the Diageo - Pernod Ricard relationship specified in the Framework Agreement until all transactions and commitments specified in the Framework Agreement have been accomplished.
- Z. “Diageo Firewalled Senior Executives” means Respondent Diageo’s Chief Executive Officer, Chief Financial Officer and the executive responsible for the SSWG Acquisition, and their respective staffs.
- AA. “Diageo U.S. Spirits Business” means Respondent Diageo’s business engaged in the research, development, production, distribution, marketing, sale or after-sale support of distilled spirits in the United States, other than the Held Separate Business.
- BB. “Diageo U.S. Spirits Employees” means all Persons employed by the Diageo U.S. Spirits Business with responsibility for, or who directly participate in (irrespective of the portion of working time involved), the research, development, production, distribution, marketing, sales or after-sales support of distilled spirits in the United States.
- CC. “Divestiture Agreement” means any agreement between Respondent Diageo and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph VIII.A. of this Order and a Commission-approved Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Malibu Rum Assets to be divested that have been approved by the Commission to accomplish the requirements of this Order.
- DD. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph VIII.A. of this Order.

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- EE. “The Glenlivet” means “The Glenlivet” and any other product owned or sold by the SSWG Business that uses the trade name or trademark “The Glenlivet” in connection with Scotch whisky or a Scotch whisky product.
- FF. “The Glenlivet Companies and Assets” means all of Respondent Vivendi Universal’s rights, title and interests in and to the businesses and assets of the SSWG Business relating to The Glenlivet that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including The Glenlivet Distillers Ltd.
- GG. “Held Separate Business” means the JES U.S. Spirits Business.
- HH. “Interim Monitor” means the Interim Monitor appointed by the Commission pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter.
- II. “JES” means Joseph E. Seagram & Sons, Inc. (U.S.A.), a corporation organized and existing under the laws of Indiana, with its principal place of business located at 375 Park Avenue, New York, NY 10152-0192, which is the primary entity responsible for the SSWG Business.
- JJ. “JES Back Office” means those facilities, assets and personnel of JES and its subsidiaries that provide administrative services and that will provide such services for Pernod Ricard and its subsidiaries and affiliates following the SSWG Acquisition Date pursuant to the Back Office Services Agreement.
- KK. “JES U.S. Spirits Business” means the JES business engaged in the research, development, production, distribution, marketing, sale or after-sale support of distilled spirits in the United States, which among other things, is responsible for developing global brand strategies for the Captain Morgan Rum Business.

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- LL. “Malibu Rum” means “Malibu Rum” and any other brand or product owned, produced or sold by Respondent Diageo that uses the trade name or trademark “Malibu” in connection with rum or any beverage product.
- MM. “Malibu Rum Assets” means all of Respondent Diageo’s rights, titles and interests, worldwide, as of the Closing Date, in and to all assets, tangible and intangible, of the Malibu Rum Business, including, without limitation, the following:
1. all Malibu Rum Intellectual Property;
 2. all Malibu Rum Confidential Business Information;
 3. all Malibu Rum Sales and Marketing Materials;
 4. all assets relating to the research, development, production (*provided, however*, the only assets relating to production and manufacturing that are included in this definition are those identified in Paragraph I.MM.11.), distribution, marketing, promotion, sale, or after-sales support of Malibu Rum worldwide;
 5. a copy of all vendor lists, and all names of manufacturers and suppliers under contract with Respondent Diageo who or which produce for, or supply to, Respondent Diageo in connection with the production or sale of Malibu Rum;
 6. at the option of the Commission-approved Acquirer, all rights, title and interest in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished case goods, packaging and point of sale materials specifically related to Malibu Rum;
 7. at the option of the Commission-approved Acquirer and to the extent transferable, divisible or assignable, all rights, title and interest in and to agreements (except contracts of employment), express or implied, relating to

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research, design, development, production, distribution, marketing, promotion, sale or after-sales support of Malibu Rum, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with customers (together with associated bid and performance bonds, if any), other rum distillers, joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees including, but not limited to, the Malibu Rum Input Supply Agreements;

8. all unfilled customer orders for finished Malibu Rum as of the Closing Date (a list of such orders for customers within the United States, Canada, Mexico, and the European Union to be provided to the Commission-approved Acquirer within twenty (20) Business Days after the Closing Date);
9. all rights under warranties and guarantees, express or implied, relating to Malibu Rum;
10. all books, records and files relating to Malibu Rum; and
11. at the Commission-approved Acquirer's option:
 - a. all rights, titles and interests in and to the blending and bottling plant located at 283 Horner Avenue, Etobicoke, Ontario, Canada, ON M8Z 4Y4 ("Canadian Plant"), that is used in the production, blending, bottling or packaging of Malibu Rum or other distilled spirits;
 - b. all machinery, fixtures, equipment, vehicles, furniture, tools and other personal property associated with the Canadian Plant, (except for those assets that are used exclusively in the manufacture of

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products other than Malibu Rum and are listed on the attached Confidential Appendix I); and

- c. all machinery, equipment, tools, and other personal property specifically relating to the bottle sleeving equipment at the blending and bottling plant located at Strada Statale 63, Santa Vittoria, D'Alba, 12069 Italy.

Provided, however, that the Malibu Rum Assets shall not include:

- a. any rights to use Respondent Diageo's general business strategies or practices relating to product formulation or market research activities or methods or methodologies that Respondent Diageo uses on a company-wide basis for the purposes of formulating, marketing, promoting, managing, or selling its various brands. Except that, to the extent that documents or other materials relating to such business strategies or practices contain the results of product formulation or marketing research activities relating to Malibu Rum, Respondent Diageo shall divest those results to the Commission-approved Acquirer and the Commission-approved Acquirer shall be entitled to use such product formulation or marketing research results;
- b. any rights, title and interest in or to any owned or leased real property and improvements, office space, office equipment and furniture, management information systems, software, and personal property used by Respondent Diageo (other than the assets included in the Malibu Rum Assets as a result of Paragraph I.MM.11.);
- c. any interest in any distributor of beverage alcohol;
- d. any Payables or Receivables;

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- e. any contracts for the procurement or receipt of goods or services for Respondent Diageo on a company-wide or portfolio-wide basis; and
- f. that portion of any document or other material containing information solely relating to a brand or business other than Malibu Rum.

Provided further, however, in cases in which documents or other materials included in the Malibu Rum Assets contain information that (1) relates both to Malibu Rum and other brands or businesses of Respondent Diageo, and (2) such information cannot be segregated in a manner that preserves the usefulness of the information as it relates to Malibu Rum, then Respondent Diageo shall be required only to provide copies of the documents and materials containing this information. The purpose of this proviso is to ensure that Respondent Diageo provides the Commission-approved Acquirer with the above-described information without requiring Respondent Diageo completely to divest itself of information that, in content, also relates to brands and businesses other than Malibu Rum.

- NN. “Malibu Rum Business” means all of the operations and businesses of Respondent Diageo related to the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support for Malibu Rum.
- OO. “Malibu Rum Confidential Business Information” means all information owned by Respondent Diageo as of the Closing Date that is not in the public domain relating to the Malibu Rum Assets, including the research, development, production, marketing, advertising, promotion, distribution, sale or after-sales support of Malibu Rum. *Provided, however,* that where such confidential business information also relates to other brands or businesses of Respondent Diageo, Respondent Diageo shall grant the Commission-approved Acquirer the rights to use such confidential

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business information on a non-exclusive basis in connection with the Malibu Rum Business.

PP. “Malibu Rum Employee(s)” means:

1. all Malibu Rum Key Employees; and
2. all persons designated as, or otherwise functioning as, brand managers for Malibu Rum, at any time from the date Respondent Diageo signs the Agreement Containing Consent Orders until the Closing Date. (A list of such individuals performing such roles as of the date Respondent Diageo signed the Agreement Containing Consent Orders is attached as Confidential Appendix II.C.)

QQ. “Malibu Rum Input Supply Agreements” means the following agreements:

1. West Indies Rum Distillery: Manufacturing Agreement dated 20 July 1993 between Twelve Islands Shipping Company Limited (“TISC”) and West India Rum Refinery Limited, now called West Indies Rum Distillery Limited (“WIRD”), as amended by a Variation Agreement dated 25 February 1998 between TISC and WIRD, and as novated in favor of Guinness UDV Amsterdam B.V. (“GUDVA”) by a Supply Novation Agreement dated 21 July 2000 between TISC, GUDVA, and WIRD;
2. any agreement with Haarmann & Reimer for the supply of flavorings for Malibu Rum; and
3. any agreement with Givaudan Canada Co. for the supply of flavorings for Malibu Rum.

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RR. “Malibu Rum Intellectual Property” means all:

1. Malibu Rum Trademarks;
2. Malibu Rum Trade Dress;
3. trade secrets, know-how and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world, relating to Malibu Rum;
4. Malibu Rum Patents;
5. Malibu Rum Production Technology; and
6. all research materials, technical information, and data contained in software, anywhere in the world, relating to Malibu Rum.

Provided, however, that where such intellectual property (other than Malibu Rum Trademarks or Malibu Rum Trade Dress) also relates to other brands or businesses of Respondent Diageo, Respondent Diageo shall grant the Commission-approved Acquirer the rights to use such intellectual property on a non-exclusive basis in connection with the Malibu Rum Business.

SS. “Malibu Rum Key Employee(s)” means those individuals identified in Confidential Appendix II.D. to this Order.

TT. “Malibu Rum Patents” means all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for

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patents and registrations thereto, anywhere in the world, related to Malibu Rum.

- UU. “Malibu Rum Production Technology” means all recipes, formulas, blend specifications, technology, trade secrets, know-how, and proprietary information, anywhere in the world, relating to the production and bottling of Malibu Rum.
- VV. “Malibu Rum Sales and Marketing Materials” means all marketing and promotional materials used anywhere in the world with respect to Malibu Rum or the Malibu Rum Assets as of the Closing Date, including, without limitation: all advertising materials; customer lists; contribution statements; Internet/Web sites and domain name(s) (uniform resource locators), and registration(s) thereof, and related materials; product data; profit and loss statements; price lists; mailing lists; sales materials; marketing information (*e.g.*, customer sales and competitor data); catalogs, sales promotion literature and other promotional materials; spend records related to advertising, marketing or promotion; training and other materials associated with the Malibu Rum Assets; and all copyrights in and to the Malibu Rum Sales and Marketing Materials.
- WW. “Malibu Rum Trademarks” means all trademarks, trade names and brand names, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized by and associated therewith, anywhere in the world, for or relating to Malibu Rum; but excluding any goodwill or other rights that are associated generally with Respondent Diageo or any of its businesses, products, or brands other than Malibu Rum, including, among other things, the trade names, trademarks, or logos “Diageo,” “Guinness UDV,” “Guinness,” “United Distillers & Vintners,” “UDV,” “International Distillers & Vintners,” “Jose Cuervo,” “Moët Hennessy,” “IDV,” “Louis Vuitton,” “LVMH,” “Gilbey’s,” “Justerini & Brooks,” “Schenley,” and “Heublein.”

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- XX. “Malibu Rum Trade Dress” means the current trade dress of Malibu Rum products, including, but not limited to, product packaging associated with the sale of Malibu Rum products anywhere in the world, logos, and the lettering of the Malibu Rum products’ trade name or brand name; but excluding any portion of any such trade dress rights that is solely related to Respondent Diageo or to any of its businesses, products, or brands other than Malibu Rum.
- YY. “Martell” means “Martell” and any other product owned or sold by Vivendi Universal or the SSWG Business that uses the trade name or trademark "Martell" in connection with brandy or Cognac.
- ZZ. “Martell Companies and Assets” means all of Respondent Vivendi Universal’s rights, title and interests in and to the businesses and assets of the SSWG Business relating to Martell that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement, including, but not limited to, all of the issued and outstanding capital stock held by Vivendi Universal of Martell S.A., Martell & Co., Societe des Domaines Viticoles Martell S.A., Martell & Cie (South Africa) (Pty.) Ltd., Martell Inc. USA, Augier Robin Briand & Co., and any other dormant entities held by those entities.
- AAA. “Non-Public Pernod Ricard Information” means: (a) any information relating to the Martell Companies and Assets, the Chivas Companies and Assets, the Glenlivet Companies and Assets, or the Seagram’s Gin Businesses and Assets obtained by Respondent Diageo through the SSWG Acquisition or through Respondent Diageo’s provision of services pursuant to the Co-packing Agreement, or through Respondent Diageo’s provision of services to Pernod Ricard under the Back Office Services Agreement or similar transitional arrangements in other countries; and (b) information relating to the “Pernod Ricard On-Sale Businesses,” as defined in the Framework Agreement, learned by the Diageo Disposals Team; *provided, however*, that Non-Public Pernod Ricard Information shall not include information already in the

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public domain and information that subsequently enters the public domain through no violation of this Order by Diageo.

- BBB. “Non-Rum Overlap Companies and Assets” means the Chivas Companies and Assets, The Glenlivet Companies and Assets, the Martell Companies and Assets and the Seagram’s Gin Businesses and Assets.
- CCC. “Payables” means trade and other creditors and accounts payable, including any part of such amount as relates to any tax.
- DDD. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- EEE. “Receivables” means all outstanding payments due as of the Closing Date for goods or services supplied or rights licensed.
- FFF. “Seagram’s Gin” means “Seagram’s Extra Dry Gin” and any other product owned or sold by the SSWG Business that uses the trade name or trademark “Seagram” or “Seagram’s” in connection with gin.
- GGG. “Seagram’s Gin Businesses and Assets” means all of Respondent Vivendi Universal’s rights, title and interests in and to the businesses and assets of the SSWG Business relating to Seagram’s Gin that Pernod Ricard is entitled to acquire pursuant to the Framework Agreement.
- HHH. “Trademark Agreement” means the Trademark Implementation Agreement (including any attachments to that agreement), contained in Confidential Appendix III, attached hereto, pursuant to which Pernod Ricard grants to Respondent Diageo a license to use the “Seagram’s” trademark in connection with the production, marketing, promotion and sale of Canadian and American whiskey and whiskey-flavored alcoholic beverages.

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- III. “Transition Services Agreements” means the Back Office Services Agreement, the Co-packing Agreement, the Vivendi Universal Transition Services Agreement, and the Vivendi Universal Information Technology Transition Services Agreement.
- JJJ. “Vivendi Universal Transition Services Agreement” means the agreement, contained in Confidential Appendix V, attached hereto, pursuant to which Vivendi Universal will provide transitional administrative services to Pernod Ricard and Respondent Diageo after the SSWG Acquisition Date.
- KKK. “Vivendi Universal Information Technology Transition Services Agreement” means the agreement contained in Confidential Appendix V, attached hereto, pursuant to which Vivendi Universal will provide transitional information technology services to Pernod Ricard and Respondent Diageo after the SSWG Acquisition Date.

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

- A. Respondent Diageo shall divest the Malibu Rum Assets, absolutely and in good faith and at no minimum price, within six (6) months after the SSWG Acquisition Date. Respondent Diageo shall divest the Malibu Rum Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. Respondent Diageo shall, at the Commission-approved Acquirer’s option, assign to the Commission-approved Acquirer any or all of the Malibu Rum Input Supply Agreements where permissible under applicable law and the terms of the contracts, and with respect to non-assignable Malibu Rum Input Supply Agreements, shall use best efforts to assist the Commission-approved Acquirer in securing contractual rights with such input suppliers, including, but

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not limited to, any agreements related to the flavorings for Malibu Rum.

- C. Respondent Diageo shall provide the Malibu Rum Employees with financial incentives to continue in their employment positions pending divestiture of the Malibu Rum Assets, including providing them with the same employee benefits offered by Respondent Diageo to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Malibu Rum Assets is completed.
- D. Respondent Diageo shall provide the Malibu Rum Key Employees with the following;
 - 1. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets in this matter is issued by the Commission to be paid to those Malibu Rum Key Employees who continue their employment with Respondent Diageo until the divestiture of the Malibu Rum Assets is completed;
 - 2. the Malibu Rum Key Employees who accept employment with the Commission-approved Acquirer shall be offered an additional retention incentive equal to twenty (20) percent of such employee's annual salary under the following terms:
 - a. ten (10) percent to be paid at the beginning of the employee's employment with the Commission-approved Acquirer, and ten (10) percent to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and
 - b. a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved

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Acquirer, the Commission-approved Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent Diageo and been terminated at such time, less any severance payment actually paid by the Commission-approved Acquirer.

- E. Respondent Diageo shall provide the Commission-approved Acquirer with a complete list of the Malibu Rum Key Employees at the request of the Commission-approved Acquirer at any time after the execution of the Divestiture Agreement. Such list shall state each individual's name, position, address, telephone number and a description of the duties and work performed by the individual in connection with the Malibu Rum Assets. Respondent Diageo shall also provide the Commission-approved Acquirer with an opportunity to inspect the personnel files and other documentation relating to the Malibu Rum Key Employees at the request of the Commission-approved Acquirer at any time after the execution of the Divestiture Agreement. *Provided, however,* that in cases in which applicable law restricts access to the information required to be provided to the Commission-approved Acquirer pursuant to this Paragraph, Respondent Diageo shall use best efforts to ensure that such information is provided to the Commission-approved Acquirer consistent with applicable law.
- F. Respondent Diageo shall provide the Commission-approved Acquirer with an opportunity to enter into employment contracts with the Malibu Rum Key Employees, contingent upon the divestiture of the Malibu Rum Assets. Respondent Diageo shall not interfere with the employment by the Commission-approved Acquirer of any Malibu Rum Key Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent

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Diageo, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to Malibu Rum or any non-compete or confidentiality provisions of employment or other contracts with Respondent Diageo that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

- G. For a period of one (1) year following the Closing Date, Respondent Diageo shall not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any responsibility relating to Malibu Rum who is a former employee of Respondent Diageo to terminate their employment relationship with the Commission-approved Acquirer; *provided, however*, it shall not be deemed a violation of this provision if: (i) Respondent Diageo advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees of the Commission-approved Acquirer, (ii) Respondent Diageo hires employees who apply for employment with Respondent Diageo, as long as such employees were not solicited by Respondent Diageo in violation of this Paragraph, or (iii) the Commission-approved Acquirer has terminated the individual's employment or has otherwise granted a release to the individual to permit the individual to be employed by Respondent Diageo.
- H. Respondent Diageo shall require, as a condition of continued employment post-divestiture, that each Malibu Rum Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Malibu Rum Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent Diageo. Such agreement shall provide for the following:

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1. restrictions on the use of trade secrets and Malibu Rum Confidential Business Information;
2. appropriate conduct relating to information that could be used to the detriment of competitors; and
3. sanctions for violation of the terms of the agreement.
Respondent Diageo shall send such agreement by e-mail with return receipt requested or similar transmission, and keep a file of such return receipts for one (1) year after the Closing Date.

Respondent Diageo shall provide a copy of such agreement to the Commission-approved Acquirer. Respondent Diageo shall maintain complete records of all such agreements at Respondent Diageo's corporate headquarters and shall provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondent Diageo shall make available at the Commission-approved Acquirer's request copies of all certifications, notifications and reminders sent to Respondent Diageo's personnel. *Provided, however*, that nothing in this paragraph shall preclude Malibu Rum Employees who remain employed by Respondent Diageo following the Closing Date from working on any product, brand, or business of Respondent Diageo and from relying in the course of such work on any expertise or general knowledge or activities relating to rum, rum-based beverage products or other beverage alcohol.

- I. Respondent Diageo shall institute procedures and requirements to ensure that all Diageo Firewalled Senior Executives do not:
 1. disclose or make available, directly or indirectly, any Captain Morgan Rum Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; or

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2. disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee.

Respondent Diageo shall require that each Diageo Firewalled Senior Executive execute a non-disclosure agreement pursuant to which each such Person agrees to comply with the terms of this Paragraph.

- J. Respondent Diageo shall, at the request of the Commission-approved Acquirer, for a period of up to one (1) year following the Closing Date and at Cost to the Commission-approved Acquirer, provide such technical assistance and training, and make available such personnel, as are reasonably necessary to transfer the Malibu Rum Assets to the Commission-approved Acquirer and to enable the Commission-approved Acquirer to produce Malibu Rum in substantially the same manner and quality as that achieved by Respondent Diageo.
- K. Respondent Diageo shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to which the Malibu Rum Assets are divested to the Commission-approved Acquirer. Any Divestiture Agreement between Respondent Diageo (or a trustee appointed pursuant to Paragraph VIII of this Order) and a Commission-approved Acquirer of the Malibu Assets that has been approved by the Commission shall be deemed incorporated by reference to this Order. Any failure by Respondent Diageo to comply with the terms of any Divestiture Agreement shall constitute a failure to comply with this Order.
- L. Counsel for Respondent Diageo (including in-house counsel under appropriate confidentiality arrangements) may retain or have access to unredacted copies of all documents or other material provided to the Commission-approved Acquirer in order to:

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1. comply with any Divestiture Agreement or this Order, any law, including without limitation, any requirement to obtain regulatory licenses or approvals or with any data retention requirement of any applicable government or jurisdiction, or any taxation requirements; or
2. to defend against, respond to, or otherwise participate in, any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Malibu Rum Business; *provided, however*, that Respondent Diageo may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement.

Provided further, however, Respondent Diageo shall require:

1. those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however*, that Respondent Diageo shall not be deemed to have violated this Paragraph if the Commission-approved Acquirer withholds such agreement unreasonably; and
 2. Respondent Diageo shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.
- M. The purpose of the divestiture of the Malibu Rum Assets is to ensure the continued use of the Malibu Rum Assets in the same business in which the Malibu Rum Assets were engaged at the time of the announcement of the SSWG Acquisition, and to remedy the lessening of competition resulting from the SSWG Acquisition as alleged in the Commission's complaint.

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III.

IT IS FURTHER ORDERED that:

- A. Respondent Diageo shall not acquire, directly or indirectly, any stock, share capital, equity or other interest in the Non-Rum Overlap Companies and Assets; *provided, however*, that, to the extent Respondent Diageo acquires any part of the stock, share capital, equity or other interest in any of the Non-Rum Overlap Companies and Assets as a result of transactions and legal requirements incident to the SSWG Acquisition, then Respondent Diageo: (i) shall divest and transfer full legal ownership and all other incidents of ownership to Pernod Ricard on, or as soon as practicable following, the SSWG Acquisition Date, and in any event no later than twenty (20) Business Days after the SSWG Acquisition Date (or such longer period as required by local law outside the United States, or, in the case of the countries of Columbia, Korea, Uruguay and Venezuela, Pernod Ricard's establishment of an infrastructure necessary to distribute the products of the Non-Rum Overlap Companies and Assets), and (ii) pending such divestiture or transfer, shall not exercise any incident of ownership over any of the Non-Rum Overlap Companies and Assets other than those necessary to transfer full legal ownership and all other incidents of ownership to Pernod Ricard, or to maintain distribution of products pending Pernod Ricard's receipt of legal authorization, or establishment of an infrastructure necessary, to distribute such products, subject to appropriate protections for any Non-Public Pernod Ricard Information; *and provided further* that Respondent Diageo may license from Pernod Ricard, pursuant to the Trademark Agreement, the exclusive rights to produce, promote and sell Canadian and American whiskey and whiskey-flavored alcoholic beverages under the "Seagram's" trademark. Respondent Diageo shall comply with the terms of the Framework Agreement relating to the Non-Rum Overlap Companies and Assets, which agreement shall be deemed incorporated by reference into this Order. Failure by Respondent Diageo to

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comply with the provisions of the Framework Agreement relating to the Non-Rum Overlap Companies and Assets shall constitute a failure to comply with this Order.

- B. Respondent Vivendi Universal shall not sell, transfer or otherwise convey, directly or indirectly, any stock, share capital, equity or other interest in the Non-Rum Overlap Companies and Assets to Respondent Diageo in a way that conflicts with Paragraph III.A. of this Order.
- C. The purpose of the requirements of this Paragraph is to remedy the lessening of competition that would result if Respondent Diageo were to acquire the Non-Rum Overlap Companies and Assets from Respondent Vivendi Universal as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondent Diageo shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, stock, share capital equity or other interest, in whole or in part, in the Non-Rum Overlap Companies and Assets.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (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 Respondent Diageo and not of any other party to the transaction. Respondent Diageo shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the

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“first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Diageo shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that Respondents shall provide transition services pursuant to the Transition Services Agreements as follows :

- A. For a period of up to twelve (12) months after the SSWG Acquisition Date, Respondent Diageo shall provide to Pernod Ricard transition services as set forth below:
 1. Respondent Diageo shall provide the services specified in the Back Office Services Agreement to Pernod Ricard on terms agreed to by Diageo and Pernod Ricard in the Back Office Services Agreement. Respondent Diageo shall provide the services required by this Paragraph in a non-discriminatory fashion to Pernod Ricard with service levels comparable to those JES provides to itself or its affiliates. Respondent Diageo shall comply with all the terms of the Back Office Services Agreement, and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Back Office Services Agreement shall constitute a failure to comply with this Order.
 2. Respondent Diageo shall provide transitional bottling and/or maturing services to Pernod Ricard on the terms

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agreed to by Diageo and Pernod Ricard in the Co-packing Agreement. Respondent Diageo shall comply with all the terms of the Co-packing Agreement, and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Co-packing Agreement shall constitute a failure to comply with this Order.

- B. Respondent Vivendi Universal shall provide transition services on the terms agreed to by Respondent Vivendi Universal, Respondent Diageo and Pernod Ricard in: (i) the Vivendi Universal Transition Services Agreement, and (ii) the Vivendi Universal Information Technology Transition Services Agreement. Respondent Vivendi Universal shall comply with all the terms of the Vivendi Universal Transition Services Agreement and the Vivendi Universal Information Technology Transition Services Agreement, and such agreements shall be deemed incorporated by reference into this Order. Failure to comply with the Vivendi Universal Transition Services Agreement and the Vivendi Universal Information Technology Transition Services Agreement shall constitute a failure to comply with this Order.

VI.

IT IS FURTHER ORDERED that, for a period of two (2) years after the SSWG Acquisition Date, Respondent Diageo:

- A. Shall not provide, disclose or otherwise make available any Non-Public Pernod Ricard Information to any Person - including, but not limited to, any of Diageo's employees, agents, or representatives, or any third-party - outside of the Held Separate Business (for as long as that business is held separate); shall not use any Non-Public Pernod Ricard Information for any reason or purpose other than those reasons or purposes permitted or required under the Agreements (or any similar arrangements in place in countries outside the United States), this Order and the Order to Hold Separate and Maintain Assets; and shall enforce the terms of this Paragraph VI.A. as to any Person and take such

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reasonable action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.A., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information;

B. *Provided, however*, that, in addition to the Persons who may receive or have access to Non-Public Pernod Ricard Information under Paragraph VI.A. of this Order, Respondent Diageo also may have access to and use of Non-Public Pernod Ricard Information for the following specified purposes:

1. Respondent Diageo may use Non-Public Pernod Ricard Information obtained through the SSWG Acquisition, or in the course of providing the services under the Co-packing Agreement (hereinafter “Confidential Co-packing Information”) or the Back Office Services Agreement (hereinafter “Confidential Back Office Services Information”) or their respective equivalents outside the United States to fulfill Respondent Diageo's obligations under the Back Office Services Agreement and the Co-packing Agreement; Respondent Diageo:

a. shall make available Confidential Back Office Services Information and Confidential Co-packing Information only to:

(1) Pernod Ricard;

(2) those Persons working for Respondent Diageo having a need to know such information in order to provide transition services to Pernod Ricard, including those transition services covered under the Framework Agreement; and

(3) those third parties that Pernod Ricard agrees should have access to the information; *provided, however*, that Respondent Diageo shall not be deemed to have violated this

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Paragraph if Pernod Ricard withholds such agreement unreasonably.

- b. shall take steps to ensure that all of its employees with access to Non-Public Pernod Ricard Information are aware of the confidentiality obligations and restrictions on the use of Non-Public Pernod Ricard Information; and
 - c. shall enforce the terms of this Paragraph VI.B.1. as to any Person and take such reasonable action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.B.1., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information; and
2. the Diageo Disposals Team may have access to Non-Public Pernod Ricard Information relating to the disposal process. The Diageo Disposals Team shall not include Diageo employees who have ongoing, direct responsibility for the selling or marketing of any Diageo spirits products or individuals responsible for line management of business organizations that produce or sell any Diageo spirits products. Respondent Diageo may use Non-Public Pernod Ricard Information learned by the Diageo Disposals Team in the course of the disposal process of the Pernod Ricard On-sale Businesses (hereinafter “Confidential Disposals Team Information”) only for the purposes of conducting that disposal process. Respondent Diageo:
- a. shall make available Confidential Disposals Team Information only to:
 - (1) those Persons working for Respondent Diageo having a need to know and who agree in writing to maintain the confidentiality of such information;

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- (2) the Diageo/Pernod Ricard Supervisory Committee; and
 - (3) those third parties that Pernod Ricard agrees should have access to the Confidential Disposals Team Information; *provided, however,* that Respondent Diageo shall not be deemed to have violated this Paragraph if Pernod Ricard withholds such agreement unreasonably.
- b. shall take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph VI.B.2., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information. Respondent Diageo shall require its members of the Diageo/Pernod Ricard Supervisory Committee to agree in writing to maintain the confidentiality of Confidential Disposals Team Information, or any other Non-Public Pernod Ricard Information they learn in their function of administering the Framework Agreement.
3. Counsel for Respondent Diageo (including in house counsel under appropriate confidentiality arrangements) may retain or have access to the Non-Public Pernod Ricard Information to the extent reasonably necessary in order to:
- a. comply with the Framework Agreement, this Order, any law, including without limitation, any requirement to obtain regulatory licenses or approvals, any data retention requirement of any applicable government or jurisdiction, or any taxation requirements; or
 - b. defend against, respond to, or otherwise participate in, any litigation, investigation, audit, process,

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subpoena or other proceeding relating to the divestiture or any other aspect of the SSWG Business.

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

- a. those who view such Non-Public Pernod Ricard Information to enter into confidentiality agreements with Pernod Ricard; *provided, however,* that Respondent Diageo shall not be deemed to have violated this Paragraph if Pernod Ricard withholds such agreement unreasonably; and
- b. Respondent Diageo shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that:
 1. Respondent Diageo expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and by the Order to Hold Separate and Maintain Assets (collectively, “the Orders”); and
 2. Respondent Vivendi Universal expeditiously complies with all of its obligations and performs all of its functions required by this Order.

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- B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter or this Paragraph, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to each Respondent of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
 2. The Interim Monitor shall have the power and authority to monitor each Respondent's respective compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 3. Within ten (10) days after appointment of the Interim Monitor, each Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor the Respondent's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
 4. The Interim Monitor shall serve until:
 - a. the Malibu Rum Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is

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fully capable of, independently of Respondent Diageo, producing or procuring, directly or indirectly, Malibu Rum acquired pursuant to a Divestiture Agreement; and

- b. the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to each Respondent's personnel, books, records, documents, records kept in the normal course of business, facilities and technical information, and to such other relevant information as the Interim Monitor may reasonably request, relating to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations relating to the Malibu Rum Assets and the Held Separate Business. Each Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor the Respondent's compliance with the Orders.
6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent(s) on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the relevant Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim

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Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

7. Each Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter.
9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
10. Respondent Diageo shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.A. of this Order and/or as otherwise provided in any agreement approved by the Commission. Respondent Vivendi Universal shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.B of this Order. The Interim Monitor shall evaluate the reports

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submitted to it by each Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by each Respondent with the provisions of the Orders.

11. Each Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter may be the same Person appointed as Divestiture Trustee pursuant to Paragraph VIII.A. of this Order.

VIII.

IT IS FURTHER ORDERED that:

- A. If Respondent Diageo has not fully complied with the obligations specified in Paragraph II of this Order, the Commission may appoint a trustee to divest the Malibu Rum Assets required to be divested pursuant to Paragraph II in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*I*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*I*), or any other statute enforced by the Commission, Respondent Diageo shall consent to the appointment of a Divestiture Trustee in such action to divest the Malibu Rum Assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission

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or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Diageo to comply with this Order.

- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph VIII.A. of this Order, Respondent Diageo shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Diageo, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Diageo has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Diageo of the identity of any proposed Divestiture Trustee, Respondent Diageo shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
 2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the assets that are required by this Order to be divested.
 3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent Diageo shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

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4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph VIII.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) 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.
5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be divested by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondent Diageo shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Diageo shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Diageo 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.
6. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Diageo's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from

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more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Diageo from among those approved by the Commission; *provided further, however*, that Respondent Diageo shall select such entity within five (5) Business Days after receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Diageo, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Diageo, 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 Respondent Diageo, 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.
8. Respondent Diageo 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,

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whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph VIII.A. of this Order.
10. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the Divestiture Trustee determines that he or she is unable to divest the Malibu Rum Assets required to be divested in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, development, production, distribution, marketing, promotion, sale, or after-sales support of the Malibu Rum Assets, the Divestiture Trustee may divest such additional assets of Respondent Diageo and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Malibu Rum Assets required to be divested by this Order.
13. The Divestiture Trustee shall report in writing to Respondent Diageo and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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14. Respondent Diageo 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.
- C. The Divestiture Trustee appointed pursuant to Paragraph VIII.A. of this Order may be the same Person appointed as Interim Monitor pursuant to Paragraph IV.A. of the Order to Hold Separate and Maintain Assets in this matter.

IX.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent Diageo has fully complied with the provisions of Paragraphs II, III, VI.A. and VIII. of this Order and with the provisions of the Order to Hold Separate and Maintain Assets in this matter, Respondent Diageo shall submit to the Commission (with simultaneous copies to the Interim Monitor and Divestiture Trustee, as appropriate) verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and with the Order to Hold Separate and Maintain Assets, as applicable. Respondent Diageo shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Subject to any demonstrated legally recognized privilege, Respondent Diageo shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

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- B. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter, and at other times as the Commission may require, until Respondent Vivendi Universal has fully complied with the provisions of Paragraphs III and V.B. of this Order, Respondent Vivendi Universal shall submit to the Commission verified written reports setting forth in detail the manner and form in which it has complied and is complying with the Paragraphs III and V.B. of this Order.
- C. One (1) year after the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent Diageo shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

X.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in that corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may 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 demonstrated legally recognized privilege, and upon written request with reasonable notice to a Respondent made to its principal United States offices, that Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and

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copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of that Respondent relating to compliance with this Order; and

- B. Upon five (5) days' notice to a Respondent and without restraint or interference from that Respondent, to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

By the Commission.

Order

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Diageo plc (“Diageo”) and Pernod Ricard S.A. of certain voting securities and assets of the Seagram Spirits and Wine business conducted by various subsidiaries of Respondent Vivendi Universal S.A. (“Vivendi Universal”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents Diageo and Vivendi Universal 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 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 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 finding and issues this Order to Hold Separate and Maintain Assets:

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1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1M 9AG, England. Diageo's principal subsidiary in the United States is headquartered at Six Landmark Square, Stamford, CT 06901.
2. Respondent Vivendi Universal is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France. Vivendi Universal's principal subsidiary in the United States is headquartered at 375 Park Avenue, New York, NY, 10152.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Hold Separate and Maintain Assets, the definitions in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that, as of the SSWG Acquisition Date:

- A. Respondent Diageo shall maintain the viability, marketability, and competitive vigor of the Malibu Rum Assets, and shall prevent the destruction, removal, wasting or deterioration of the Malibu Rum Assets, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business. Respondent Diageo shall not sell,

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transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Malibu Rum Assets.

- B. Respondent Diageo shall maintain the operations of the Malibu Rum Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Malibu Rum Assets) and shall use its best efforts to preserve the existing relationships with suppliers, vendors, customers, employees, and others having business relations with the Malibu Rum Assets. Such responsibilities include, but are not limited to:
1. providing the Malibu Rum Assets with sufficient working capital to operate the Malibu Rum Assets at least at current rates of operation, to meet all capital calls with respect to the Malibu Rum Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Malibu Rum Assets;
 2. continuing, at least at their scheduled pace, any additional expenditures for the Malibu Rum Assets authorized prior to the date the Consent Agreement was signed by Respondents;
 3. making available for use by the Malibu Rum Assets funds sufficient to perform all necessary routine maintenance to, and replacements of, the Malibu Rum Assets;
 4. providing the Malibu Rum Assets with such funds as are necessary to maintain the viability, competitive vigor, and marketability of the Malibu Rum Assets;
 5. providing such support services to the Malibu Rum Assets as are being provided to this business by Respondent Diageo as of the date the Consent Agreement was signed by Respondents; *provided, however*, Respondent Diageo's personnel providing such support services shall retain and maintain all Malibu Rum Confidential Business Information on a confidential

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basis, and, except as is permitted by the Decision and Order in this matter and by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves the Held Separate Business.

- C. Respondent Diageo shall maintain a work force of equivalent size, training, and expertise as has been associated with the Malibu Rum Assets.
- D. Respondent Diageo shall provide the Malibu Rum Employees with financial incentives to continue in their employment positions pending divestiture of the Malibu Rum Assets, including providing them with the same employee benefits offered by Respondent Diageo to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Malibu Rum Assets is completed.
- E. Respondent Diageo shall provide the Malibu Rum Key Employees with the following;
 - 1. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets in this matter is issued by the Commission to be paid to those Malibu Rum Key Employees who continue their employment with Respondent Diageo until the divestiture of the Malibu Rum Assets is completed;
 - 2. the Malibu Rum Key Employees who accept employment with the Commission-approved Acquirer shall be offered an additional retention incentive equal to twenty (20) percent of such employee's annual salary under the following terms:

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- a. ten (10) percent to be paid at the beginning of the employee's employment with the Commission-approved Acquirer, and ten (10) percent to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and
 - b. a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved Acquirer, the Commission-approved Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent Diageo and been terminated at such time, less any severance payment actually paid by the Commission-approved Acquirer.
- F. Respondent Diageo shall not interfere with the employment by the Commission-approved Acquirer of any Malibu Rum Key Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent Diageo, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to Malibu Rum or any non-compete or confidentiality provisions of employment or other contracts with Respondent Diageo that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

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III.

IT IS FURTHER ORDERED that:

- A. Respondent Diageo shall, as of the SSWG Acquisition Date, hold the Held Separate Business as a separate and independent business apart from the Diageo U.S. Spirits Business and from all Malibu Rum Employees, except to the extent that Respondent Diageo must exercise direction and control over the Held Separate Business to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order in this matter, and except as otherwise provided in this Order to Hold Separate and Maintain Assets.
- B. Respondent Diageo:
 - 1. shall not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee;
 - 2. shall prevent all Malibu Rum Employees and all Diageo U.S. Spirits Business Employees from soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose;
 - 3. shall institute procedures and requirements to ensure that the Held Separate Business and the Captain Morgan Rum Employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Rum Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and

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- b. do not solicit, access or use any Malibu Rum Confidential Business Information for any reason or purpose;
- 4. shall institute procedures and requirements to ensure that all Diageo Firewalled Senior Executives:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and
 - b. do not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee, and shall within thirty (30) Business Days after the SSWG Acquisition Date require each Diageo Firewalled Senior Executive to sign a non-disclosure agreement pursuant to which each such Person agrees to comply with the terms of this Paragraph; and
- 5. shall enforce the terms of this Paragraph III.B. as to:
 - a. the Diageo U.S. Spirits Business and Diageo U.S. Spirits Employees;
 - b. all Malibu Rum Employees;
 - c. the Held Separate Business; and
 - d. all Captain Morgan Rum Employees,

and shall take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph III.B., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information.

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- C. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Malibu Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Malibu Rum Confidential Business Information on a confidential basis and they shall be prohibited from:
1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing Malibu Rum Confidential Business Information to or with any Person whose employment involves the Held Separate Business; or
 2. soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose.

These Persons shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products of the Held Separate Business.

- D. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Captain Morgan Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Captain Morgan Rum Confidential Business Information on a confidential basis and they shall be prohibited from:
1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any Captain Morgan Rum Confidential Business Information to or with any Malibu Rum Employee or any Diageo U.S. Spirits Employee; or

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2. soliciting, accessing, or using, directly or indirectly, any Malibu Rum Confidential Business Information for any reason or purpose.

The Captain Morgan Rum Employees shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products or businesses of Respondent Diageo other than the Held Separate Business.

- E. Respondent Diageo shall, within ten (10) Business Days of the SSWG Acquisition Date, circulate to all Malibu Rum Employees, to all Diageo U.S. Spirits Employees, to all Diageo Firewalled Senior Executives, to all employees of any Diageo business outside the United States that will distribute or sell Captain Morgan Rum pending the divestiture of the Malibu Rum Assets, and to all employees of the Held Separate Business a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Appendix A to this Order to Hold Separate and Maintain Assets.
- F. Respondent Diageo shall, within thirty (30) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, establish written procedures, to be submitted for approval to any Interim Monitor the Commission may appoint, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Order to Hold Separate and Maintain Assets.
- G. *Provided, however,* this Order to Hold Separate and Maintain Assets does not prohibit Respondent Diageo from :
 1. providing to, or procuring for, the Held Separate Business corporate or administrative services;

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2. engaging in activities designed to achieve efficiencies resulting from the SSWG Acquisition, *provided that* any such activity: (i) does not reveal any Malibu Rum Confidential Business Information to any employee of the Held Separate Business, (ii) does not include any Malibu Rum Employees, and (iii) is conducted by employees who have no direct role in the sales, marketing or development of brand strategies of Malibu Rum or Captain Morgan Rum and who have signed a non-disclosure/confidentiality agreement pursuant to which such Person(s) have agreed to disclose such information only to other Persons who have signed the non-disclosure/confidentiality agreement pursuant to this Paragraph III.

H. The purpose of this Paragraph III is:

1. to ensure that, pending divestiture of the Malibu Rum Assets and except as otherwise provided in this Order to Hold Separate and Maintain Assets: (a) no Captain Morgan Rum Confidential Business Information is exchanged between the Held Separate Business and the Diageo U.S. Spirits Business or the Malibu Rum Employees; and (b) no Malibu Rum Confidential Business Information is exchanged between Respondent Diageo and the Held Separate Business;
2. to prevent interim harm to competition pending divestiture of the Malibu Rum Assets; and
3. to help remedy the lessening of competition resulting from the SSWG Acquisition alleged in the Commission's complaint.

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IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that:
 - 1. Respondent Diageo expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Hold Separate and Maintain Assets and by the attached Decision and Order (collectively, “the Orders”); and
 - 2. Respondent Vivendi Universal expeditiously complies with all of its obligations and performs all of its functions required by the attached Decision and Order.
- B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.A. of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to each Respondent of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
 - 2. The Interim Monitor shall have the power and authority to monitor each Respondent’s respective compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities

Order

of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

3. Within ten (10) days after appointment of the Interim Monitor, each Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor the Respondent's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
4. The Interim Monitor shall serve until:
 - a. the Malibu Rum Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is fully capable of, independently of Respondent Diageo, producing or procuring, directly or indirectly, Malibu Rum acquired pursuant to a Divestiture Agreement; and
 - b. the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to each Respondent's personnel, books, records, documents, records kept in the normal course of business, facilities and technical information, and to any other relevant information as the Interim Monitor may reasonably request, relating to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations relating to the

Order

Malibu Rum Assets and the Held Separate Business. Each Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor the Respondent's compliance with the Orders.

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent(s) on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the relevant Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
7. Each Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

Order

8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.A. of the Decision and Order in this matter.
 9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
 10. Respondent Diageo shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.A. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. Respondent Vivendi Universal shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.B of the Decision and Order. The Interim Monitor shall evaluate the reports submitted to it by each Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by each Respondent with the provisions of the Orders.
 11. Each Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph IV.A. of this Order Hold Separate and Maintain Assets in this matter may be the same Person appointed as Divestiture

Order

Trustee pursuant to Paragraph VIII.A. of the Decision and Order in this matter.

V.

IT IS FURTHER ORDERED that Respondent Diageo shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Hold Separate and Maintain Assets.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Hold Separate and Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Diageo made to its principal United States office, Respondent Diageo shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondent Diageo and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent Diageo relating to compliance with this Order to Hold Separate and Maintain Assets; and
- B. Upon five (5) days' notice to Respondent Diageo and without restraint or interference from Respondent Diageo, to interview officers, directors, or employees of Respondent Diageo, who may have counsel present, regarding such matters.

Order

VII.

IT IS FURTHER ORDERED that this Order to Hold Separate and Maintain Assets shall terminate on the earlier of:

- 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. The day after the divestiture of all of the Malibu Rum Assets, as described in and required by the attached Decision and Order, is completed.

By the Commission.

Order

APPENDIX A**TO THE ORDER TO HOLD SEPARATE AND MAINTAIN
ASSETS
NOTICE OF DIVESTITURE AND REQUIREMENT FOR
CONFIDENTIALITY**

On [date], Diageo plc (“Diageo”) and Vivendi Universal S.A., hereinafter referred to collectively as “Respondents,” entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission (“FTC”) relating to the divestiture of certain assets. That Consent Agreement includes two orders. The Decision and Order requires the divestiture of assets relating to the Malibu Rum business of Diageo. These assets are hereinafter referred to as the “Malibu Rum Assets.” The Order to Hold Separate and Maintain Assets (“the Hold Separate Order”) requires that the U.S. distilled spirits business of Joseph E. Seagram & Sons, Inc. (“JES”), which, among other things, is responsible for developing global brand strategies for the Captain Morgan Rum business in the U.S. and worldwide, be held separate and apart from Diageo’s U.S. Spirits Business pending the divestiture of the Malibu Rum Assets under the Decision and Order. JES is hereinafter referred to as the Held Separate Business. The Hold Separate Order also requires Diageo to commit that no confidential information of the Captain Morgan Rum business will be disclosed to the Malibu brand team (designated as the “Malibu Rum Employees,” on the attached list of employees), and that no confidential information relating to Malibu Rum will be disclosed to employees of the Held Separate Business.

Under the Decision and Order, Diageo is required to divest the Malibu Rum Assets to an acquirer that must be approved by the FTC. That divestiture, however, has not occurred, and certain requirements of the second order – the Hold Separate Order – are now in place to hold the Held Separate Business separate from Diageo’s U.S. Spirits Business pending completion of the divestiture of the Malibu Rum Assets, and to prevent the disclosure of confidential Malibu Rum information to the Held

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Separate Business, and to prevent the disclosure of confidential Captain Morgan Rum information to any Malibu Rum Employees on the attached list. You are receiving this notice because you are either (i) an employee for an entity that is part of the Held Separate Business, (ii) a Malibu Rum Employee, (iii) an employee of the Diageo U.S. Spirits Business (Guinness UDV North America), or (iv) an employee of a Diageo IMC outside of the United States that will be distributing both Captain Morgan Rum and Malibu Rum until the Malibu Rum Assets are divested.

The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of Diageo's U.S. Spirits Business until the Malibu Rum Assets are divested. All competitive information relating to the Held Separate Business and, in particular, those operations related to Captain Morgan Rum, must be retained and maintained by the persons involved in the operation of those businesses on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any other person whose employment involves Diageo's U.S. Spirits Business, or any other person who is a Malibu Rum Employee as shown on the attached list. In addition, persons involved in Diageo's Malibu Rum business must not provide, discuss, exchange, circulate, or otherwise furnish any similar information to or with any other person whose employment involves the Held Separate Business.

Any violation of the Decision and Order, or the Hold Separate Order may subject Diageo to civil penalties and other relief as provided by law. If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Hold Separate Order, you should contact

_____ at ____ - ____ - ____.

Analysis

**Analysis to Aid Public Comment on the Provisionally
Accepted Consent Order***I. Introduction*

The Federal Trade Commission has accepted for public comment from Diageo plc ("Diageo") and Vivendi S.A. ("Vivendi") an *Agreement Containing Consent Orders* ("Proposed Consent Order"). Among other things, the Proposed Consent Order requires Diageo, as a condition to acquiring its interest in Seagram, to divest its Malibu rum business to an acquirer approved by the Commission. Diageo and Vivendi ("Proposed Respondents") have also reviewed a Draft Complaint that the Commission contemplates issuing.

The Commission and the Proposed Respondents have also agreed to an Order To Hold Separate and Maintain Assets that requires the Proposed Respondents to maintain the competitive viability of certain assets pending divestiture. The Proposed Consent Order will remedy the likely anticompetitive effects arising from the proposed acquisition by Diageo and Pernod Ricard S.A. ("Pernod Ricard") of Vivendi's Seagram Wine and Spirits business ("Seagram") in five relevant product markets in the distilled spirits industry.

The Proposed Consent Order and the Order to Hold Separate and Maintain Assets were negotiated between the Commission's staff and Proposed Respondents after the Commission, on October 23, 2001, authorized its staff to seek a court order in United States District Court to preliminarily enjoin the proposed transaction, pending a Commission determination of the legality of the proposed transaction after a full trial on the merits in Commission administrative proceedings.

II. The Parties and The Transaction

Proposed Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the

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laws of the United Kingdom with its office and principal place of business located at 8 Henrietta Place, London, England W1A 9AG. In the United States, Diageo's operates a distilled spirits business through a wholly-owned subsidiary corporation, GuinnessUDV North America, Inc., whose offices are located at Six Landmark Square, Stamford, Connecticut 06901.

Proposed Respondent Vivendi is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex 08, France. In the United States, Respondent Vivendi operates a distilled spirits business through Joseph E. Seagram & Sons, Inc., a wholly-owned subsidiary corporation whose offices are located at 375 Park Avenue, New York, New York 10152-0192.

Third party Pernod Ricard is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 142 boulevard Haussmann, 75379 Paris, France. In the United States, Pernod Ricard operates a distilled spirits business through Austin, Nichols & Co., Inc., a wholly-owned subsidiary corporation whose offices are located at 156 East 46th Street, New York, New York.

On December 19, 2000, Diageo, Pernod Ricard, and Vivendi entered into an agreement for Diageo and Pernod Ricard jointly to acquire Seagram. The value of the transaction is \$8.15 billion. Diageo and Pernod Ricard had previously agreed that if their joint bid to acquire Seagram were successful, they would split the Seagram assets between them. Under their Framework Agreement, Diageo would pay \$5 billion for its share of the Seagram assets and Pernod Ricard would pay \$3.15 for the remaining share of Seagram.

Among the distilled spirits brands that Diageo and Pernod Ricard agreed would be acquired and held by Diageo were Captain Morgan Original Spiced Rum and Captain Morgan's

Analysis

Parrot Bay Rum. Among the distilled spirits brands that Diageo and Pernod Ricard agreed would be acquired and held by Pernod Ricard were Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac.

Under the terms of the proposed transaction, Pernod Ricard will acquire Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac brands. These are brands that Diageo should not acquire because doing so would be anticompetitive. Also, Diageo will acquire Joseph E. Seagram & Sons, Inc., which is the Vivendi entity responsible for marketing all the Seagram-owned brands in the United States. For this reason, commercially sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac – information that Diageo should not acquire for competitive reasons — could remain with Joseph E. Seagram & Sons, Inc. and wind up in Diageo's possession.

Also, under the terms of the proposed transaction, Diageo will continue to operate, for up to one year, a “back office” administrative operation for Pernod Ricard in connection with the Seagram brands that Pernod Ricard will be acquiring. Here too, as the transaction was originally structured by the parties, Diageo could acquire and learn commercially sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac. The proposed transaction also provides that for up to one year, under a co-packing arrangement, Diageo will bottle for Pernod some of the Seagram's Gin and Scotch products sold in the United States.

III. The Proposed Complaint

According to the Draft Complaint that the Commission intends to issue, Diageo and Vivendi compete in the United States in connection with the distribution and sale of the following distilled spirits markets: (a) premium rum, (b) popular gin, (c) deluxe Scotch, (d) single malt Scotch, and (e) Cognac.

Analysis

The Commission is concerned that the proposed transaction would eliminate substantial competition between Diageo and Vivendi in each relevant market, and result in higher prices. The Commission stated it has reason to believe that the proposed transaction would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

IV. The Commission's Competitive Concerns

A. Premium Rum

Total United States sales at retail of all premium rum products are about \$1 billion. In this market, Bacardi USA, with its Bacardi Light and Bacardi Limon products, is the largest competitor with about a 54% share, Seagram, with its Captain Morgan Original Spiced Rum and Captain Morgan's Parrot Bay Rum products, has about a 33% share, and Diageo, with its Malibu Rum, has about an 8% share. After the proposed acquisition, Diageo and Bacardi USA together would have a combined market share of about 95% in the premium rum market in the United States. The proposed acquisition will increase the Herfindahl-Hirschman Index ("HHI") (the customary measure of market concentration) in the premium rum market by about 500 points, and result in market concentration of about 4600 points.

B. Popular Gin

Total United States sales of all popular gin products at retail are about \$650 million. In this market, Diageo, through its ownership and marketing of Gordon's Gin (and interest in Gilbey's Gin), is the nation's second largest competitor, with about a 34% share, and Vivendi, through its ownership and marketing of Seagram's Gin (and interest in Burnett's White Satin Gin), is the nation's largest competitor, with about a 66% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Seagram's Gin, its principal competitor. Were Diageo actually to acquire

Analysis

Seagram's Gin, it would have a market share of (or have a financial interest in) close to 100% of the popular gin market in the United States. Such an acquisition would increase the HHI by about 4500 points, and result in market concentration of about 10,000 points.

C. Deluxe Scotch

Total United States sales of all deluxe Scotch products at retail are about \$450 million. In this market, Diageo, with its Johnnie Walker Black Scotch, is the nation's largest competitor, with about a 51% share, and Vivendi, with its Chivas Regal Scotch, is the nation's second largest competitor, with about a 49% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Chivas Regal Scotch, its principal competitor. Were Diageo actually to acquire Chivas Regal Scotch, it would have a market share of close to 100% of the deluxe Scotch market in the United States. Such an acquisition would increase the HHI by about 5,000 points, and result in market concentration of about 10,000 points.

D. Single Malt Scotch

Total United States sales of all single malt Scotch products at retail are about \$250 million. In this market, Diageo, with its Oban, Lagavulin, Dalwhinnie, Cardhu, Talisker, Cragganmore, Knocando, Glenkinchie, and Glen Ord brands, is the nation's fourth largest competitor, with about a 6% share, and Vivendi, with its The Glenlivet Scotch product, is the nation's largest competitor with about a 26% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about The Glenlivet Scotch. Were Diageo actually to acquire The Glenlivet Scotch, it would have a market share of about 32% in the single malt Scotch market in the United States. Such an acquisition would increase the HHI by about 300 points, and result in market concentration of about 2,000 points.

Analysis

E. Cognac

Total United States sales of all Cognac products at retail are about \$1 billion. In this market, Diageo, with its Hennessy brand, is the largest competitor with about a 54% share, and Vivendi, with its Martell product, is the third largest competitor with about a 9% share. After the proposed transaction, Diageo will have access to highly sensitive commercial business information about Martell Cognac. Were Diageo actually to acquire Martell Cognac, it would have a market share of about 63% of the Cognac market in the United States. Such an acquisition would increase the HHI by about 900 points, and result in market concentration of about 4,600 points.

V. The Proposed Consent Order

A. The premium rum market

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's Draft Complaint. Under the terms of the Proposed Consent Order, Diageo will be required to divest its Malibu rum business, worldwide, to an acquirer that is acceptable to the Commission.

Diageo will be required to complete the mandated divestiture within six (6) months from the date it (together with Pernod) acquires Seagram. In the event that Diageo does not complete the required divestiture in the time allowed, the Commission will appoint a trustee to sell the assets. The Proposed Consent Order empowers the trustee to sell such additional assets as may be necessary to assure the marketability, viability, and competitiveness of the businesses that are required to be divested. Pending Diageo's divestiture of the Malibu rum business to a Commission-approved acquirer, and to prevent competitive harm pending the divestiture and to ensure that the assets required to be divested will remain a competitively viable business, the Commission has appointed Theodore F. Martens of

Analysis

PricewaterhouseCoopers LLP as an interim monitor. Among other things, the monitor will ensure that during the period of time that Diageo will own both the Malibu and Captain Morgan rum businesses, it will manage them separately.

B. The Popular Gin, deluxe Scotch, single malt Scotch, and Cognac markets

Under the terms of the Proposed Consent Order, Diageo will be prevented from obtaining or using any commercially sensitive business information relating to Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, or Martell Cognac. To ensure that this will not occur, Diageo has agreed to the following procedures:

First, to ensure that Diageo will not acquire pre-existing competitively sensitive information about Seagram's Gin, Chivas Regal Scotch, The Glenlivet Scotch, and Martell Cognac, Vivendi will hire an independent consultant to identify and segregate those materials. This will prevent Diageo from seeing the competitively sensitive business information in the materials that Diageo will be acquiring.

Second, Diageo will implement a series of firewalls to keep confidential information from the back office operation it will be operating in part for the benefit of Pernod, or confidential information that Diageo will learn because of its co-packing arrangement, from getting into the hands of Diageo marketing personnel.

C. The Order To Hold Separate and Maintain Assets

Accompanying the Proposed Consent Order is an Order to Hold Separate and Maintain Assets. This order requires Diageo to preserve and maintain the Seagram Captain Morgan rum assets as a separate competitive entity pending the divestiture of the Malibu assets. This will ensure that there will be no interim harm to

Analysis

competition pending the divestiture by Diageo of the Malibu assets during the period (maximum of six months) that Diageo will be the owner of both Malibu Rum and Captain Morgan Rum.

The Order to Hold Separate and Maintain Assets also requires Diageo to preserve and maintain the competitive viability of the Malibu assets, pending their divestiture. This will ensure that the competitive value of these assets will be maintained after Diageo acquires the Seagram rum assets but before the Malibu Rum assets are actually divested.

VI. The Opportunity for Public Comment

The Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the Consent Order in the agreement.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Draft Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order. It is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

NESTLE HOLDINGS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4028; File No. 0110083**Complaint, December 10, 2001--Decision, February 4, 2002*

This consent order addresses the merger of Respondent Nestle Holdings, Inc. (“Nestle”) – the largest food corporation in the world, which sells its pet food products in the United States through its Friskies division – and Respondent Ralston Purina Company (“Ralston”), the world’s leading producer of dry dog and dry and soft-moist cat foods. The order, among other things, requires the respondents to divest all rights, titles, and interests in and to all assets relating to the Meow Mix and Alley Cat brands of dry cat food to J.W. Childs Equity Partners II, L.P., a Boston-based investment firm that owns the Hartz Mountain Corporation (“Hartz”), a leading manufacturer and distributor of pet supplies in the United States. The order also requires the respondents to grant a patent license to Childs for the coating applied to Meow Mix products – covering both current Meow Mix products and any pet product Childs chooses to manufacture in the future – and to provide Childs with technical assistance and a supply of Meow Mix and Alley Cat products for a period of up to two years from the date of the divestiture. In addition, the order requires Childs, for five years, to secure Commission approval before selling all or substantially all of the United States assets acquired in the divestiture. An accompanying Asset Maintenance Order requires the respondents to maintain certain assets pending divestiture.

Participants

For the Commission: *Jill M. Frumin, Anthony Low Joseph, Erika Lee, Jeff Dahnke, Evelyn J. Boynton, Amy Swift, Catharine M. Moscatelli, Roberta S. Baruch, Phillip L. Broyles, Elizabeth A. Schneirov, Hajime Hadeishi and Michael G. Vita.*

For the Respondents: *Roxanne E. Henry, Howrey Simon Arnold & White, LLP.*