

Order

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent The Procter & Gamble Company ("P&G") of Respondent The Gillette Company ("Gillette"), hereinafter referred to as "Respondents," 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 that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of 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 to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

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1. Respondent P&G is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at One Procter & Gamble Plaza, Cincinnati, Ohio 45202.
2. Respondent Gillette is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its offices and principal place of business located Prudential Tower, Boston, Massachusetts 02199.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

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I.

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

- A. "P&G" means The Procter & Gamble Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by P&G, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition P&G, shall include Gillette.
- B. "Gillette" means The Gillette Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Gillette, and

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the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- C. "Respondents" means P&G and Gillette, individually and collectively.
- D. "Acquisition" means the acquisition contemplated by the "Agreement and Plan of Merger" dated as of January 27, 2005, among The Proctor & Gamble Company, Aquarium Acquisition Corp. and The Gillette Company.
- E. "Acquisition Date" means the earlier of the following dates:
 - 1. the date the Respondents close on the Acquisition pursuant to the Acquisition Agreement; or
 - 2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing the certificate of merger with the Secretary of State of the State of Delaware.
- F. "Commission" means the Federal Trade Commission.
- G. "Closing Date" means as to each Divestiture Product the date on which Respondent (or a Divestiture Trustee) closes on the divestiture of the assets relevant to such Divestiture Product pursuant to the Decision and Order.
- H. "Commission-approved Acquirer" means the following: (1) an entity that is specifically identified in the Decision and Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to the Decision and Order and that has been approved by the Commission to accomplish the requirements of the Decision and Order in connection with the Commission's determination to make the Decision and Order final; or (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to

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assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to the Decision and Order.

- I. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain and that is related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, pricing, supply, sales, sales support or use of the Divestiture Product(s) or the IntelliClean Products, respectively; provided however, that “Confidential Business Information” shall not include, the following:
1. information that subsequently falls with the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondents;
 2. information related to the SpinBrush Products that Respondent Gillette can demonstrate it obtained without the assistance of Respondent P&G prior to the Acquisition;
 3. information related to the Rembrandt Products that Respondent P&G can demonstrate it obtained without the assistance of Respondent Gillette prior to the Acquisition;
 4. information related to the APDO Products that Respondent P&G can demonstrate it obtained without the assistance of Respondent Gillette prior to the Acquisition;
 5. information related to the IntelliClean Products that Respondent Gillette can demonstrate it obtained without the assistance of Respondent P&G prior to the Acquisition;
 6. information that is required by Law to be publically disclosed;

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7. information that does not relate to the Divestiture Product(s) or the IntelliClean Products.
- J. “Divestiture Assets” means the APDO Assets, the Rembrandt Assets and the SpinBrush Assets, individually and collectively, as defined in the Decision and Order.
- K. “Divestiture Product” means a Product that is the subject of a divestiture under this Order, *i.e.*, the APDO Products, the Rembrandt Products, or the SpinBrush Products; *provided, however*, that, for the purposes of this Order to Maintain Assets, the APDO Products shall be deemed to include all Products Developed, in Development, manufactured, distributed, marketed or sold by Respondent Gillette prior to the Acquisition that were marketed or sold or to be marketed or sold as Products using any of the Product Trademarks Soft&Dri[®] and Dry Idea[®] or any variations or derivatives of such Product Trademarks
- L. “Acquisition Date” means the date on which the Acquisition occurs.
- M. “Divestiture Core Employees” means the APDO Core Employees, the Rembrandt Core Employees, Rembrandt Key Employees, and the Spinbrush Core Employees, individually and collectively, as defined in the Decision and Order.
- N. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph VI of the Decision and Order .
- O. “Orders” means the Decision and Order and this Order to Maintain Assets.
- P. “Pre-Acquisition Marketing Plan” means any marketing or brand plan that was planned or implemented within the period immediately prior to the Acquisition and without consideration of the affects of the pending Acquisition for a

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Product(s) subject to divestiture under the attached Decision and Order.

- Q. “Remedial Agreement” means the following: (1) any agreement between Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to the Decision and Order and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that have been approved by the Commission to accomplish the requirements of the Decision and Order in connection with the Commission’s determination to make the Decision and Order final; and/or (2) any agreement between the Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of the Decision and Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed that have been approved by the Commission to accomplish the requirements of the Decision and Order.

II.

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

- A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the business associated with the Divestiture Assets, to minimize any risk of loss of competitive potential for the business associated with the Divestiture Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the

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Divestiture Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the full economic viability, marketability or competitiveness of the Divestiture Assets.

- B. Respondents shall maintain the operations of the Divestiture Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Divestiture Assets) and/or as may be necessary to preserve the marketability, viability, and competitiveness of each of the Products associated with the Divestiture Assets and shall use their best efforts to preserve the existing relationships with, the following: suppliers; vendors including, but not limited to, the High Volume Retail Account; distributors; customers; Agencies; employees; and, others having business relations with the Divestiture Assets. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing the Divestiture Assets with sufficient working capital to operate the Divestiture Assets at least at current rates of operation, to meet all capital calls with respect to the Divestiture Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Divestiture Assets (including, but not limited to, such capital related to the slotting and/or shelf spacing assignments of the Divestiture Product with the High Volume Retail Accounts);
 2. continuing, at least at their scheduled pace, any additional expenditures for the Divestiture Assets authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, and marketing expenditures (including, but not limited to, expenditures related to the relaunch of the Spinbrush Products);

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3. provide such resources as may be necessary to respond to competition against the Products associated with the Divestiture Assets and/or to prevent any diminution in retail sales of such Products during and after the Acquisition process and prior to divestiture;
 4. provide such resources as may be necessary to maintain the competitive strength and positioning of the Products associated with the Divestiture Assets at the High Volume Retail Accounts;
 5. making available for use by the Divestiture Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Divestiture Assets;
 6. providing the Divestiture Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Assets; and
 7. providing such support services to the Divestiture Assets as were being provided to these businesses by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Respondents shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Assets for the relevant Product's most recent Pre-Acquisition Marketing Plan.
- D. Until the Closing Date for each respective set of Divestiture Assets, Respondents provide all the related Divestiture Core Employees with reasonable financial incentives to continue in their positions and to market and promote the relevant Products subject to such divestiture consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Products

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pending divestiture and to ensure successful execution of the Pre-Acquisition Marketing Plans related to the relevant Products. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the respective Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Product's competitiveness.

E. Respondents shall:

1. during the Spinbrush Access Period, not interfere with the hiring or employing by the Commission-approved Acquirer of Spinbrush Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to an Spinbrush Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that this Paragraph II.E.1 shall not prohibit the Respondents from making offers of employment to or employing any Spinbrush Core Employee during the Spinbrush Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further that, if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Spinbrush Core Employee and the Commission-approved Acquirer does not

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make an offer of employment to that employee within twenty (20) Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

F. Pending divestiture of the relevant Divestiture Assets, Respondents shall:

1. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the APDO Assets to the employees associated with business related to the antiperspirant and/or deodorant Products marketed and sold by Respondent P&G prior to the Acquisition (including, but not limited to, such employees with work responsibilities related to the Old Spice[®] trademark and any variations or derivatives of such trademark);
2. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Rembrandt Assets to the employees associated with business related to the teeth whitening Products marketed and sold by Respondent P&G prior to the Acquisition (including, but not limited to, those employees with work responsibilities related to the Crest[®] trademark and any variations or derivatives of such trademark);
3. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Spinbrush Assets to the employees associated with business related to the non-rechargeable battery operated toothbrush Products marketed and sold by Respondent Gillette prior to the Acquisition (including, but not

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limited to, those employees with work responsibilities related to the Oral-B[®] trademark and any variations or derivatives of such trademark);

4. shall institute procedures and requirements to ensure that employees identified above

a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

b. do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose;

G. Not later than thirty (30) days following the Acquisition Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to each of the respective Divestiture Assets written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Commission-approved Acquirer, the Interim Monitor(s), and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.H. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their employees and

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other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the business(es) associated with the Divestiture Assets, to minimize any risk of loss of competitive potential for the business associated with the Divestiture Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements. The

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Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Remedial Agreements.

- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent P&G has not 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 Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) Days after the appointment of the Interim Monitor, Respondents 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 Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions 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 each Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

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2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Interim Monitor shall serve until the later of:
 - a. the completion by Respondents of the divestiture of all relevant assets required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order to Maintain Assets in a manner that fully satisfies the requirements of this Order to Maintain Assets and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the relevant Product(s) acquired pursuant to a Remedial Agreement independently of Respondents; and fulfillment of the Respondents obligations under the Decision and Order with respect to the IntelliClean Products; or
 - b. the completion by Respondents of the last obligation under the Order pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order to Maintain Assets.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any

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reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents 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.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial 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 performance by Respondents of their obligations under the Orders.

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

- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. 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 the relevant provisions of the Decision and Order in this matter.
- L. 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.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets or the relevant provisions of the Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

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IV.

IT IS FURTHER ORDERED that within thirty (30) Days after the date this Order to Maintain Assets becomes final, and every thirty (30) Days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A., III.A, IV.A. and V.A. of the related Decision and Order in this matter, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VIII of the Decision and Order.

V.

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

VI.

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

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written request with reasonable notice to Respondents made to their principal United States Office, Respondents shall permit any duly authorized representatives of the Commission:

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

VII.

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

- A. Three (3) Days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Commission-approved Acquirer(s), notifies the Commission that all related assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

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PUBLIC
APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS
AGREEMENT CONTAINING CONSENT ORDER
AND
PROPOSED DECISION AND ORDER

Analysis

**Analysis of Agreement Containing Consent Orders to Aid
Public Comment**

I. Introduction

The Procter & Gamble Company (“P&G”) and The Gillette Company (“Gillette”) are both leading suppliers of consumer products worldwide. P&G proposes to acquire Gillette. The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from P&G and Gillette. The purpose of the Consent Agreement is to remedy the anticompetitive effects that would otherwise result from P&G’s proposed acquisition. Under the terms of the Consent Agreement, the parties will be required to divest: (1) Gillette’s Rembrandt® at-home teeth whitening business; (2) P&G’s Crest® SpinBrush™ battery-powered and rechargeable toothbrush business; and (3) Gillette’s Right Guard® men’s antiperspirant/deodorant (“AP/DO”) business. In addition, P&G is required to amend its joint venture agreement with Philips Oral Healthcare, Inc. (“Philips”) regarding the Crest® Sonicare® IntelliClean System (“IntelliClean”) rechargeable toothbrush.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested people. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated January 27, 2005, P&G proposes to acquire 100 percent of the voting securities of Gillette in a transaction valued at approximately \$57 billion (“Proposed Acquisition”). The Commission’s Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended,

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15 U.S.C. § 45, by lessening competition in the United States markets for the research, development, manufacture, distribution, and sale of at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and men's AP/DOs.

Consistent with the well-established approach to merger analysis, we have determined the appropriate product markets in which to analyze the likely competitive effects of the proposed merger. Staff initially examined whether the combination of the two companies' broad array of consumer products would be likely to have anticompetitive effects, including not only increased prices in the short term but also the creation of entry barriers that could affect price and innovation in the long term. In particular, staff investigated whether the combined entity would have an increased ability to exploit its position as a so-called "category manager" or "category captain," in order to obtain premium retailer shelf space and potentially exclude or disadvantage competitors in various broad categories, like oral care or AP/DO.

The investigation has disclosed, however, that most retailers do not look at broad categories, like oral care and AP/DO, when they decide which products to stock and sell. They generally make decisions on individual products (e.g., men's AP/DO), that are perceived to be close substitutes within these broad categories. One supplier may be preferred for an individual product even though another supplier is preferred for other products in the broad category. Moreover, most retailers are likely to employ different category captains to assist them on a product-by-product basis within the broad categories. We have therefore concluded that the loss of competition between the merging parties in broad categories is unlikely to cause competitive harm. We have instead focused on individual products within the broad categories. These individual product markets include at-home teeth whitening, battery-powered toothbrushes, and men's AP/DO. The Commission has sought and obtained relief in these relevant markets.

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II. The Parties

Headquartered in Cincinnati, Ohio, P&G is one of the largest and most diversified suppliers of consumer products in the world. In 2004, P&G had worldwide net sales of approximately \$51.4 billion. With its Crest® line of products, P&G is one of the leading suppliers of oral care products in the United States. The Crest family of products includes the Crest® Whitestrips™ and Crest® Night Effects™ lines of at-home teeth whitening products and the Crest® SpinBrush™ line of battery-powered toothbrushes. P&G is also a leading supplier of men's AP/DOs under its Old Spice® brand.

Gillette, based in Boston, Massachusetts, is also one of the world's leading suppliers of consumer products. Gillette had total worldwide net sales of approximately \$10.5 billion in its 2004 fiscal year. Like P&G, Gillette is one of the leading suppliers of oral care products in the United States with its Oral-B® and Oral-B® Braun® line of manual, battery-powered, and rechargeable toothbrushes, and its Oral-B® Rembrandt® and Rembrandt® line of at-home teeth whitening products. Gillette is also a leading supplier of men's AP/DOs under its Right Guard® and Gillette® Series brands.

III. At-Home Teeth Whitening Products

One of the relevant markets in which to assess the competitive effects of the Proposed Acquisition is the United States market for at-home teeth whitening products. At-home teeth whitening products whiten teeth by bleaching them with either hydrogen or carbamide peroxide. These products are typically sold over-the-counter through food, drug, club, and mass merchandise channels and are marketed to be used by the consumer at home. There are several different types of at-home teeth whitening products, including strips, gels, pens and sticks, although strip and gel products account for the vast majority of sales of at-home teeth whitening products in the United States.

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The United States market for at-home teeth whitening products is highly concentrated, with P&G and Gillette as the two largest suppliers in this market and the only two significant suppliers of branded strips. P&G is the market leader with its Crest Whitestrips® and Crest Night Effects® products, while Gillette is the second leading supplier with its Oral-B® Rembrandt® and Rembrandt® products. Together, the parties account for over 80% of the sales in this market.

The Proposed Acquisition would significantly increase concentration in the United States market for at-home teeth whitening products, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

IV. Adult Battery-Powered Toothbrushes

A second relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for adult battery-powered toothbrushes. Adult battery-powered toothbrushes are usually powered by AA or AAA batteries and either have oscillating or pulsating brush heads. The majority of adult battery-powered toothbrushes are sold at retail for between \$5 and \$8, and the batteries and brush heads can be replaced on some, but not all, products. Adult battery-powered toothbrushes are typically marketed as upgrades over manual toothbrushes and are more affordable than sophisticated rechargeable toothbrushes.

The United States market for adult battery-powered toothbrushes is highly concentrated. P&G and Gillette are the two largest suppliers in this market. P&G markets its adult battery-powered products under the Crest® SpinBrush™ brand name, while Gillette sells its adult battery-powered products under the Oral-B® brand name. Gillette also dominates the adult high-priced manual and low-priced rechargeable toothbrush segments,

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which are the segments most likely to capture any switching away from adult battery-powered toothbrushes in the face of a price increase. Together, the parties account for over 85% of the sales in the United States adult battery-powered toothbrush market.

The Proposed Acquisition would significantly increase concentration in the United States market for adult battery-powered toothbrush products, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

V. Rechargeable Toothbrushes

A third relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for rechargeable toothbrushes. Rechargeable toothbrushes contain a rechargeable battery that powers high-speed oscillating, pulsating, or vibrating brush heads. They have a separate recharging unit that plugs into an electrical outlet to recharge the battery contained in the toothbrush. Brush heads for these products are almost always replaceable. Rechargeable toothbrushes typically are sold at retail for between \$20 and \$150, and are marketed as the premium brushing option for consumers.

The United States market for rechargeable toothbrushes is highly concentrated with only two suppliers, Gillette and Philips, accounting for virtually all of the sales of these products. Gillette markets a full line of rechargeable toothbrush products under the Oral-B® Braun® brand name, while Philips sells mostly mid- to high-end products under the Philips® Sonicare® brand name. Philips and P&G also have a joint venture to co-develop and co-market the IntelliClean product, the first integrated toothbrush/dentifrice product (*i.e.*, toothbrush that self dispenses toothpaste) sold in the United States. As a result, the Proposed Acquisition would allow P&G to acquire the only significant competitor to its joint venture partner, Philips, thereby reducing

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P&G's incentives to support the IntelliClean product. The agreement between Philips and P&G also contains non-compete provisions that, if the Proposed Acquisition were consummated, could harm consumers.

The Proposed Acquisition would eliminate P&G's incentive to fully support and promote the IntelliClean product and create a situation where the only two suppliers in the market are subject to non-compete provisions. Accordingly, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

VI. Men's AP/DOs

A fourth relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for men's AP/DOs. An antiperspirant is a substance that is used to prevent or reduce underarm sweating. A deodorant is a substance that is used to suppress underarm odor. These ingredients are typically combined together for complete underarm protection. AP/DOs are typically gender-specific and sold in various forms, including roll-ons, traditional solids, invisible solids, gels, and aerosols. Men's AP/DOs are unique in, among other things, their packaging, fragrances, marketing, formulations, and location on the shelf.

The United States market for men's AP/DOs is highly concentrated. P&G and Gillette are the two largest suppliers of men's AP/DOs in the United States. P&G markets its men's AP/DOs under the Old Spice® brand name, while Gillette sells its products under the Right Guard® and Gillette Series® brand names. Combined, the Respondents account for well over 50% of the sales in this highly concentrated market.

Accordingly, the Proposed Acquisition would significantly increase concentration in the United States market for men's AP/DOs, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed

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Acquisition would likely result in higher prices and fewer product choices for consumers in this market.

VII. Entry

Entry into the United States at-home teeth whitening, adult battery-powered toothbrush, rechargeable toothbrush, and men's AP/DO markets is unlikely to deter or counteract the anticompetitive effects of the Proposed Acquisition. Entry into these markets is difficult and time-consuming and would require the investment of extremely high sunk costs to, among other things, develop products, provide advertising and promotional funding, establish a strong brand name, and create a distribution network. A new entrant also faces the difficult task of convincing retailers to carry their products.

VIII. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets discussed above. The Consent Agreement preserves competition in these markets by requiring the divestiture of: (1) the Rembrandt at-home teeth whitening business to a Commission-approved acquirer; (2) the Crest SpinBrush battery-powered business to Church & Dwight Company, Inc. ("Church & Dwight"); and (3) the Right Guard business to a Commission-approved acquirer.¹ In addition, the Consent Agreement requires P&G to amend its joint venture agreement to allow Philips to independently market and sell the IntelliClean product.

¹ The Rembrandt business that will be divested includes all of Gillette's existing and future teeth whitening products. For viability reasons, the purchaser of the Right Guard business will have the option of acquiring certain manufacturing assets and/or Gillette's Soft & Dri® and Dry Idea® assets.

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The divestiture of the Rembrandt business must take place within three (3) months and the Right Guard business within four (4) months after the date the order becomes final. The Commission's goal in evaluating possible purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems. Should the parties fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within one year of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires the parties to provide the trustee with access to information related to, among other things, the Rembrandt and Right Guard businesses as necessary to fulfill his or her obligations.

The Order to Maintain Assets that is included in the Consent Agreement requires that P&G and Gillette maintain the viability of the Rembrandt and Right Guard businesses as competitive operations until the businesses are transferred to Commission-approved acquirers.² The Commission has approved Edward Gold of PricewaterhouseCoopers as the Interim Monitor pursuant to the Consent Agreement to ensure that P&G and Gillette comply with the provisions of the Order.

There are also several provisions of the Consent Agreement designed to ensure the success of the divestiture of the Crest SpinBrush business to Church & Dwight. First, the Consent Agreement requires P&G to divest its rights and assets relating to adult battery-powered toothbrushes, including all research and development data, sales and marketing materials, and intellectual

² The Order to Maintain Assets also requires that P&G and Gillette maintain the viability of the Soft & Dri and Dry Idea businesses.

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property. Second, P&G will provide Church & Dwight with a license to the Crest trademark, subject to minimum protections under trademark law, for use with the SpinBrush brand name that will be acquired outright by Church & Dwight. These provisions are designed to ensure that Church & Dwight can successfully transition the Crest SpinBrush family of products to a brand name of its choosing. Third, the Consent Agreement allows, and provides incentives for, P&G to render transitional services to Church & Dwight and retailers for a period of time to ensure the continuity and competitive viability of the products.

The Commission is satisfied that Church & Dwight is a well-qualified acquirer of the Crest SpinBrush business. Church & Dwight sells a variety of consumer products throughout the world, including oral care, personal care, and household products, and had total worldwide net sales of approximately \$1.5 billion in 2004. The company owns several well-known oral care brands, such as Arm & Hammer®, Aim®, and Mentadent™, and currently sells a variety of oral care products, including toothpaste and manual toothbrushes. Because of its existing business, Church & Dwight already has an experienced sales force that has relationships with major retailers and dental professionals, thereby enabling it to be a successful acquirer of the SpinBrush assets.

The Consent Agreement also requires P&G to amend its joint venture agreement with Philips regarding IntelliClean. The amended agreement, which is an attachment to the order, allows Philips to independently market and sell IntelliClean. The amended agreement also eliminates all non-compete provisions allowing both P&G and Philips to develop and sell future rechargeable toothbrush products.

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

Complaint

IN THE MATTER OF

JOHNSON & JOHNSON

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-4154; File No. 0510050**Complaint, December 21, 2005--Decision, December 21, 2005*

This consent order addresses the acquisition by Respondent Johnson & Johnson -- a comprehensive and broadly-based manufacturer of products related to all aspects of human health care -- of Guidant Corporation, which manufactures products in three broad business units: cardiac rhythm management, vascular intervention, and cardiac surgery. The order, among other things, requires the respondent to grant to Abbott Laboratories or another Commission-approved firm -- within ten days and at no minimum price -- a fully paid-up, non-exclusive, irrevocable license that permits the licensee to make and sell drug-eluting stents with a drug delivery system, which are used to treat coronary artery disease by propping open a clogged artery and eluting a drug, thereby helping to prevent renarrowing of the artery. The consent order also requires the respondent to divest to Datascope or another Commission-approved firm, within fifteen days, its endoscopic vessel harvesting product line, which is used in coronary artery bypass graft surgery to remove a patient's leg vein, arm artery, or other blood vessel; that vessel is then used as a conduit to bypass one or more blocked coronary arteries. In addition, the consent order requires the respondent to terminate its agreement to distribute the proximal anastomotic assist device -- used to avoid the need to clamp the aorta when attaching a harvested vessel to it -- of Novare Surgical System, Inc.

Participants

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For the Respondent: *Steve Newborn, Weil, Gotshal & Manges, LLP.*