

Complaint

IN THE MATTER OF

HOLOGIC, INC.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-4165; File No. 051 0263**Complaint, August 9, 2006 – Decision, August 9, 2006*

This consent order addresses the acquisition by respondent Hologic, Inc., of the intellectual property and other assets of Fischer Imaging Corporation relating to its mammography and breast biopsy businesses. As a result of the acquisition, Hologic would lose its only significant competitor in the U.S. market for prone stereotactic breast biopsy systems (“prone SBBS”). The order requires Hologic to divest to Siemens AG, or another Commission-approved acquirer, all assets it acquired from Fischer relating to Fischer’s prone SBBS business, ensuring the prompt competitive viability of Siemens or another acquirer as an additional supplier of prone SBBSs in the United States. Hologic will retain a license to Fischer’s prone SBBS patents to ensure that Hologic can continue to compete in the U.S. market after the divestiture. If Hologic fails to divest within the time frames given, the Commission may appoint a trustee to divest the prone SBBS assets.

Participants

For the *Commission*: Stephanie C. Bovee, Richard H. Cunningham, Tammy L. Imhoff, Randall A. Long, and Jeffrey H. Perry.

For the *Respondent*: Robert C. Jones and Phillip A. Proger, Jones Day.

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 (hereinafter “Commission”), having reason to believe that Respondent

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Hologic, Inc. (hereinafter “Hologic”) acquired the intellectual property and other assets of Fischer Imaging Corporation (hereinafter “Fischer”) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

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

2. “Fischer” means Fischer Imaging Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Fischer Imaging Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

3. “Prone Stereotactic Breast Biopsy Systems” (hereinafter “prone SBBSs”) means equipment used for guiding percutaneous breast biopsy procedures for the minimally-invasive removal of suspicious tissue, which incorporates an elevating prone table for patient positioning, a stereotactic x-ray imaging system capable of acquiring images at two distinct angles necessary to plot coordinates, and a guidance mechanism for directing biopsy sampling devices to coordinates specific to regions within the breast. “Prone Stereotactic Breast Biopsy Systems” includes research and development, and clinical testing activities related to the incorporation of an ultrasound scanning mechanism on the Prone Stereotactic Breast Biopsy System and the use of the Prone

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Stereotactic Breast Biopsy System for purposes of patient positioning during brachytherapy procedures.

4. “Acquisition” means the acquisition of Fischer’s assets by Hologic, including Fischer’s intellectual property and other assets relating to its mammography and breast biopsy businesses, including the patents, trademarks, and other intellectual property relating to Fischer’s prone SBBS, MammoTest.

II. HOLOGIC

5. Respondent Hologic is a for-profit corporation organized, existing and doing business under and by the virtue of the laws of the State of Delaware, with its principal place of business located at 35 Crosby Drive, Bedford, Massachusetts, 01730.

6. Hologic specializes in the development and marketing of diagnostic and imaging medical devices in the field of women’s health. Its products include mammography equipment, breast biopsy systems, and bone densitometry equipment.

7. Hologic is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. FISCHER

8. At the time of the Acquisition, Fischer was a for-profit corporation organized, existing and doing business under and by the virtue of the laws of the State of Delaware, with its principal place of business located at 12300 North Grant Street, Denver, Colorado, 80241.

9. At the time of the Acquisition, Fischer was engaged in commerce as “commerce” is defined in Section 1 of the Clayton

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Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. Prior to the acquisition, Fischer was actively developing, manufacturing, and marketing equipment used in the screening and diagnosis of breast cancer. The company’s chief products were its SenoScan digital mammography machine and its MammoTest prone SBBS. In 2004, the company employed approximately 263 individuals and reported revenues of approximately \$64 million.

IV. HOLOGIC’S ACQUISITION OF FISCHER’S ASSETS

11. On June 22, 2005, Fischer entered into an Asset Purchase Agreement with Hologic whereby Hologic acquired substantially all of Fischer’s intellectual property and other assets relating to its mammography and breast biopsy businesses, including the patents, trademarks, and other intellectual property surrounding Fischer’s prone SBBS, MammoTest (“Acquisition”).

12. The Acquisition was valued at \$32 million, including \$27 million in cash and forgiveness of a \$5 million loan made to Fischer by Hologic upon entering the agreement. The parties consummated the transaction, which was not reportable under the Hart-Scott-Rodino Act, on September 29, 2005.

13. At the time of the Acquisition, Fischer was one of two significant suppliers of prone SBBSs in the United States. Hologic was the only other significant supplier of prone SBBSs in the United States. As a result of the acquisition, Fischer exited the mammography and breast biopsy businesses and is preparing to close down its remaining operations entirely within a few months.

V. RELEVANT PRODUCT MARKET

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14. For the purposes of this Complaint, the relevant product market in which to analyze the effects of the Acquisition is the production and sale of prone SBBSs. Prone SBBSs are integrated systems that allow a physician to conduct a minimally-invasive biopsy using stereotactic guidance. SBBSs are the only minimally-invasive systems consistently capable of imaging a particular type of lesion called microcalcifications. For this type of lesion, a biopsy using a SBBS is the current standard of care, and the only method short of invasive surgery to determine whether a lesion is cancerous. Although SBBSs may also be “upright,” there are significant drawbacks associated with the use of upright SBBSs, as compared to prone SBBSs. Upright SBBSs are less comfortable for patients, less precise, and carry with them a significant incidence of patient fainting. A small but significant and non-transitory price increase would not significantly reduce the demand for prone SBBSs.

VI. RELEVANT GEOGRAPHIC MARKET

15. For the purposes of this Complaint, the relevant geographic market in which to assess the effects of the Acquisition is the United States. To compete in the United States prone SBBS market, a firm must have FDA approval for its device, establish a local sales and service organization, and must not infringe any valid U.S. prone SBBS patents.

VII. MARKET STRUCTURE

16. Pursuant to the Acquisition, the only two significant suppliers of prone SBBSs in the United States merged, leaving Hologic as a virtual monopolist in the \$40 million market. Prior to the Acquisition, Hologic and Fischer had substantially equivalent shares of the market and directly competed on price, service and product innovation. The only other firm that sells a prone SBBS is Giotto USA. Giotto has had minimal sales since its product’s introduction to the U.S. market three years ago.

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Giotto's sales are unlikely to increase sufficiently to restore the lost competition, as Giotto lacks the infrastructure, track record, product acceptance, and resources to expand U.S. sales significantly. As a result, the transaction significantly increased concentration and resulted in a highly concentrated market.

VIII. EFFECTS OF THE ACQUISITION

17. As the only significant suppliers of prone SBBSs in the United States, Hologic and Fischer competed head-to-head for over ten years before the Acquisition. Hologic's Acquisition has had or will have the effect of substantially lessening competition and tending to create a monopoly in the relevant market by, among other things:

- a. eliminating Fischer as the only other significant competitor in the market for prone SBBSs;
- b. eliminating actual, direct, and substantial competition between Hologic and Fischer, which before the Acquisition, directly competed on price, service and product innovation as next-best substitutes;
- c. increasing the ability of Hologic to unilaterally raise prices of prone SBBSs in the United States; and
- d. reducing Hologic's incentive to invest in prone SBBS innovations and service improvements, thereby adversely affecting product innovation and service.

IX. ENTRY CONDITIONS

18. Entry into the market for the production and sale of prone SBBSs is unlikely and, in any event, cannot occur in a timely and sufficient manner so as to deter or counteract the anticompetitive effects likely to result from the Acquisition.

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19. Potential entrants must overcome significant intellectual property barriers to develop a prone SBBS product. The strength and scope of Hologic's patent portfolio, including the patents that Hologic acquired from Fischer as a result of the Acquisition, pose a significant barrier to entry into this market. Hologic, for example, was only able to enter the prone SBBS market by acquiring a license from Fischer in settlement of patent litigation.

20. In addition to the intellectual property barriers to entry, potential entrants must contend with the research, development, and regulatory hurdles that companies seeking to market medical devices typically face. After developing and obtaining FDA approval for a prone SBBS product, a new entrant would face the difficult task of gaining market approval without a proven product or track record, developing manufacturing capability, recruiting and training a sales force, and establishing the infrastructure necessary to provide service for the life of the product.

X. VIOLATIONS CHARGED

21. The allegations contained in paragraphs 1 through 20 are repeated and realleged as though fully set forth here.

22. The effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this ninth day of August, 2006.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of intellectual property and other assets relating to breast biopsy systems from the Fischer Imaging Corporation by Hologic, Inc. (hereafter referred to as “Respondent” or “Hologic”), and Hologic having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

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1. Respondent Hologic, Inc. is 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 35 Crosby Street, Bedford, MA 01730.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, 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. “Hologic” means Hologic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Hologic, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Siemens” means Siemens AG, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Postfach 32 60 91050 Erlangen, Germany.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means Siemens, or any other Person that receives the prior approval of the Commission to acquire the Fischer Breast Biopsy System Assets.
- E. “Affiliate” means any entity or acquired business which directly or indirectly is controlled by either Hologic or

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Acquirer, but only so long as such control subsists, control being the direct or indirect ownership of at least fifty percent (50%) of the stock entitled to vote upon election of directors or persons performing similar functions, or direct or indirect ownership of the maximum percentage permitted under local laws or regulations in those countries where fifty percent (50%) ownership by a foreign entity is not permitted.

- F. “Breast Biopsy System” means equipment used for guiding percutaneous breast biopsy procedures for the minimally-invasive removal of suspicious tissue, which incorporates an elevating prone table for patient positioning, a stereotactic x-ray imaging system capable of acquiring images at two distinct angles necessary to plot coordinates, and a guidance mechanism for directing biopsy sampling devices to coordinates specific to regions within the breast. Breast Biopsy System includes research and development, and clinical testing activities related to the incorporation of an ultrasound scanning mechanism on the Breast Biopsy System and the use of the Breast Biopsy System for purposes of patient positioning during brachytherapy procedures. *PROVIDED, HOWEVER*, Breast Biopsy System does not include equipment for biopsy sampling, surgery, or therapy, whether or not capable of being attached to the Breast Biopsy System, including but not limited to equipment manufactured or sold by Suros Surgical Systems, Inc.
- G. “Divestiture Agreement” means the Siemens Divestiture Agreement, or the agreement between the Divestiture Trustee and Acquirer for the divestiture of the Fischer Breast Biopsy System Assets.
- H. “Effective Date” means the date on which the divestiture required by Paragraph II or III of this Order is completed.

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I. “Excluded Assets” means:

1. the trade name Fischer Imaging or any derivative thereof, any registered trademark containing the name Fischer Imaging or any derivative thereof, or any domain name containing the name Fischer Imaging or any derivative thereof;
2. Licensed Intellectual Property to the extent it cannot be transferred as part of the divestiture because the licensor will not agree to such transfer;
3. Intellectual Property and assets exclusively Related To Fischer’s SenoScan business and products;
4. Intellectual Property, assets, and documents received by Hologic as a result of its acquisition of Suros Surgical Systems, Inc.; and
5. the non-exclusive, limited license to continue to use the Intellectual Property Related To Mammothest granted to Fischer Imaging Corporation in order to allow Fischer Imaging Corporation to fulfill certain continuing obligations as described in the Fischer-Hologic APA, including any sublicenses granted in accordance with the provision of the Fischer-Hologic APA by Fischer, including but not limited to the license agreement by and between Fischer Imaging Corporation and Eastman Kodak Company dated January 23, 2006.

J. “Fischer” means Fischer Imaging Corporation, 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 370 Interlocken Blvd., Suite 400, Broomfield, Colorado, 80021.

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K. “Fischer Breast Biopsy System Assets” means:

1. all Intellectual Property and other information and assets acquired by Hologic pursuant to the Fischer-Hologic APA Relating To Mammotest, and still in the possession of Hologic, including, but not limited to,
 - a. all United States and foreign patents, trademarks, trade names, domain names, service marks and copyrights and any applications for and registrations of such patents, trademarks, trade names, domain names, service marks and copyrights and any renewal, derivation, divisions, reissues, continuation, continuations-in part, modifications or extensions thereof including, but not limited to, Fischer’s currently pending patent applications EPO 02713506.0 and 97911697.7 or, if the patents have already been issued on the basis of said applications, the resulting patents.
 - b. all processes, formulae, algorithms, methods, schematics, trade secrets, technology, mask works, know-how, inventions and tangible or intangible proprietary information or material, including, but not limited to, all catalogs, research material, technical information, designs, drawings, formulae, processes, procedures, documentation, diagrams, flow charts, methods and schematics;
 - c. all computer software programs or applications (in all forms received, including but not limited to object code and source code form), and data contained therein;
 - d. past and present customer lists for Mammotest, including the name, address, and relevant contact person of each such customer, a detailed list of

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each prospective customer of Fischer that has previously received a sales quote for Mammotest from Fischer including the name, address and relevant contact person of each prospective Mammotest customer accompanied by all Mammotest quote reports, and all other data and information relating to said customers and Mammotest sales activities relating thereto, to the extent and in the form such information was provided to Hologic pursuant to the Fischer-Hologic APA;

- e. all vendor lists detailing the name, address, and relevant contact person for each past and present vendor supplying products or services to Fischer relating to Mammotest (“Fischer Vendors”);
- f. all existing data and information relating to any of Fischer’s approvals, clearances, licenses, registrations, permits, franchises, product registrations or authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body, Relating To Mammotest including, without limitation, all clinical trial data, filings, engineering and design documentation, manufacturing and test results and procedures;
- g. if any, all licenses or sublicenses previously held by Fischer and now held by Hologic to any of the Intellectual Property described in this Paragraph; and
- h. all rights to sue for past infringements of any of the Intellectual Property Relating To Mammotest;

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2. all service and sales contracts Relating To Mammotest, if any;
3. all Intellectual Property, information, research and development, and assets, if any, developed or acquired since the consummation of the Fischer-Hologic APA based on Mammotest up to the date this Order is accepted by the Commission for public comment; and

Provided, however, Fischer Breast Biopsy System Assets shall not include the Excluded Assets.

- L. “Fischer-Hologic APA” means the June 22, 2005, Asset Purchase Agreement entered into between Fischer Imaging Corporation and Hologic, Inc.
- M. “Hologic Vendors” means the entities listed on the Hologic Vendor List.
- N. “Hologic Vendor List” means a list of the names, addresses, and contacts for vendors for Hologic’s Breast Biopsy System as of the date this Order is accepted by the Commission for public comment.
- O. “Intellectual Property” means any intellectual property, including, but not limited to, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.
- P. “Licensed Intellectual Property” means intellectual property licensed to Fischer or Hologic from a Third Party Relating To Mammotest (to the extent Hologic had Intellectual Property licensed to it regarding Mammotest), including, but not limited to, software, computer

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programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property that are licensed to Fischer or Hologic. “Licensed Intellectual Property” does not mean modifications and improvements to intellectual property that are not licensed to Fischer or Hologic.

- Q. “Mammotest” means (1) the Breast Biopsy System manufactured and sold by Fischer prior to and as of September 29, 2005, including all products and components incorporated into and included as part of the system, and (2) technology, research and development, and clinical testing activities respecting said system, including but not limited to any technology, research and development, and clinical testing activities respecting the incorporation of an ultrasound scanning mechanism on the system and the use of the system for purposes of patient positioning during brachytherapy procedures.
- R. “Patents” means all patents, patent applications, and statutory invention registrations (which shall be deemed to include provisional applications, invention disclosures, certificates of invention and applications for certificates of invention), in each case existing as of the date this Order is accepted by the Commission for public comment, and includes all reissues, divisions, continuations, continuations-in-part, 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 patents and registrations thereto in the world, Related To any Breast Biopsy System of or owned by Hologic as of the date Hologic signs the Agreement Containing Consent Orders in this matter.

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- S. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- T. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- U. “Siemens Divestiture Agreement” means the June 26, 2006, Sale and License-Back; Covenant Not to Sue Agreement between Hologic, Inc., and Siemens AG.
- V. “Third Party” means any private entity other than the following: (1) Hologic, or (2) the Acquirer.
- W. “Trust Agreement” means the agreement between Hologic and the Divestiture Trustee that transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Fischer Breast Biopsy System Assets pursuant to this Order.

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

- A. Not later than five (5) days after the date on which this Order is accepted for public comment, Hologic shall divest the Fischer Breast Biopsy System Assets to Siemens absolutely and in good faith, pursuant to and in accordance with the Siemens Divestiture Agreement. The Siemens Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix A. Any failure by Hologic to comply with the Siemens Divestiture Agreement shall constitute a failure to comply with this Order. The Siemens Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order

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shall reduce, or be construed to reduce, any rights or benefits of Siemens, or any obligations of Hologic, under the Siemens Divestiture Agreement. If any term of the Siemens Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Hologic’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Siemens Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Siemens Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

Provided, however, if Hologic has divested the Fischer Breast Biopsy System Assets to Siemens prior to the date this Order becomes final, and if, at the time the Commission makes this Order final, the Commission determines that Siemens is not an acceptable acquirer or that the Siemens Divestiture Agreement is not an acceptable manner of divestiture, and so notifies Hologic, then Hologic shall within three (3) business days of receiving such notification, rescind the transaction with Siemens; *provided, further, however,* if the Commission determines to issue this Order and notifies Hologic that Siemens is not an acceptable acquirer or that the Siemens Divestiture Agreement is not an acceptable manner of divestiture, Hologic shall divest the Fischer Breast Biopsy System Assets, consistent with the terms of this Order, including the right to receive a non-exclusive license as described in Paragraph IV of this Order, within six (6) months of the date this Order becomes final absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

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B. With regard to the Hologic Vendor List:

1. if Siemens or any proposed Acquirer requests in writing to Hologic that Hologic give a copy of the Hologic Vendor List to Siemens or the proposed Acquirer at anytime on or after the date of the divestiture pursuant to Paragraph II.A., Hologic shall within three (3) business days of such request, give, without cost, to that Acquirer the Hologic Vendor List; *Provided, however*, that if Siemens or the proposed Acquirer fails to make such a request before the date on which the Order becomes final, Hologic shall provide the Hologic Vendor List to the Acquirer within three (3) days of the date on which the Order becomes final.
 2. Hologic shall create no disincentive for Siemens or any proposed Acquirer to make such a request for the Hologic Vendor List, and shall not enter into any agreement or understanding with Siemens or any proposed Acquirer that Siemens or the proposed Acquirer not make such a request.
- C. The purpose of this Paragraph II of this Order is to ensure the continuation of the Fischer Breast Biopsy System Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition of the Intellectual Property and assets of Fischer Imaging Corporation by Hologic, to ensure that the Fischer Breast Biopsy System Assets are used independently of, and in competition with, Hologic, and to remedy the lessening of competition alleged in the Commission's Complaint.

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

- A. If Hologic has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Fischer Breast Biopsy System Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest the Fischer Breast Biopsy System Assets in a manner that satisfies the requirements of Paragraph II of this Order ("Divestiture Trustee"). In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Hologic shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Hologic to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Hologic, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Hologic has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of notice by the staff of the Commission to Hologic of the identity of any proposed Divestiture Trustee, Hologic shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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- C. Within ten (10) days after appointment of a Divestiture Trustee, Hologic shall execute a Trust Agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Hologic shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Fischer Breast Biopsy System Assets consistent with the terms of this Order including the right of Hologic to receive a non-exclusive license as described in Paragraph IV of this Order.
 - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Trust Agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, or if the Commission determines in its discretion that it is appropriate for other reasons to do so, the Commission may extend the divestiture period to achieve the purposes of this Order.
 - 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and

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facilities related to the relevant assets that are required to be divested by this Order, and to any other relevant information, as the Divestiture Trustee may request. Hologic shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Hologic shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Hologic shall extend the time for divestiture under this Paragraph III in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Hologic'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 for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the Divestiture Trustee shall divest the assets to the acquiring entity selected by Hologic from among those approved by the Commission; *provided, further, however*, that Hologic shall select such entity within five (5) days of receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Hologic, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture

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Trustee shall have the authority to employ, at the cost and expense of Hologic, 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 Hologic, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Hologic shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

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8. The Divestiture Trustee shall report in writing to Hologic and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Hologic may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee as provided in this Paragraph III.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that the Divestiture Agreement shall include the following provisions:

- A. Hologic shall covenant to the Acquirer that Hologic shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer (the Acquirer's successor or Affiliate, or any Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) to

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the extent that such suit alleges that any Breast Biopsy System developed, designed, manufactured, licensed, or otherwise sold by or on behalf of Acquirer infringes any Patent, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution or sale of Breast Biopsy Systems, *provided, however*, that such covenant not to sue shall not apply to any Patent issued after the date this Order is accepted by the Commission for public comment; and

- B. Hologic shall covenant to the Acquirer that: (1) any Third Party assignee, transferee or licensee of the Patents shall agree to provide a covenant not to sue the Acquirer (the Acquirer's successor, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) at least as protective as those extended pursuant to the preceding Paragraph IV.A, as a condition of such assignment, transfer or license; and (2) with respect to any Third Party patents existing as of the date this Order is accepted by the Commission for public comment and licensed to Hologic, and as to which Hologic does not control the right of prosecution of any legal action, Hologic shall not actively induce, assist or participate in any legal action or proceeding Relating To Breast Biopsy Systems against the Acquirer (the Acquirer's successor or Affiliate, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

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- C. Hologic shall be allowed to receive, as part of the negotiated Divestiture Agreement, a royalty free, non-exclusive, perpetual, irrevocable, transferable, worldwide right and license to the Fischer Breast Biopsy System Assets to use such rights and licenses in any form to develop, have developed, make, have made, use, sell, have sold, offer for sale, import, export, or otherwise dispose of any products or services of any kind without restriction, and subject to the forgoing including the right to grant sublicenses to its Affiliates at any time but not the right to grant sublicenses to Third Parties.
- D. Hologic shall covenant to the Acquirer that Hologic will not interfere with, restrict, or otherwise impair the Fischer Vendors and the Hologic Vendors from dealing with the Acquirer, *provided, however*, that if Hologic has an exclusive contract arrangement, or similar arrangement with a Hologic Vendor as of the signing of the Agreement Containing Consent Order, such exclusivity arrangement will be waived as to the Acquirer only for a period of two (2) years beginning on the Effective Date; *provided, further, however*, that Hologic is permitted to alter or terminate the Hologic Vendor relationships at its sole discretion consistent with the terms of this Paragraph IV.D.
- E. The purpose of this Paragraph IV of this Order is to ensure the continuation of the Fischer Breast Biopsy Systems Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition of Intellectual Property and assets of Fischer Imaging Corporation by Hologic, to ensure that the Fischer Breast Biopsy Systems Assets are used independently of, and in competition with, Hologic, and to remedy the lessening of competition alleged in the Commission's Complaint.

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V**IT IS FURTHER ORDERED** that:

A. Hologic shall:

1. not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer (the Acquirer's successor or Affiliate, or any Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) to the extent that such suit alleges that any Breast Biopsy System developed, designed, manufactured, licensed, or otherwise sold by or on behalf of Acquirer infringes any Patent, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution or sale of Breast Biopsy Systems, *provided, however*, that such covenant not to sue shall not apply to any Patent issued after the date this Order is accepted by the Commission for public comment; and
2. in the event it assigns, transfers, or licenses the Patents to a Third Party, include in such assignment, transfer, or license a covenant not to sue the Acquirer (the Acquirer's successor or Affiliate, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) at least as protective as those extended pursuant to the preceding Paragraph V.A.1, as a condition of such assignment, transfer or license;

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3. not, with respect to any Third Party patents existing as of the date this Order is accepted by the Commission for public comment and licensed to Hologic, and as to which Hologic does not control the right of prosecution of any legal action, actively induce, assist or participate in any legal action or proceeding relating to Breast Biopsy Systems against the Acquirer (the Acquirer's successor or Affiliate, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order);
 4. until the divestiture required pursuant to Paragraph II is completed, take such actions as are necessary to maintain the viability and marketability of the Fischer Breast Biopsy System Assets as they exist as of the date Hologic signs the Agreement Containing Consent Order in this matter, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Fischer Breast Biopsy Systems Assets, as they exist as of the date Hologic signs the Agreement Containing Consent Order in this matter; *provided, however*, that nothing in this paragraph limits or precludes Hologic from promoting, marketing, and selling its own products and services.
- B. Hologic shall place no restrictions on the use by any Acquirer of any of the Fischer Breast Biopsy System Assets.
- C. Hologic shall not interfere with, restrict, or otherwise impair the Fischer Vendors and the Hologic Vendors from

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dealing with the Acquirer, *provided, however*, that if Hologic has an exclusive contract arrangement, or similar arrangement with a Hologic Vendor as of the signing of the Agreement Containing Consent Order, such exclusivity arrangement shall be waived as to the Acquirer only for a period of two (2) years beginning on the Effective Date; *provided, further, however*, that Hologic is permitted to alter or terminate the Hologic Vendor relationships at its sole discretion consistent with the terms of this Paragraph V.C.

- D. The purpose of this Paragraph V of this Order is to ensure the continuation of the Fischer Breast Biopsy System Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition of the Intellectual Property and assets of Fischer Imaging Corporation by Hologic, to ensure that the Fischer Breast Biopsy System Assets are used independently of, and in competition with, Hologic, and to remedy the lessening of competition alleged in the Commission's Complaint.

VI.

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

- A. acquire any assets of or financial interest in any Person who develops, manufactures, or sells Breast Biopsy Systems;
- B. Enter into any contract to participate in the management of any person who develops, manufactures, or sells Breast Biopsy Systems.

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Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as “the Notification), *provided, however*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Hologic and not from any other party to the transaction. Hologic shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Hologic 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.

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

- A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until the divestiture pursuant to Paragraphs II and III of this

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Order has been completed, Hologic shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order. Hologic shall submit at the same time a copy of these reports to the Divestiture Trustee, if one is appointed.

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreement. Hologic shall submit at the same time a copy of these reports to the Divestiture Trustee, if the Divestiture Trustee has been appointed and has not completed his or duties pursuant to Paragraph III.

VIII.

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

- A. Any proposed dissolution of Hologic;
- B. Any proposed acquisition, merger, or consolidation of Hologic; or
- C. Any other change in Hologic that may affect compliance obligations arising out of this Order, including but, not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Hologic.

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IX.

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on August 9, 2016.

By the Commission.

NONPUBLIC APPENDIX A
SIEMENS DIVESTITURE AGREEMENT

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

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Hologic, Inc. (“Hologic”). The purpose of the proposed Consent Agreement is to remedy the competitive harm resulting from Hologic’s consummated acquisition of certain assets of Fischer Imaging Corporation (“Fischer”). Under the terms of the proposed Consent Agreement, Hologic is required to divest to Siemens AG (“Siemens”) all assets it acquired from Fischer relating to Fischer’s prone stereotactic breast biopsy system (“prone SBBS”) business.

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

On September 29, 2005, Hologic paid \$32 million to acquire substantially all of Fischer’s intellectual property and certain other assets relating to its mammography and breast biopsy businesses, including the patents, trademarks, customer lists, and vendor lists relating to Fischer’s prone SBBS product, MammoTest (“Acquisition”). As a result of the Acquisition, Fischer – the only significant competitor to Hologic in the U.S. market for prone SBBSs – relinquished all rights to develop, manufacture, market, and sell prone SBBSs in the United States. The Commission’s complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating Hologic’s only significant competitor in the U.S.

Analysis to Aid Public Comment

market for prone SBBSs. The proposed Consent Agreement would restore the competition eliminated by the Acquisition by ensuring the prompt competitive viability of Siemens as an additional supplier of prone SBBSs in the United States.

II. The Parties

Hologic is a developer, manufacturer, and marketer of diagnostic and imaging medical devices. Its chief product areas are mammography equipment, breast biopsy systems (including the MultiCare Platinum prone SBBS), and bone densitometry equipment. In 2005, Hologic reported worldwide revenues of approximately \$288 million.

Prior to the Acquisition, Fischer was actively involved in developing, manufacturing, and marketing equipment used in the screening and diagnosis of breast cancer. The company's chief products were its SenoScan digital mammography system and its MammoTest prone SBBS. In 2004, Fischer reported revenues of approximately \$64 million. For the first nine months of 2005, prior to the Acquisition, Fischer reported revenues of \$39 million.

III. Prone SBBSs

A prone SBBS is an integrated system that allows a physician to conduct a highly precise, minimally-invasive breast biopsy using x-ray guidance. During the procedure, the patient lies prone on a table with her breast suspended through an aperture in the table. With the patient's breast compressed, the physician utilizes the system's x-ray imaging to guide a needle to the precise location of the suspected lesion and extracts small tissue samples for diagnosis. The entire procedure is conducted beneath the table and is obscured from the patient's view.

There are several other methods of performing breast biopsies, including open surgical biopsies and other types of minimally-invasive systems. None of these other methods, however, are

Analysis to Aid Public Comment

viable economic substitutes for prone SBBSs. Indeed, most hospitals have the capability to perform breast biopsies using multiple methods to ensure that the most appropriate system is used for each procedure.

Surgical biopsies were once the only method of biopsying breast tissue, but these procedures have declined significantly in popularity in response to the availability of newer, minimally-invasive, biopsy systems. Minimally-invasive biopsies provide accurate diagnosis while avoiding the economic costs and patient hardship associated with surgical breast biopsies. Surgical breast biopsies are performed under general anesthesia, require a longer hospital stay, and result in noticeable scarring. For these reasons, surgical procedures are typically performed only in circumstances in which none of the minimally-invasive alternatives is appropriate or available. An ability to perform surgical breast biopsies does not provide a meaningful competitive restraint on the exercise of market power by a prone SBBS monopolist.

There are two other types of minimally-invasive breast biopsy systems: ultrasound and magnetic resonance ("MR") systems. These systems are complementary treatment modalities, however, and are not competitive substitutes for a prone SBBS. Ultrasound-guided breast biopsies are the most prevalent type of minimally-invasive breast biopsy performed in the United States, and are typically used to biopsy suspicious masses. Ultrasound systems are not well suited for visualizing lesions called microcalcifications, however, and patients with this type of lesion are typically sent for biopsy using a prone SBBS. MR breast biopsy systems are currently considered a niche technology, and are significantly more expensive than prone SBBSs. Further, MR biopsies are cumbersome and time consuming compared to biopsies performed with a prone SBBS. Thus, MR-guided systems are used infrequently, and only in cases for which ultrasound or stereotactic systems would not be appropriate.

Analysis to Aid Public Comment

Stereotactic breast biopsies may also be performed using an “upright” system, which consists of a biopsy unit that attaches to an existing mammography system. There are significant disadvantages associated with using upright systems as compared to prone SBBS procedures, including reduced comfort and a risk of vasovagal reactions (fainting). These problems result from the fact that an upright system performs the biopsy in plain view of the patient. Also, upright systems occupy a mammography machine that could otherwise be used to conduct mammograms, thereby reducing the number of screening mammographies that can be performed in a given day. This makes upright systems a particularly unattractive option for a breast care center that has a significant patient volume. For these reasons, even though upright systems are much less expensive, they are not used commonly in the United States, and do not provide meaningful competition to prone SBBS suppliers.

The relevant geographic market in which to analyze the effects of the Acquisition is the United States. Prone SBBSs are medical devices, and thus cannot be marketed or sold in the United States without prior approval by the United States Food and Drug Administration (“FDA”). Further, a firm wishing to sell prone SBBSs in the United States must establish a local sales and service organization and must not infringe any U.S. patents.

IV. Competitive Effects and Entry Conditions

Fischer pioneered the prone SBBS market when it introduced its MammoTest product in the late 1980s. In 1992, Lorad, a company subsequently acquired by Hologic, introduced the MultiCare prone SBBS to the U.S. market as the first competitor to MammoTest. Over the next fourteen years, Hologic’s MultiCare and Fischer’s MammoTest competed head-to-head in the U.S. market, with each firm supplying approximately fifty percent of the U.S. market for prone SBBSs. This competition directly benefitted U.S. consumers in the form of lower prices, better service, and product innovations. Evidence gathered in the

Analysis to Aid Public Comment

Commission's investigation demonstrates that, prior to the acquisition, customers received lower prices and other economic benefits such as extended warranties and favorable service or payment terms as a result of the competition between Hologic and Fischer. The evidence also shows that the competition between the two companies has resulted in product improvements, including higher resolution detectors and improved software for image manipulation and storage. Since the Acquisition in September 2005, Hologic has enjoyed a virtual monopoly in the U.S. prone SBBS market.

The only other firm that sells a prone SBBS in the United States is Giotto USA. Giotto currently is not a significant competitor, however, having achieved minimal sales in the three years during which its product has been available in the United States. It is unlikely that Giotto could significantly expand its U.S. sales because it does not have access to critical prone SBBS patents, and in any event lacks the necessary infrastructure, track record, product acceptance, and resources to do so.

There is little prospect for new entry into the U.S. prone SBBS market. The strength and breadth of Hologic's patent portfolio, including the patents it acquired from Fischer, insulate the U.S. prone SBBS market from entry. In fact, no company has ever had a meaningful impact on the U.S. prone SBBS market without access to these critical patents. Hologic's MultiCare product, the only prone SBBS ever to compete effectively with Fischer's MammoTest, was able to compete in the U.S. market only by virtue of a license to the Fischer patents that Hologic acquired as part of the settlement of patent infringement litigation. In addition to the intellectual property barriers to entry, potential entrants must contend with the research, development, and regulatory hurdles that companies seeking to market medical devices typically face. Finally, a new entrant would also need to develop manufacturing capability and potentially recruit and train a local sales force in order to gain market acceptance and have an impact on price in the U.S. prone SBBS market.

Analysis to Aid Public Comment

V. The Proposed Consent Agreement

The proposed Consent Agreement effectively remedies the competitive harm that resulted from the Acquisition. Pursuant to the proposed Consent Agreement, Hologic is required to divest to Siemens all of the prone SBBS-related assets it acquired from Fischer no later than five (5) days after the Consent Agreement is accepted for public comment. Hologic will retain a license to Fischer's prone SBBS patents to ensure that Hologic can continue to compete in the U.S. prone SBBS market after the divestiture.

Siemens is particularly well-positioned to manufacture and sell prone SBBSs in the United States. Siemens is one of the world's largest public corporations, with 461,000 employees and over 600 manufacturing plants, research facilities and sales offices worldwide. Siemens Medical Solutions Group is a worldwide leader in medical imaging, with product offerings including angiography, fluoroscopy, magnetic resonance imaging, ultrasound, and mammography. As an established supplier of breast cancer related imaging products, Siemens has earned a strong reputation in the field of breast cancer screening and detection, and already has a domestic sales and service network in place to make it a vigorous prone SBBS competitor. Further, although it already has a mammography business, Siemens does not currently compete in the prone SBBS market, and thus does not present any competitive problems as an acquirer of the divested assets.

If the Commission determines that Siemens is not an acceptable purchaser, or that the manner of the divestiture is not acceptable, Hologic must unwind the sale and divest the prone SBBS assets within six (6) months of the date the Order becomes final to another Commission-approved acquirer. If Hologic fails to divest within that time frame, the Commission may appoint a trustee to divest the prone SBBS assets.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

**PUERTO RICO ASSOCIATION OF
ENDODONTISTS CORP.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4166; File No. 051 0170
Complaint, August 24, 2006 – Decision, August 24, 2006

This consent order addresses charges that the respondent, the Puerto Rico Association of Endodontists Corp. (PRAE), orchestrated and implemented agreements among its endodontist members on price and other competitively significant terms, refused or threatened to refuse to deal with payors except on collectively agreed-upon terms, and negotiated fees and other competitively significant terms with payors in contracts for PRAE's member endodontists. The respondent has approximately 30 member endodontists, who are engaged in providing professional services to patients throughout Puerto Rico. The order prohibits PRAE from entering into or facilitating agreements among endodontists (1) to negotiate on behalf of any endodontist with any payor, (2) to deal, refuse to deal, or threaten to refuse to deal with any payor, (3) regarding any term upon which any endodontist deals, or is willing to deal, with any payor, and (4) not to deal individually with any payor or through any arrangement other than PRAE. In addition, PRAE is prohibited from exchanging or facilitating the transfer of information among endodontists concerning any endodontist's willingness to deal with a payor, or the terms or conditions, including price terms, on which the endodontist is willing to deal. PRAE is prohibited from attempting to engage in any such action and from encouraging, pressuring, or attempting to induce any person to engage in any such action. The order requires PRAE to distribute the complaint and order to its members, certain payors, and specified others. Other provisions impose various obligations on PRAE to report or provide access to information to the Commission to facilitate monitoring PRAE's compliance with the order.

Participants

For the *Commission*: *Leonard L. Gordon, Jr. and Theodore Zang.*

For the *Respondent*: *James E. Toro Monserrate.*