

Complaint

IN THE MATTER OF

THERMO ELECTRON CORPORATIONCONSENT 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-4170, File No. 061 0187**Complaint, October 17, 2006 – Decision, November 30, 2006*

This consent order addresses the acquisition of Fisher Scientific International, Inc., by respondent Thermo Electron Corporation. Both companies supply analytical laboratory equipment and are the only two significant suppliers in the U.S. market for high-performance centrifugal vacuum evaporators. Under the terms of the order, Thermo is required to divest Fisher's centrifugal vacuum evaporator business (Genevac) to a Commission-approved buyer. Should Thermo fail to accomplish the divestiture within the time and in the manner required, the Commission may appoint a trustee to divest the assets. The order requires Thermo, at the acquirer's option, to enter into a distribution agreement with the acquirer so that Genevac's products can continue to be sold through the Fisher catalog. The order also requires Thermo to implement and fund a retention plan for key Genevac employees and prohibits Thermo from soliciting Genevac employees for at least a year after the divestiture. In addition, Thermo is required to file periodic reports with the Commission until the divestiture is accomplished.

Participants

For the *Commission*: *Roberta S. Baruch, Richard H. Cunningham, and David L. Inglefield.*

For the *Respondent*: *David S. Neill, Wachtell, Lipton, Rosen & Katz LLP.*

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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Thermo Electron Corporation, a corporation subject to the jurisdiction of the Commission, has agreed to acquire Fisher Scientific International, Inc., a corporation subject to the jurisdiction of the Commission, 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. RESPONDENT

1. Respondent Thermo Electron Corporation (“Thermo”) is a for-profit 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 at 81 Wyman Street, Waltham, Massachusetts 02454.

2. Thermo, among other things, is engaged in the development, manufacture, and marketing of a broad range of analytical equipment and laboratory instrumentation. Thermo employs approximately 11,000 persons and it achieved revenues of \$2.63 billion in 2005.

3. Thermo 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.

II. THE ACQUIRED COMPANY

4. Fisher Scientific International, Inc. (“Fisher”) 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

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principal place of business located at Liberty Lane, Hampton, New Hampshire, 03842.

5. Fisher, among other things, is engaged in the manufacture, development, marketing, and distribution of laboratory equipment and health care products. Fisher also provides a variety of services to laboratories and health care providers. Fisher currently has approximately 19,500 employees and its 2005 revenues were \$5.6 billion.

III. THE PROPOSED ACQUISITION

6. On May 7, 2006, Thermo entered into an Agreement and Plan of Merger with Fisher to acquire Fisher, for approximately \$12.8 billion in stock and assumed debt (the “Acquisition”).

IV. THE RELEVANT MARKET

7. For the purposes of this Complaint, the relevant product market in which to analyze the effects of the Acquisition is the research, development, production, sale, and service of high-performance centrifugal vacuum evaporators (“CVEs”). CVEs apply a combination of heat, vacuum, and centrifugal force to remove solvents from laboratory samples, evaporating off the solvents while preserving and drying the samples for storage, further analysis, characterization, or experimentation. High-performance CVEs offer advanced features, including high-throughput capability, compatibility with corrosive and aggressive solvents, and sophisticated control, programming, and monitoring capabilities, that are considered useful and necessary by high-performance CVE purchasers. Other types of laboratory evaporation equipment, such as low-performance CVEs, lyophilizers (*i.e.* freeze drying equipment), and nitrogen blowdown systems, do not offer these capabilities. A small but significant and non-transitory price increase would not significantly reduce the demand for high-performance CVEs.

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V. RELEVANT GEOGRAPHIC MARKET

8. 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 high-performance CVE market, a firm must establish a local sales force, service infrastructure, and reputation among high-performance CVE purchasers. In addition, the firm's product offering must not infringe any valid U.S. high-performance CVE patents.

VI. MARKET STRUCTURE

9. If consummated, the Acquisition would consolidate the only two significant suppliers of high-performance CVEs in the United States, leaving Thermo as a virtual monopolist in the approximately \$10 million market. Thermo and Fisher account for approximately 30 percent and 70 percent of the market, respectively, and directly compete on price, service, and product innovation. The only other firm that sells high-performance CVEs, Martin Christ GmbH ("Martin Christ"), has had minimal sales in the United States during the last three years and its sales are unlikely to increase sufficiently to restore the lost competition. As a result, the proposed Acquisition would significantly increase concentration and result in a highly concentrated market.

VII. EFFECTS OF THE ACQUISITION

10. As the only significant suppliers of high-performance CVEs in the United States, Thermo and Fisher compete head-to-head. The Acquisition, if consummated, will have the effect of substantially lessening competition and tending to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

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- a. eliminating Fisher as the only other significant competitor in the market for high-performance CVEs;
- b. eliminating actual, direct, and substantial competition between Thermo and Fisher, which currently compete directly on price, service, and product innovation as next-best substitutes;
- c. increasing the ability of Thermo to raise prices unilaterally of high-performance CVEs in the United States; and
- d. reducing Thermo's incentive to invest in high-performance CVE innovations and service improvements, thereby adversely affecting product innovation and service.

VIII. ENTRY CONDITIONS

11. To enter the high-performance CVE market and achieve significant market impact, a firm must first develop a product offering comparable functionality and performance to the high-performance CVEs offered by the incumbent firms without violating any existing patents. After developing a viable product line, an entrant would face the difficult tasks of developing manufacturing capabilities, gaining market acceptance without a proven product or track record, recruiting and training a sales force, and establishing the infrastructure necessary to provide service for the life of the product. In addition, the small size of the high-performance CVE market, and correspondingly limited profit opportunities available to a potential entrant, lessen the likelihood of entry into the high-performance CVE market.

12. New entry into the market for the production and sale of high-performance CVEs sufficient to deter or counteract the anticompetitive effects described in Paragraph 10 is unlikely to occur, and would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

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IX. VIOLATIONS CHARGED

13. The allegations contained in paragraphs 1 through 12 are repeated and realleged as though fully set forth here.

14. The Agreement and Plan of Merger described in paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. ‘ 45.

15. The Acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. ‘ 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. ‘ 45.

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 seventeenth day of October, 2006.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent Thermo Electron Corporation (hereinafter “Thermo Electron”, “Respondent”, or “Respondent Thermo Electron”) and Fisher Scientific International Inc., and Respondent 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

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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 Respondent 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 determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order 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 Hold Separate and Maintain Assets (“Hold Separate”):

1. Respondent Thermo Electron 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 at 81 Wyman Street, Waltham, Massachusetts 02454.

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2. The Federal Trade Commission has jurisdiction over 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 the Order, the following definitions shall apply:

- A. “Thermo Electron” or “Respondent” means Thermo Electron Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by Thermo Electron Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Fisher Scientific” means, Fisher Scientific International Inc., 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 at Liberty Lane, Hampton, New Hampshire 03842; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fisher Scientific International Inc.
- C. “Genevac” means Genevac Limited, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its offices and principal place of business located at The Sovereign Center, Farthing Road, Ipswich IP1 5AP, United Kingdom; and Genevac Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 707

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Executive Boulevard, Suite D, Valley Cottage, New York 10989, and their joint ventures, subsidiaries, divisions, groups, and affiliates controlled by either Genevac Limited or Genevac Inc.

- D. "Commission" means the Federal Trade Commission.
- E. "Acquirer" means any Person who receives the prior approval of the Commission to acquire the CVE Business pursuant to the Decision and Order.
- F. "Acquisition" means the proposed acquisition of Fisher Scientific by Thermo Electron pursuant to the Agreement and Plan of Merger, dated as of May 7, 2006, by and among Thermo Electron and Trumpet Merger Corporation, a wholly owned subsidiary of Thermo Electron, and Fisher Scientific.
- G. "Acquisition Date" means the date the Acquisition is consummated.
- H. "Confidential Business Information" means any information relating to the CVE Business before the Effective Date of Divestiture that is not in the public domain, including, but not limited to:
 - 1. All contracts, agreements, bids, purchase orders, or other documents or information relating to any acquisition of goods or services related to the CVE Business;
 - 2. All marketing studies, marketing plans, data, or other documents or information relating to the CVE Business;
 - 3. All files and documents relating to Genevac's suppliers to the extent relating to Genevac;

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4. All customer files, customer payment records, price information, service records, and purchase history; and,
 5. All trade secrets, information about products or processes under development, and other intellectual property that is not in the public domain.
- I. “CVEs” means centrifugal vacuum evaporators, which use a combination of heat, vacuum, and centrifugal force to remove solvents from laboratory samples, evaporating off the solvents while preserving and drying the samples for storage, further analysis, characterization, or experimentation.
- J. “CVE Business” means all of Respondent’s right, title, and interest in Genevac acquired in the Acquisition, including, but not limited to, all of Genevac’s outstanding capital stock, tangible and intangible assets, properties, business and goodwill, *provided, however*, that cash, receivables or other non-unique assets may be excluded from the sale of the CVE Business at the request of the Acquirer and subject to the prior approval of the Commission.
- K. “Divestiture Agreement” means any agreement or contract that receives the prior approval of the Commission that is related to the divestiture required by Paragraph II. or IV. of the Decision and Order.
- L. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of the Decision and Order.
- M. “Effective Date of Divestiture” means the date on which Respondent (or a Divestiture Trustee) divests to a Commission-approved Acquirer the CVE Business

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completely and as required by Paragraph II or IV of the Decision and Order.

- N. “Key Employees” means the persons listed in Confidential Appendix 1.
- O. “Knowledgeable Employees” means any person employed by or under contract to Genevac at any time between May 7, 2006, and the Effective Date of Divestiture, including but not limited to, Key Employees, *provided, however*, that such person is still employed by Fisher Scientific or Genevac at the time Respondent’s obligations under Paragraph II.C. of the Decision and Order arise.
- P. “Retention Bonus” means the retention bonus and compensation described in Confidential Appendix 2.
- Q. “Governmental Entity” means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.
- R. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- S. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the date that the Acquisition is consummated and terminate pursuant to Paragraph VII. hereof.
- T. “Hold Separate” means this Order to Hold Separate and Maintain Assets.

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- U. “Hold Separate Trustee” means the person appointed as the Hold Separate Trustee pursuant to this Hold Separate.
- V. “CVE Business Manager” means an individual with experience in the management, sales, marketing, and financial operations of the CVE Business, who is appointed by the Respondent and approved by the Hold Separate Trustee to manage the CVE Business during the Hold Separate Period.

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

- A. During the Hold Separate Period, Respondent shall (i) hold the CVE Business as a separate and independent business as required by this Hold Separate, except to the extent that Respondent must exercise direction and control over the CVE Business to assure compliance with this Hold Separate, or with the Decision and Order contained in the Consent Agreement, and except as otherwise provided in this Hold Separate, and (ii) shall vest the CVE Business and Hold Separate Trustee with all powers and authorities necessary to conduct its business.
- B. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the CVE Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining intellectual property, contracts, proprietary trademarks, trade names, logos, trade dress, identification signs, and renewing or extending any

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leases or licenses that expire or terminate prior to the Effective Date of Divestiture.

- C. The purpose of this Hold Separate is to: (i) preserve the CVE Business as a viable, competitive, and ongoing business, independent of Respondent, until the Effective Date of Divestiture of the CVE Business; (ii) assure that no Confidential Business information is exchanged between Respondent and the CVE Business, except as otherwise provided in this Hold Separate; and (iii) prevent interim harm to competition pending divestiture of the CVE Business.
- D. Respondent shall comply with all terms of the Divestiture Agreement, Hold Separate Trustee Agreement, and Management Agreement, and any breach by Respondent of any term of the Divestiture Agreement, Hold Separate Trustee Agreement, or Management Agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement, Hold Separate Trustee Agreement, or Management 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 Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

III.

IT IS FURTHER ORDERED that:

- A. Harry Cole is hereby appointed to serve as the Hold Separate Trustee. The Hold Separate Trustee may be the same Person as the Divestiture Trustee.

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- B. The Hold Separate Trustee shall monitor Respondent's compliance with this Hold Separate, and shall have all powers and authority necessary to effectuate his or her responsibilities pursuant to this Hold Separate and shall have the rights, duties and responsibilities described below:
1. No later than ten (10) days after the execution of the Consent Agreement, Respondent shall execute a Hold Separate Trustee Agreement that, subject to the approval of the Commission, transfers to the Hold Separate Trustee all rights, powers and authorities contained in the Hold Separate and consistent with the Decision and Order or necessary to permit the Hold Separate Trustee to perform his or her duties and obligations pursuant to this Hold Separate and the Decision and Order.
 2. No later than one (1) day after the commencement of the Hold Separate Period, Respondent shall transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his or her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order contained in the Consent Agreement.
 3. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the CVE Business; for managing the CVE Business through the CVE Business Manager; for maintaining the independence of the CVE Business; and for assuring Respondent's compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

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4. The Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the CVE Business, or to any other relevant information of the Respondent relating to the CVE Business, or (subject to any legally recognizable privilege of Respondent) to any other relevant information relating to Respondents' obligations under the Decision and Order and/or under this Hold Separate, as the Hold Separate Trustee may reasonably request. During the Hold Separate Period, Respondent shall develop such financial or other information relating to the CVE Business as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Hold Separate Trustee's ability to perform his or her responsibilities consistent with the terms of this Hold Separate or to monitor Respondent's compliance with this Hold Separate or the Decision and Order.
5. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonable and necessary to carry out the Hold Separate Trustee's duties and responsibilities. The Hold Separate Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
6. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to materials and information received from the Commission, and Confidential Business Information received from Respondent, in

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connection with the performance of the Hold Separate Trustee's duties.

7. The Respondent may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information relating to the CVE Business, to anyone other than the Commission. However, nothing herein shall be construed to inhibit the communication of any Confidential Business Information between and among the Hold Separate Trustee, the Commission, and the individuals contemplated for the employment relationships provided for in this Hold Separate.
 8. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Hold Separate Trustee within ten (10) business days after receipt of written notice from the Commission's staff to Respondents of the identity of any proposed Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.
- C. No later than ten (10) days after the execution of the Hold Separate Trustee Agreement, Respondent shall, subject to the approval of the Hold Separate Trustee, enter into a management agreement ("Management Agreement") with, and transfer to the CVE Business Manager all rights, powers, and authorities necessary to permit the CVE Business Manager to perform his or her duties and responsibilities, pursuant to the Hold Separate and consistent with the purposes of the Decision and

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Order. The Management Agreement shall be effective on the Acquisition Date.

1. The CVE Business Manager, in his or her capacity as such, shall report directly and exclusively to the Hold Separate Trustee, and shall manage the CVE Business independently of the management of Respondent. The CVE Business Manager shall not be involved in any way in the operations of the Respondent's businesses (other than the CVE Business) during the Hold Separate Period.
2. The CVE Business Manager shall sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information relating to the CVE Business to anyone other than the Commission and to the Hold Separate Trustee; *provided, however*, as authorized by the Hold Separate Trustee and consistent with this Hold Separate and the Decision and Order, the CVE Business Manager may disclose Confidential Business Information pursuant to Paragraph III.D. of this Hold Separate directly to Respondent's employees and agents.
3. In the event the CVE Business Manager ceases to act in his or her capacity as such, then Respondent shall select a substitute CVE Business Manager, subject to the approval of the Hold Separate Trustee, and transfer to the substitute CVE Business Manager all rights, powers and authorities necessary to permit the substitute CVE Business Manager to perform his or her duties and responsibilities, pursuant to this Hold Separate.
4. Respondent shall not change the composition of the management of the CVE Business except that the CVE Business Manager shall be permitted to remove

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management employees for cause subject to approval of the Hold Separate Trustee. The Hold Separate Trustee shall have the power to remove the CVE Business Manager for cause. Within fifteen (15) days after such removal, Respondent shall appoint a replacement for the CVE Business Manager, subject to the approval of the Hold Separate Trustee in the same manner as provided in Paragraph III. of this Hold Separate.

5. The CVE Business Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the CVE Business Manager's compensation for managing the CVE Business may include economic incentives dependent on the financial performance of the CVE Business if there are also sufficient incentives for the CVE Business Manager to operate the CVE Business at no less than current rates of operations (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate. For a period of two (2) years beginning after the termination of this Hold Separate, Respondent shall not retain the services of the CVE Business Manager.
 6. The CVE Business Manager shall make no material changes in the present operation of the CVE Business except with the approval of or at the instruction of the Hold Separate Trustee.
 7. The CVE Business Manager shall employ such employees as are reasonably necessary to assist the CVE Business Manager in managing the CVE Business.
- D. Respondent's employees (excluding support services employees involved in providing support to the CVE

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Business pursuant to this Hold Separate) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the CVE Business not in the public domain except:

1. as required by law;
2. to the extent that necessary information is exchanged in the course of consummating the Acquisition;
3. in negotiating agreements to divest the CVE Business pursuant to the Consent Agreement and engaging in related due diligence;
4. in complying with this Hold Separate or the Consent Agreement;
5. in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the CVE Business and the integrity of the CVE Business's financial controls;
6. in defending legal claims, investigations or enforcement actions threatened or brought against or related to the CVE Business; or
7. in obtaining legal advice.

Nor shall the CVE Business Manager or employees of the CVE Business receive or have access to, or use or continue to use, any Confidential Business Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the CVE Business. Respondent may receive aggregate financial and operational information relating to the CVE Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States

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and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

- E. Respondent shall assure that the CVE Business is staffed with employees sufficient to maintain the marketability, viability, and competitiveness of the CVE Business. During the Hold Separate Period, the CVE Business Manager, with the approval of the Hold Separate Trustee, shall have the authority to replace employees who have otherwise left their positions with the CVE Business since May 7, 2006. To the extent that Knowledgeable Employees or Key Employees leave the CVE Business during the Hold Separate Period, the CVE Business Manager, with the approval of the Hold Separate Trustee, shall use reasonable efforts to replace the departing employees with persons who have similar experience and expertise.
- 1. No later than five (5) days after the Acquisition Date, Respondent shall cause the CVE Business Manager and each Knowledgeable Employee and Key Employee with managerial responsibilities having access to Confidential Business Information relating to the CVE Business to sign an agreement to maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Confidential Business Information relating to the CVE Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondent's businesses other than the CVE

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Business. These persons shall not be involved in any way in the management, sales, marketing, and financial operations of products of Respondent that compete with the products of the CVE Business. This agreement shall provide that it may be enforced by the Acquirer.

2. No later than ten (10) days after the execution of the Hold Separate Trustee Agreement, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the CVE Business consistent with the provisions of this Hold Separate. These procedures shall be effective on the Acquisition Date.
 3. No later than five (5) days after the Acquisition Date, Respondent shall circulate to the Knowledgeable Employees and Key Employees and to Respondent's employees who are responsible for the operation of the CVE Business, or the research, development, manufacture, distribution, marketing or sale of Respondent's CVEs, a notice of this Hold Separate and Consent Agreement, in the form attached as Attachment A.
- F. The Hold Separate Trustee and the CVE Business Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms and conditions commensurate with the person's experience and responsibilities.
- G. Respondent shall indemnify the Hold Separate Trustee and the CVE Business Manager, and hold the Hold Separate Trustee and the CVE Business Manager harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the CVE

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Business Manager's duties under this Hold Separate, the Hold Separate Trustee Agreement, and the Management Agreement, including all reasonable fees of counsel and other expenses reasonably 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 Hold Separate Trustee or the CVE Business Manager.

H. During the Hold Separate Period, Respondent shall provide the CVE Business with sufficient financial resources:

1. as are appropriate in the judgment of the Hold Separate Trustee to operate the CVE Business, and at no less than current rates of operation (including, but not limited to, current rates of the CVE Business production and sales) and at no less than the rates of operation projected in the business plans and annual operating budget of the CVE Business as of May 7, 2006, (including, but not limited to, the rates of operation projected in the business plans); provided that the failure to achieve production or sales goals projected in Genevac's business plans and annual operating budget shall not, by itself, be deemed to be a violation of this Hold Separate;
2. to continue, at least at their scheduled pace, any additional expenditures for the CVE Business authorized prior to the date the Consent Agreement is executed;
3. to perform all ordinary and necessary maintenance to, and replacements of, assets of the CVE Business;

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4. to maintain the viability, competitiveness, and marketability of the CVE Business until the Effective Date of Divestiture, provided the CVE Business may not assume any new long-term debt, except as necessary to meet a competitive threat and as approved by the Hold Separate Trustee; and,
 5. such financial resources to be provided to the CVE Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; provided, however, that consistent with the purposes of the Decision and Order, the Hold Separate Trustee may reduce the scale or pace of any capital or research and development project, or substitute any capital or research and development project for another of the same cost.
- I. During the Hold Separate Period, Respondent shall, at the option of the CVE Business Manager, and with the approval of the Hold Separate Trustee, continue to provide the same support services to the CVE Business as are being provided to such assets and business as of the date Respondent executes the Consent Agreement; provided:
1. Respondent may charge the CVE Business the same fees, if any, charged by Fisher Scientific for such support services as of the date Respondent executes the Consent Agreement; and,
 2. Respondent shall ensure that all personnel providing such support services retain and maintain all Confidential Business Information relating to the CVE Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing,

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exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondent's businesses (other than the CVE Business). Such personnel shall also be required to execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information relating to the CVE Business.

3. Respondent shall not exercise direction or control over, or influence directly or indirectly, the CVE Business, the Hold Separate Trustee, the CVE Business Manager, or any of its operations; provided, however, that Respondent may exercise only such direction and control over the CVE Business as are necessary to assure compliance with this Hold Separate or the Consent Agreement, or with all applicable laws including, in consultation with the Hold Separate Trustee, continued oversight of the CVE Business compliance with policies and standards concerning the safety, health, and environmental aspects of their operations and the integrity of their financial controls; and Respondent shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against the CVE Business.
4. Except for the CVE Business Manager, the Hold Separate Trustee and except to the extent provided in this Paragraph TIL, Respondent shall not permit any Person who is not an employee, officer or director of the CVE Business to be involved in the operations of the CVE Business.

J. During the Hold Separate Period:

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1. Respondent shall not employ or make offers of employment to any Knowledgeable Employee or Key Employee; and,
 2. Respondent shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Knowledgeable Employees, directly or indirectly attempt to persuade any one or more of the Knowledgeable Employees to decline any offer of employment from the Acquirer, or offer any incentive to any Knowledgeable Employee to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Knowledgeable Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that directly or indirectly relate to CVEs or Genevac; and, (iii) continue to extend to any Knowledgeable Employees, during their employment by Genevac prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits.
- K. Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Key Employees for two (2) years from Effective Date of Divestiture.
- L. Respondent shall pay a Retention Bonus to any and all Key Employees.
- M. For a period of one year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Knowledgeable

Order to Maintain Assets

Employees employed by the Acquirer, unless such employee's employment has been terminated by the Acquirer.

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

- A. Respondent shall maintain the viability, marketability, and competitiveness of the CVE Business, and shall not cause the wasting or deterioration of the CVE Business, nor shall they cause the CVE Business to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the CVE Business. Respondent shall comply with the terms of this subparagraph IV.A. until such time as Respondent or the Divestiture Trustee has divested the CVE Business pursuant to the terms of the Decision and Order. Respondent shall conduct the business of the CVE Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relationships with the CVE Business, in the ordinary course of business and in accordance with past practice. Respondent shall use its best efforts to keep the organization and properties of the CVE Business intact, including current business operations, physical facilities and working conditions, and a work force of equivalent size, training, and expertise associated with the CVE Business.
- B. During the Hold Separate Period, Respondent shall ensure that the Knowledgeable Employees and the Key Employees continue to be paid their salaries, all current

Order to Maintain Assets

and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled.

- C. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating and meeting obligations under agreements to divest assets pursuant to the Decision and Order contained in the Consent Agreement and engaging in related due diligence, or complying with this Hold Separate or the Decision and Order contained in the Consent Agreement, or as permitted by Paragraph III.B. of the Decision and Order, Respondent shall not receive or have access to, or use or continue to use, any Confidential Business Information. Respondent may receive, on a regular basis, aggregate financial and operating information relating to the CVE Business necessary to allow Respondents to prepare consolidated financial reports and tax returns. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph and Paragraph III.B. of the Decision and Order.
- D. Within thirty (30) days after commencement of the Hold Separate Period and every sixty (60) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the CVE Business is meeting (or exceeding) projected goals as reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

Order to Maintain Assets

V.

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

VI.

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, Respondent shall permit any duly authorized representative of the Commission:

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

VII.

IT IS FURTHER ORDERED that this Hold Separate shall terminate on the earlier of:

Order to Maintain Assets

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or,
- B. the Effective Date of Divestiture of the CVE Business, as required by the Decision and Order contained in the Consent Agreement.

By the Commission.

Attachment A**NOTICE OF DIVESTITURE and REQUIREMENT FOR
CONFIDENTIALITY**

Thermo Electron Corporation (hereinafter, “Thermo Electron”) has entered into an Agreement Containing Consent Order (hereinafter, “Consent Agreement”) with the Federal Trade Commission relating to the divestiture of Genevac Limited (“Genevac”). Additional information about the Consent Agreement, as well as a copy of the Consent Agreement and a proposed Decision and Order that requires the divestiture, can be found on the web site of the Federal Trade Commission at www.ftc.gov.

Under the terms of the Consent Agreement, Thermo Electron must divest Genevac within one hundred and fifty (150) days after Thermo Electron closes the acquisition of Fisher Scientific International, Inc. Thermo Electron may only divest Genevac to an acquirer, approved by the Federal Trade Commission, who is financially sound and who will maintain Genevac as a viable competitor in the centrifugal vacuum evaporator market.

Order to Maintain Assets

Until Thermo Electron divests Genevac, Thermo Electron must manage and maintain Genevac as a separate, ongoing business, independent of all of Thermo Electron's other businesses. Harry Cole has been appointed by the Federal Trade Commission to supervise the operation of Genevac until it is divested. All confidential competitive information about Genevac must be retained and maintained by the people operating Genevac on a confidential basis. The people operating Genevac are prohibited from discussing, exchanging, circulating, or providing any confidential competitive information about Genevac with anyone, other than Mr. Cole, outside of Genevac. Similarly, people working for Thermo Electron with duties relating to centrifugal vacuum evaporators are prohibited from discussing, exchanging, circulating, or providing any confidential competitive information about Thermo Electron's products with anyone at Genevac.

We invite you to ask any questions about the divestiture of Genevac and the prohibition against discussing or disclosing confidential competitive information. Employees of Genevac should contact either James Roche at jim.roche@genevac.co.uk or +44 (0) 1473 243011, or Caron McLure at caron.mclure@genevac.co.uk or +44 (0) 1473 243015. All other employees should contact Jonathan Wilk at jonathan.wilk@thermo.com or 781-622-1281.

Decision and Order

Confidential Appendix 1 and Confidential Appendix 2

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

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent Thermo Electron Corporation (hereinafter “Thermo Electron”, “Respondent”, or “Respondent Thermo Electron”) and Fisher Scientific International Inc., and Respondent 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 Respondent 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

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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”):

1. Respondent Thermo Electron 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 at 81 Wyman Street, Waltham, Massachusetts 02454.

2. The Federal Trade Commission has jurisdiction over 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 the Order, the following definitions shall apply:

- A. “Thermo Electron” or “Respondent” means Thermo Electron Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by Thermo Electron Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

Decision and Order

- B. “Fisher Scientific” means, Fisher Scientific International Inc., 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 at Liberty Lane, Hampton, New Hampshire 03842; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fisher Scientific International Inc.
- C. “Genevac” means Genevac Limited, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its offices and principal place of business located at The Sovereign Center, Farthing Road, Ipswich IP1 5AP, United Kingdom; and Genevac Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 707 Executive Boulevard, Suite D, Valley Cottage, New York 10989, and their joint ventures, subsidiaries, divisions, groups, and affiliates controlled by either Genevac Limited or Genevac Inc.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means any Person who receives the prior approval of the Commission to acquire the CVE Business pursuant to this Order.
- F. “Acquisition” means the proposed acquisition of Fisher Scientific by Thermo Electron pursuant to the Agreement and Plan of Merger, dated as of May 7, 2006, by and among Thermo Electron and Trumpet Merger Corporation, a wholly owned subsidiary of Thermo Electron, and Fisher Scientific.
- G. “Acquisition Date” means the date the Acquisition is consummated.

Decision and Order

- H. “Confidential Business Information” means any information relating to the CVE Business before the Effective Date of Divestiture that is not in the public domain, including, but not limited to:
1. All contracts, agreements, bids, purchase orders, or other documents or information relating to any acquisition of goods or services related to the CVE Business;
 2. All marketing studies, marketing plans, data, or other documents or information relating to the CVE Business;
 3. All files and documents relating to Genevac’s suppliers to the extent relating to Genevac;
 4. All customer files, customer payment records, price information, service records, and purchase history; and,
 5. All trade secrets, information about products or processes under development, and other intellectual property that is not in the public domain.
- I. “CVEs” means centrifugal vacuum evaporators, which use a combination of heat, vacuum, and centrifugal force to remove solvents from laboratory samples, evaporating off the solvents while preserving and drying the samples for storage, further analysis, characterization, or experimentation.
- J. “CVE Business” means all of Respondent’s right, title, and interest in Genevac acquired in the Acquisition, including, but not limited to, all of Genevac’s outstanding capital stock, tangible and intangible assets, properties, business and goodwill, *provided, however*, that cash,

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receivables or other non-unique assets may be excluded from the sale of the CVE Business at the request of the Acquirer and subject to the prior approval of the Commission.

- K. “Divestiture Agreement” means any agreement or contract that receives the prior approval of the Commission that is related to the divestiture required by Paragraph II. or IV. of this Order.
- L. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- M. “Effective Date of Divestiture” means the date on which Respondent (or a Divestiture Trustee) divests to a Commission-approved Acquirer the CVE Business completely and as required by Paragraph II or IV of this Order.
- N. “Fisher Catalogue” means the 2,500 plus page standard paper and internet catalogue published by Fisher Scientific International Inc., containing 200,000 plus items, including any foreign-language, industry-specific, country-specific, or region-specific version(s).
- O. “Key Employees” means the persons listed in Confidential Appendix 1.
- P. “Knowledgeable Employees” means any person employed by or under contract to Genevac at any time between May 7, 2006, and the Effective Date of Divestiture, including but not limited to, Key Employees, *provided, however*, that such person is still employed by Fisher Scientific or Genevac at the time Respondent’s obligations under Paragraph II.C. of this Order arise.
- Q. “Retention Bonus” means the retention bonus and compensation described in Confidential Appendix 2.

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- R. “Hold Separate” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- S. “Governmental Entity” means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.
- T. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.

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

- A. Respondent shall divest, absolutely and in good faith and at no minimum price, the CVE Business to an Acquirer pursuant to and in accordance with the Divestiture Agreement within one hundred and fifty (150) days from the Acquisition Date.
- B. At the option of the Acquirer, and subject to the prior approval of the Commission, the Respondent, prior to or as of the Effective Date of Divestiture, shall enter into a non-exclusive, commercially reasonable agreement with the Acquirer for the distribution of Genevac’s CVE products through the Fisher Catalogue. Respondent shall not permit or provide, and the agreement shall prohibit, access by any of Respondent’s employees with duties primarily relating to the research, development, manufacture, marketing, sales or service of Respondent’s CVEs to Confidential Business Information or to information relating to the Acquirer’s sales of CVEs

Decision and Order

through the Fisher Catalogue (except to the extent agreed to by the Acquirer).

- C. Unless otherwise agreed with the Acquirer, and subject to the prior approval of the Commission:
1. Not later than forty five days before the Effective Date of Divestiture, Respondent shall to the extent permitted by applicable law: (i) provide to the Acquirer a list of all Knowledgeable Employees; (ii) allow the Acquirer an opportunity to interview any Knowledgeable Employees; and, (iii) allow the Acquirer to inspect the personnel files and other documentation relating to such Knowledgeable Employees; and,
 2. Not later than thirty days before the Effective Date of Divestiture, Respondent shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Knowledgeable Employees; and, (ii) to make offers of employment to any one or more of the Knowledgeable Employees; and,
 3. Respondent shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Knowledgeable Employees, directly or indirectly attempt to persuade any one or more of the Knowledgeable Employees to decline any offer of employment from the Acquirer, or offer any incentive to any Knowledgeable Employee to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any Knowledgeable Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that

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directly or indirectly relate to CVEs or Genevac; and, (iii) continue to extend to any Knowledgeable Employees, during their employment by Genevac prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;

4. Respondent shall pay a Retention Bonus to any and all Key Employees; and,
 5. Respondent shall not solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Key Employees for two (2) years from Effective Date of Divestiture.
- D. For a period of one year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, negotiate, hire or enter into any arrangement for the services of all or any of the Knowledgeable Employees employed by the Acquirer, unless such employee's employment has been terminated by the Acquirer.
- E. Respondent shall comply with all terms of the Divestiture Agreement, and any breach by Respondent of any term of the Divestiture Agreement shall constitute a violation of this Order. If any term of the 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 Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

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- F. The purpose of the divestiture of the CVE Business to the Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the CVE Business was engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondent shall:
1. not provide, disclose or otherwise make available any Confidential Business Information to any Person except as set forth in Paragraph III.B. of this Order; and,
 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by this Order.
- B. Notwithstanding Paragraph III.A. of this Order and subject to the Hold Separate, Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order, the Hold Separate, or the Divestiture Agreements; or, (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or, (iii) for inclusion within the periodic financial reports that Genevac may provide Respondent but only to the extent that any Confidential Business

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Information is aggregated so that data as to individual customers are not disclosed.

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

- A. If Respondent fails to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Divestiture Trustee to divest the CVE Business to an Acquirer and to execute Divestiture Agreements that satisfy the requirements of Paragraph II of this Order.
- B. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph IV. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV. of this Order to divest the CVE Business to an Acquirer, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture

Decision and Order

Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the CVE Business to an Acquirer pursuant to the terms of this Order and to enter into Divestiture Agreements with the Acquirer pursuant to the terms of this Order, which Divestiture Agreements shall be subject to the prior approval of the Commission.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a (or amend the existing) trust agreement (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the CVE Business to an Acquirer and to enter into Divestiture Agreements with the Acquirer. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee’s consultants, accountants, attorneys, and other representatives and assistants from disclosing, except to the Commission (and in the case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however*, Confidential Business Information may be disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.

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4. The Divestiture Trustee shall have six (6) months from the date the Commission approves the Divestiture Trustee Agreement described in Paragraph IV. of this Order to divest the CVE Business and to enter into Divestiture Agreements with an Acquirer that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable six-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to Genevac's manufacture, distribution, or sale of CVEs, related to the CVE Business, or related to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.
6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this Order; to assure that Respondent enters into Divestiture

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Agreements that comply with the provisions of Paragraph II. of this Order; to assure that Respondent complies with the remaining provisions of this Order; and to assure that the Acquirer obtains the assets required to research, develop, manufacture, sell and distribute CVEs and to operate the CVE Business in a manner to achieve the purposes of this Order. The divestiture shall be made to, and the Divestiture Agreements executed with, an Acquirer in the manner set forth in Paragraph II. of this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided, further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

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

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commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV. of this Order.
10. The Commission or, in the case of a court-appointed 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 comply with the terms of this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the CVE Business.

Decision and Order

12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to divest the CVE Business and Respondent's compliance with the terms of this Order.

D. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

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

VI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondent has fully complied with the provisions of Paragraphs II. and IV. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and IV. of this Order.

Decision and Order

Respondent shall include in the reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II.A. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondent shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and,

- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VII.

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, Respondent shall permit any duly authorized representative of the Commission:

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

Analysis to Aid Public Comment

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on November 30, 2016.

By the Commission.

**CONFIDENTIAL APPENDIX 1 AND CONFIDENTIAL
APPENDIX 2**

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

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Thermo Electron Corporation (“Thermo”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Thermo’s acquisition of Fisher Scientific International Inc. (“Fisher”). Under the terms of the Consent Agreement, Thermo is required to divest Genevac Limited and Genevac, Inc. (hereinafter referred to together as “Genevac”), which together comprise the entirety of

Analysis to Aid Public Comment

Fisher's centrifugal vacuum evaporator ("CVE") business, within five months after the date Thermo signed the Consent Agreement.

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

Pursuant to an Agreement and Plan of Merger dated May 7, 2006, Thermo proposes to acquire Fisher in a transaction valued at approximately \$12.8 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for high-performance CVEs.

II. The Parties

Headquartered in Waltham, Massachusetts, Thermo is one of the largest and most diversified suppliers of analytical instruments in the world. Founded in 1956, the company now employs 11,000 people worldwide with offices in thirty countries. Thermo owns many well-known laboratory equipment brands and sells high-performance CVEs under its Savant Speedvac brand. Thermo's 2005 worldwide revenue was \$2.6 billion and its North American sales were approximately \$1.2 billion.

Fisher is headquartered in Hampton, New Hampshire. Founded in 1902 to supply equipment and consumables to laboratories, Fisher today employs 19,500 people worldwide, 13,000 of those in the United States. The company is divided into three segments: biopharma services, scientific equipment and products, and distribution. Fisher has many well-known

Analysis to Aid Public Comment

laboratory equipment and instrument brands and sells its CVE products under the Genevac brand. Through its distribution operations, Fisher sells approximately 600,000 scientific and laboratory products and serves over 350,000 customers worldwide. Fisher's 2005 worldwide revenue was \$5.6 billion, of which \$4.1 billion was achieved in the United States.

III. High-Performance CVEs

High-performance CVEs apply heat, vacuum, and centrifugal force to rapidly remove solvents from samples suspended in solution in the wells of microtiter plates or test tubes, while preventing any molecular degradation or cross-contamination of the samples. High-performance CVEs are used primarily in combinatorial chemistry laboratories, which develop processes to simultaneously synthesize large collections of potentially biologically-active molecules, a process called parallel synthesis. The collections of molecules then can be tested for activity against identified targets as potential drug candidates during the early stages of the drug discovery process. In academic laboratories, high-performance CVEs are used to aid in the creation of chemical libraries of potentially biologically-active molecules for research purposes. High-performance CVEs typically cost between \$25,000 and \$100,000, depending on features and throughput capabilities.

CVEs are available in both high-performance and lower-performance models. High-performance CVEs differ from their lower-performance counterparts in a number of significant respects. High-performance CVEs can process hundreds of samples at a time and include advanced control and monitoring capabilities to prevent cross contamination between samples or degradation of the molecules as they are evaporated. They also are compatible with corrosive and environmentally sensitive solvents, such as hydrochloric acid and acetonitrile. In addition, high-performance models offer sophisticated programing capabilities. All of these features are considered useful and necessary by high-performance CVE purchasers because they

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enhance the efficiency of their work and reduce the likelihood of sample loss, degradation, and contamination. High-performance CVE purchasers do not consider lower-performance CVEs to be viable alternatives because of the high value of the samples, which in many cases take a week or more to synthesize and can represent the entire quantity of the compound that the scientist has developed. The repercussions of a sample loss or degradation resulting from a failure of the CVE are simply too great to justify the use of lower performance CVEs in these applications.

Besides the use of CVEs, there are also other methods available for removing solvents and drying samples, such as freeze drying and nitrogen blowdown. These technologies, however, have many limitations as compared to high-performance CVEs. Freeze drying, also called lyophilisation, is an effective technique for drying samples suspended in aqueous solvents. Lyophilisation is far less effective, however, with solvents that are not water-based and can be significantly more time consuming than high-performance CVEs when evaporating a large number of samples. Nitrogen blowdown equipment, which circulates nitrogen – a very dry gas – across the samples' surface to evaporate the solvent, does not capture the evaporated solvent and does not maintain a constant temperature during evaporation. These drawbacks, among others, prevent the alternative technologies from being viable alternatives to high-performance CVEs.

The United States is the relevant geographic market in which to analyze the effects of Thermo's proposed acquisition of Fisher in the market for high-performance CVEs. Firms that lack significant U.S. business operations cannot compete meaningfully in the United States. Successful participation in the U.S. high-performance CVE market requires substantial domestic, even local service and support. Because many purchasers use their high-performance CVEs daily, breakdowns may halt work in the lab. Such delay is costly, so customers demand reliable equipment and, in the event of a breakdown, that required service,

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support, and replacement parts be readily available. Thus, establishing a reputation for high quality products and strong after-sales support is necessary to gain acceptance among customers and succeed in the U.S. high-performance CVE market.

IV. Competitive Effects and Entry Conditions

Thermo and Fisher are the only two significant suppliers in the approximately \$10 million U.S. high-performance CVE market. Thermo and Fisher account for approximately 30 percent and 70 percent of the market, respectively, and compete directly on price, service, and product innovations. The evidence gathered in the Commission's investigation demonstrates that customers receive lower prices and other economic benefits, such as favorable service or payment terms, as a result of the competition between Thermo and Fisher. Indeed, many customers fear that the proposed transaction would allow the merged entity to increase prices of high-performance CVE's considerably, as they would have no alternative but to go along with a price increase imposed by the combined Thermo/Fisher. The evidence also shows that the parties compete on the basis of product performance, features, and innovation resulting in product improvements, such as enhanced vacuum and monitoring capabilities. If the proposed transaction were consummated, Thermo would obtain a virtual monopoly in the U.S. high-performance CVE market.

Martin Christ GmbH ("Martin Christ"), which is based in Germany, also offers high-performance CVEs. Martin Christ currently is not a significant competitor in the United States, however, and is not expected to be in the future. Martin Christ has had minimal sales of its high-performance CVE products in the United States during the last three years, and its sales are not likely to increase sufficiently to restore the lost competition.

Entry into the relevant market that would be sufficient to deter or counteract the anticompetitive effects of proposed transaction is unlikely to occur in a timely manner, as there are significant

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impediments to entry and expansion. First, a firm would have to design, develop, and test a product with functionality and reliability nearly equivalent to the products offered by incumbent models, while designing around, or obtaining licenses to, any intellectual property protecting the features and design of the incumbent high-performance CVEs. Second, if a prospective entrant does not have a pre-existing sales force directly selling related products, it also would have to establish a distribution channel by building a sales force and initiating a marketing effort sufficient to convince customers to buy its new high-performance CVE. Third, because high-performance CVEs are used regularly to perform critical laboratory functions, a new entrant must build a reputation for product quality and reliability and for responsive service in order to succeed. Finally, even if an entrant could overcome these barriers to entry, the relatively small high-performance CVE market, and correspondingly limited profit opportunities available to a new entrant, likely are insufficient to justify the investment necessary to enter the high-performance CVE market.

V. The Consent Agreement

The Consent Agreement effectively remedies the anticompetitive effects that are likely to occur as a result of the proposed transaction on the high-performance CVE market by requiring Thermo to divest Genevac, Fisher's stand alone CVE subsidiary. Pursuant to the Consent Agreement, Thermo is required to divest Genevac to a Commission-approved buyer, at no minimum price, within five months after the date Thermo signed the Consent Agreement. The Commission's goal in evaluating and approving 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 Thermo fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the

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Commission may appoint a trustee to divest the assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within six months of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires Thermo to provide the trustee with access to information related to the Genevac business as necessary to fulfill his or her obligations.

The Order to Hold Separate and Maintain Assets (“Hold Separate Order”) that is included in the Consent Agreement requires that Thermo hold separate and maintain the viability of Genevac as a competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Thermo and Genevac (except as otherwise provided in the Consent Agreement) and provisions designed to prevent interim harm to competition in the high-performance CVE market.

The Hold Separate Order provides that the Commission may appoint a Hold Separate Trustee who is charged with the duty of monitoring Thermo’s compliance with the Consent Agreement. Pursuant to that order, the Commission has appointed Harry Cole as Hold Separate Trustee to oversee Genevac prior to its divestiture and to ensure that Thermo complies with its obligations under the Consent Agreement. Mr. Cole was employed by Genevac from its incorporation in 1990 until 2005 and held numerous production, service, sales, and management positions, including serving as General Manager of Genevac with plenary responsibility for Genevac’s performance. Mr. Cole’s extensive background in the CVE market and intimate knowledge of Genevac uniquely qualify him to serve as the Hold Separate Trustee. The Hold Separate Order will become effective upon the date the Commission accepts the Consent Agreement for placement on the public record and will remain in effect until Thermo divests Genevac to a Commission-approved buyer. In the event that Thermo does not divest Genevac within the five-month

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time period, the Consent Agreement allows the Commission to appoint a trustee to divest Genevac.

The Consent Agreement contains several further provisions designed to help ensure that the divestiture of Genevac is successful. First, because a few of Genevac's lower-performance CVEs are currently sold through Fisher's catalog, the Consent Agreement requires Thermo, at the acquirer's option, to enter into a distribution agreement with the acquirer for Genevac's products to continue to be sold via the Fisher catalog, ensuring that Thermo cannot diminish Genevac's competitiveness by disrupting Genevac's distribution channels. Second, so that key Genevac employees stay with Genevac through the divestiture process, the Consent Agreement requires Thermo to implement and fund a retention plan for key employees. Third, the Consent Agreement prohibits Thermo from soliciting Genevac employees for at least a year after the divestiture of Genevac. For key Genevac employees, including its management and head of research and development, this prohibition is extended to two years.

In order to ensure that the Commission remains informed about the status of the Genevac business pending divestiture, and about the efforts being made to accomplish the divestiture, the Consent Agreement requires Thermo to file periodic reports with the Commission until the divestiture is accomplished.

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 Decision and Order or the Hold Separate Order, or to modify their terms in any way.

Complaint

IN THE MATTER OF

**WATSON PHARMACEUTICALS, INC.
AND
ANDRX CORPORATION****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-4172, File No. 061 0139**Complaint, October 31, 2006 – Decision, December 6, 2006*

This consent order addresses the acquisition of Andrx Corporation by Watson Pharmaceuticals, Inc. Both companies are suppliers of generic pharmaceutical products. Under the terms of the order, the companies would be required to (1) terminate Watson's marketing agreement with Interpharm Holdings, Inc., and return all of the Watson rights and assets necessary to market generic hydrocodone bitartrate/ibuprofen tablets to Interpharm, (2) assign and divest the Andrx rights and assets necessary to develop, manufacture, and market generic extended release glipizide tablets to Actavis Elizabeth LLC, and (3) divest the Andrx rights and assets necessary to develop, manufacture, and market eleven generic oral contraceptive products to Teva Pharmaceutical Industries, Inc. The acquirers of the divested assets must receive the prior approval of the Commission. If the parties fail to divest within the allotted time, the Commission may appoint a trustee to divest the assets. The order requires Watson and Andrx to provide transitional services to enable the acquirers to obtain all of the necessary approvals from the FDA, including technology transfer assistance to manufacture the products in substantially the same manner and quality employed or achieved by Watson and Andrx. In addition, Watson and Andrx must file reports with the Commission periodically until the divestitures and transfers are accomplished.

Participants

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For the Respondents: *Maria A. Raptis and Steven C. Sunshine, Cadwalader, Wickersham & Taft LLP; and Rhett R. Krulla and Michael S. Lazaroff, Proskauer Rose LLP.*