

## Complaint

**IN THE MATTER OF  
CARDINAL HEALTH, INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF  
THE CLAYTON ACT**

*Docket No. C-4339; File No. 091 0136  
Filed, October 18, 2011 — Decision, October 18, 2011*

This consent order addresses the acquisition by Cardinal Health of nuclear pharmacies from Biotech Pharmacy, Inc., (“Biotech”) in the southwestern United States. anticompetitive effects. Nuclear pharmacies produce, distribute, and sell single photon emission computed tomography radiopharmaceuticals to hospitals and cardiology clinics, who use the products to diagnose and treat various diseases. The complaint alleges that Cardinal Health operates the nation’s largest network of nuclear pharmacies, and the acquisition would substantially lessen competition in the nuclear pharmacy markets in Las Vegas, Nevada; Albuquerque, New Mexico; and El Paso, Texas and enable Cardinal Health to increase prices for its nuclear pharmacy products. The order requires Cardinal Health to restore three nuclear pharmacies that it closed post-acquisition. The order further requires Cardinal Health to divest all intellectual property necessary for the acquirer to compete successfully in the nuclear pharmacy market. The order also requires Cardinal Health to grant each of its customers within the relevant geographic markets to terminate their existing contracts without penalty.

*Participants*

For the *Commission*: William H. Efron and Jonathan W. Platt.

For the *Respondent*: Geoffrey Oliver, Joe Sims, and David Wales, 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, having reason to believe that Respondent Cardinal Health, Inc.’s (“Cardinal Health”) acquisition of certain assets of Biotech, violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §

## Complaint

45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

## I. SUMMARY

1. Nuclear pharmacies provide radiopharmaceuticals to local hospitals and cardiology clinics, which use the products to diagnose and treat various diseases. Radiopharmaceuticals are drugs containing a radioactive isotope combined with a chemical compound. Due to the fact that the radioactive isotopes in radiopharmaceuticals have short half-lives and decay rapidly, a nuclear pharmacy for all practical purposes can only serve its local area. Accordingly, competition between nuclear pharmacies occurs at the local level.

2. Cardinal Health owns and operates the largest network of nuclear pharmacies in the United States. In July of 2009, Cardinal Health acquired nuclear pharmacies owned by Biotech in Las Vegas, Nevada, Albuquerque, New Mexico, and El Paso, Texas. As a result of the acquisition, Cardinal Health now holds a monopoly in Albuquerque and has obtained large market shares in Las Vegas and El Paso. If allowed to remain, the transaction would likely allow Cardinal Health to increase prices and reduce service to radiopharmaceutical customers in these three cities and surrounding local areas.

## II. RESPONDENT CARDINAL HEALTH

3. Respondent Cardinal Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal executive offices at 7000 Cardinal Place, Dublin, Ohio 43017.

4. Cardinal Health is a \$99 billion health care services company. Cardinal Health is one of the leading suppliers of pharmaceuticals and medical products in the world. Cardinal Health is also a leading manufacturer of medical and surgical products, including gloves, surgical apparel, and fluid

## Complaint

management products. In addition, Cardinal Health operates the nation's largest network of nuclear pharmacies.

## III. THE ACQUISITION

5. On or about July 31, 2009, Cardinal Health 414, LLC, a wholly owned subsidiary of Cardinal Health, entered into an Asset Purchase Agreement (the "Agreement") with Biotech Pharmacy, Inc., Biotech Pharmacy of Northern Arizona, LLC, Biotech Nuclear, LLC, Biotech Cyclotron, LLC, Southwest Cyclotron, LLC, Biotech Cyclotron of New Mexico, LLC, Biotech Cyclotron of Arizona, LLC, Biotech Cyclotron of Texas, LLC, Leroy Candelaria, Scott Nelson, Mark Friedlander and Dennis Eshima (collectively "Biotech").

6. Pursuant to the Agreement, Cardinal Health acquired certain assets of Biotech, including nuclear pharmacies owned by Biotech in Las Vegas, Nevada, Albuquerque, New Mexico, and El Paso, Texas (the "Acquisition").

## IV. JURISDICTION

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

## V. RELEVANT PRODUCT MARKET

8. The relevant product market in which to analyze the effects of the Acquisition is the production, sale, and distribution of single photon emission computed tomography ("SPECT") radiopharmaceuticals (also referred to as "low energy radiopharmaceuticals").

## VI. RELEVANT GEOGRAPHIC MARKET

9. The relevant geographic markets in which to analyze the effects of the Acquisition are (i) Albuquerque, New Mexico and

## Complaint

surrounding areas (the “Albuquerque market”); (ii) El Paso, Texas and surrounding areas (the “El Paso market”); and (iii) Las Vegas, Nevada and surrounding areas (the “Las Vegas market”).

## VII. STRUCTURE OF THE MARKETS

10. Prior to the Acquisition, Cardinal Health and Biotech were the only two providers of low energy radiopharmaceuticals in the Albuquerque market. As a result of the Acquisition, Cardinal Health holds a monopoly in the Albuquerque market.

11. Prior to the Acquisition, Cardinal Health and Biotech were the only two providers of low energy radiopharmaceuticals in the El Paso market. As a result of the Acquisition, Cardinal held a monopoly in the El Paso market, until approximately November of 2010, when Rio Grande Nuclear Pharmacy, LLC, opened in El Paso. Currently, Cardinal Health holds a large market share in the El Paso market.

12. Prior to the Acquisition, there were three providers of low energy radiopharmaceuticals in the Las Vegas market. Cardinal Health and Biotech were the two leading providers, followed by Advanced Isotopes of Las Vegas. As a result of the Acquisition, Cardinal Health obtained and has since held a large market share in the Las Vegas market.

## VIII. COMPETITIVE EFFECTS

13. The Acquisition may substantially lessen competition in the relevant markets by, among other things:

- a. Eliminating actual, direct, and substantial competition between Cardinal Health and Biotech;
- b. Reducing the number of significant competitors in each relevant market giving Cardinal Health substantial market power;
- c. Facilitating the ability of Cardinal Health to exercise unilateral market power;

## Complaint

- d. Reducing Cardinal Health's incentives to improve service or product quality or to pursue further innovation;
- e. Increasing the likelihood of coordinated interaction among the remaining competitors; and
- f. Allowing Cardinal Health, unconstrained by effective competition, to increase prices.

## IX. ENTRY CONDITIONS

14. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Acquisition. Entrants face significant barriers in capturing sufficient business to replicate the scale and strength of either Cardinal or Biotech prior to the Acquisition.

## X. VIOLATIONS CHARGED

15. The Agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

16. The Acquisition may substantially 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this eighteenth day of October, 2011, issues its Complaint against said Respondent.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of certain assets of Biotech by Cardinal Health, Inc. (“Cardinal Health”), and Cardinal Health having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Cardinal Health 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

Cardinal Health, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Cardinal Health of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Cardinal Health 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 Cardinal Health 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, and having duly considered the comments received from an interested person pursuant to Section 2.34 of its Rules, 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 the following Decision and Order (“Order”):

1. Cardinal Health is a corporation organized, existing and doing business under and by virtue of the laws of

## Decision and Order

Ohio with its office and principal place of business located at 7000 Cardinal Health Place, Dublin, OH 43017.

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. “Cardinal Health” means Cardinal Health, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Cardinal Health, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Biotech” means the following entities collectively and individually: Biotech Pharmacy, Inc., a New Mexico corporation, Biotech Pharmacy of Northern Arizona, LLC, an Arizona limited liability company; Biotech Nuclear, LLC, a Nevada limited liability company, Biotech Cyclotron LLC, a Nevada limited liability company, Southwest Cyclotron, LLC, a Nevada limited liability company, Biotech Cyclotron of New Mexico, LLC, a New Mexico limited liability company, Biotech Cyclotron of Arizona, LLC, an Arizona limited liability company, and Biotech Cyclotron of Texas, LLC, a Texas limited liability company, and their respective directors, officers, employees, agents, representatives, successors, and assigns; and their respective joint ventures, subsidiaries, divisions, groups, and affiliates.
- C. “Commission” means the Federal Trade Commission.

## Decision and Order

- D. “Acquirer” or “Acquirers” means any entity or entities approved by the Commission to acquire one or more of the Reconstituted Pharmacies pursuant to this Order.
- E. “Acquisition” means Cardinal Health’s acquisition of certain Biotech assets relating to Biotech’s Nuclear Pharmacy business, which was consummated on July 31, 2009.
- F. “Biotech Intellectual Property” means the intellectual property related to the Nuclear Pharmacies owned by Biotech prior to the Acquisition and acquired by Cardinal Health pursuant to the Acquisition, including, but not limited to:
  - 1. copyrights, patents, software; trademarks, trade dress, trade secrets, drawings, utility models, designs, design rights, techniques, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, methods and other confidential or proprietary technical, business, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
  - 2. rights to obtain and file for patents and copyrights and registrations thereof;
  - 3. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
  - 4. the exclusive right to all intellectual property acquired by Cardinal Health from Biotech pursuant to the Acquisition and used by Biotech in the Nuclear Pharmacy business prior to the Acquisition, including, but not limited to, patents, licenses, risk analysis, certificates of analysis, goodwill, trade secrets, marketing information,

## Decision and Order

trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

*Provided, however,* that Intellectual Property shall not include intellectual property relating solely to the Cyclotron Assets.

- G. “Common Intellectual Property” means the intellectual property related to the Nuclear Pharmacies owned by Biotech prior to the Acquisition and acquired by Cardinal Health pursuant to the Acquisition, including but not limited to know-how, technology, data, technical information, protocols (including, but not limited to, operational manuals and standard operating procedures), and quality control information.
- H. “Biotech Nuclear Pharmacy” means any and all of the Nuclear Pharmacies owned and operated by Biotech as of July 30, 2009, and located at:  
  
3940 S. Eastern Avenue, Las Vegas, Nevada 89119  
4030 Stockton Hill Road, Suite 8, Kingman, Arizona 86409  
116 W. Castellano, El Paso, Texas 79912  
4376 Alexander Boulevard, NE, Suite B, Albuquerque, New Mexico 87107
- I. “Branded Heart Perfusion Agent” means Cardiolite or Myoview.
- J. “Closing Date” means the Albuquerque Closing Date, the El Paso Closing Date, or the Las Vegas Closing Date.
- K. “Albuquerque Closing Date” means the date on which Cardinal Health (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey a Reconstituted Pharmacy located in Albuquerque, New Mexico to an Acquirer pursuant to this Order.

## Decision and Order

- L. “El Paso Closing Date” means the date on which Cardinal Health (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey a Reconstituted Pharmacy located in El Paso, Texas to an Acquirer pursuant to this Order.
- M. “Las Vegas Closing Date” means the date on which Cardinal Health (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey a Reconstituted Pharmacy located in Las Vegas, Nevada, to an Acquirer pursuant to this Order.
- N. “Customer” means any third party that, at any time between July 1, 2009 and the relevant Closing Date, purchased Radiopharmaceuticals from any of the Former Cardinal Nuclear Pharmacies or the Biotech Nuclear Pharmacies located in Las Vegas, Nevada, El Paso, Texas, and Albuquerque, New Mexico acquired by Cardinal Health in the Acquisition.
- O. “Customer Contract” means any contract between Cardinal Health and any Customer for the preparation, dispensing and distribution of Radiopharmaceuticals, including, but not limited to, contracts with the Customers identified in Confidential Exhibit A to this Order.
- Provided, however, Customer Contract shall not include any contract solely for the preparation, dispensing and distribution of High-energy Radiopharmaceuticals or where the Customer has committed to purchase only High-energy Radiopharmaceuticals.*
- P. “Existing Customer Contract” means the Customer Contract in effect on the date that Cardinal Health notifies the relevant Customer of its contract

## Decision and Order

termination rights pursuant to Paragraph IV of this Order.

- Q. “Cyclotron Assets” means the equipment and other assets associated with the manufacture of High-energy Radiopharmaceuticals.
- R. “Designated Employee” means the employee or person employed by Biotech at any Biotech Nuclear Pharmacy or by Cardinal at any of the Former Cardinal Health Nuclear Pharmacies at the time of the Acquisition.
- Provided, however, “Designated Employee” does not include the persons identified in Confidential Exhibit B.*
- S. “Albuquerque Divestiture Agreement” means the agreement between Cardinal Health and the Acquirer of the Reconstituted Nuclear Pharmacy located in Albuquerque, New Mexico.
- T. “El Paso Divestiture Agreement” means the agreement between Cardinal Health and the Acquirer of the Reconstituted Nuclear Pharmacy located in El Paso, Texas.
- U. “Las Vegas Divestiture Agreement” means the agreement between Cardinal Health and the Acquirer of the Reconstituted Nuclear Pharmacy located in Las Vegas, Nevada.
- V. “Divestiture Trustee(s)” means any person or entity appointed pursuant to Paragraph VIII of this Order to act as a trustee in this matter.
- W. “Former Cardinal Health Nuclear Pharmacies” means the Nuclear Pharmacies owned and operated by Cardinal Health as of July 30, 2009, at the following locations:

## Decision and Order

61 Spectrum Boulevard, Las Vegas, Nevada 89119;  
1020 Tijeras N.E., Suite 1, Albuquerque, New Mexico  
87107;  
1810 Murchison Road, #205, El Paso, Texas 79902.

- X. “Generic Heart Perfusion Agent” means Sestamibi.
- Y. “High-energy Radiopharmaceuticals” means any positron emission tomography (PET) Radiopharmaceutical.
- Z. “Low-energy Radiopharmaceuticals” means any non-PET Radiopharmaceutical, which is or can be used in diagnostic nuclear medicine studies, diagnostic nuclear medicine imaging or therapeutic nuclear medicine treatments.
- AA. “Monitor” means the person appointed pursuant to Paragraph VII of this Order.
- BB. “Nuclear Pharmacy” means a pharmacy dedicated to the preparation, dispensing, and distribution of Radiopharmaceuticals. *Provided, however*, “Nuclear Pharmacy” shall not include Cyclotron Assets.
- CC. “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.
- DD. “Radiopharmaceutical” means a drug containing a radioactive isotope which can be used in diagnostic nuclear medicine studies, diagnostic nuclear medicine imaging, therapeutic nuclear medicine treatments, or diagnostic molecular imaging.
- EE. “Reconstituted Pharmacies” means the Former Cardinal Health Nuclear Pharmacies as reconstituted pursuant to Paragraph II.A.1. of this Order.

## Decision and Order

- FF. “Relevant Areas” means the area within a 200 mile radius of each of the Biotech Nuclear Pharmacies.
- GG. “Tech-99” means technetium-99m.
- HH. “Third Party Consents” means all consents from any person other than Cardinal Health, including all landlords, that are necessary to effect the complete transfer of the Reconstituted Pharmacies to an Acquirer.

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

- A. Within six (6) months of the date on which this Order is accepted for public comment, Cardinal Health shall:
1. Reconstitute, in conjunction with each proposed Acquirer, each of the Former Cardinal Health Nuclear Pharmacies. Such reconstitution shall result in the creation of separate, stand-alone Nuclear Pharmacies, similar to the Former Cardinal Health Nuclear Pharmacies before the Acquisition, and each fully engaged in all aspects of the Nuclear Pharmacy business and compliant with USP 797 regulation developed by U.S. Pharmacopeia. Such reconstitution may include, but is not limited to, returning or replacing all equipment, supplies, fixtures, and furnishings.
  2. Divest the Reconstituted Pharmacies and the Biotech Intellectual Property, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers each of whom receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

*Provided, however,* that Cardinal Health may retain a fully paid-up, irrevocable, royalty-free license to the Common Intellectual Property;

## Decision and Order

*Provided further, however, that Cardinal shall demonstrate that the Acquirer of each Reconstituted Pharmacy shall have a contract for the supply of Tech-99, independent of Cardinal Health, with a capability to obtain a volume of Tech-99 similar to the volume of Tech-99 previously provided to the Biotech Nuclear Pharmacies before the Acquisition;*

*Provided further, however, that Cardinal shall demonstrate that the Acquirer of each Reconstituted Pharmacy shall have distribution rights with respect to both a Branded Heart Perfusion Agent and a Generic Heart Perfusion Agent, for, at a minimum, the area previously serviced by the corresponding Biotech Nuclear Pharmacy before the Acquisition.*

- B. Cardinal Health shall not prevent restrict, limit, or interfere in any way with the ability of an Acquirer to procure or distribute any Radiopharmaceutical product or Radiopharmaceutical input, including, but not limited to, Branded Heart Perfusion Agents and Generic Heart Perfusion Agents.
- C. Before the Closing Date for each Reconstituted Pharmacy, Cardinal Health shall:
  - 1. obtain or maintain all regulatory approvals, licenses, qualifications, permits or clearances that are capable of being transferred to the Acquirer and necessary for any aspect of the operations of such Reconstituted Pharmacy, to the extent allowed by law; and
  - 2. transfer such approvals, licenses, permits or clearances to each Acquirer, to the extent they can be transferred.
- D. The purposes of this Paragraph II of the Order are:

## Decision and Order

1. to ensure that Cardinal Health, in conjunction with the proposed Acquirer or Acquirers, reconstitutes the Former Cardinal Health Nuclear Pharmacies in Las Vegas, Nevada; Albuquerque, New Mexico; and El Paso, Texas resulting in the creation of separate, stand-alone Nuclear Pharmacies, and each fully engaged in all aspects of the Nuclear Pharmacy business;
2. to ensure that each Acquirer of the Reconstituted Pharmacies has the intention and ability to prepare and distribute Radiopharmaceuticals for use in nuclear medicine procedures, at facilities independent of Cardinal Health, similar to Cardinal Health's independent preparation and distribution of Radiopharmaceuticals prior to Cardinal Health's acquisition of Biotech, including having a Tech-99 supply agreement and distribution agreements with respect to a Branded Heart Perfusion Agent and a Generic Heart Perfusion Agent that could be used to supply customers of the Reconstituted Pharmacy;
3. to allow each Acquirer to operate the Reconstituted Pharmacies with the certifications and approvals necessary for the preparation, distribution, and pharmacology of Radiopharmaceuticals; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Cardinal Health shall take no action to prevent, restrict, limit, or interfere in any way with the ability of each Acquirer to contract with any group purchasing organization.

## Decision and Order

*Provided, however,* Cardinal Health shall not be required to terminate, amend or waive any contracts entered into with group purchasing organizations unless Cardinal Health is otherwise required to terminate, amend, or waive such contracts, or portions thereof, pursuant to Paragraph IV of this Order.

- B. Cardinal Health shall, as part of the Divestiture Agreement for the Reconstituted Pharmacies in Las Vegas, NV and Albuquerque, NM, and at the Acquirer's option for those Reconstituted Pharmacies, enter into an agreement to supply F-18 fluorodeoxyglucose and other cyclotron-produced radioisotopes from Cardinal Health to the Acquirer for a period of one (1) year after the Closing Date on price terms similar to those in the contracts through which Biotech agreed to provide such radioisotopes to Cardinal Health prior to the Acquisition.

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

- A. Cardinal Health shall, within five (5) days after each Closing Date, notify each relevant Customer of its right to terminate its Existing Customer Contract with Cardinal Health.
- B. Cardinal Health shall terminate the Existing Customer Contract within thirty (30) days of receiving a Customer's request to terminate. The Customer's right to terminate such Existing Customer Contract shall be without penalty or charge, and immediately upon request of the Customer, and shall continue for twenty-four (24) months from the relevant Closing Date. Such notification shall include notification of the existence of the relevant Reconstituted Pharmacy and be in the form of the notification attached as Exhibit C to this Order.

## Decision and Order

*Provided, however,* that, if after receiving such notification, the Existing Customer Contract is extended, renewed, or materially modified by mutual agreement between Cardinal Health and the Customer, including, but not limited to, modifications regarding the price or duration terms of such Existing Customer Contract, Cardinal Health shall not be required to terminate the Existing Customer Contract pursuant to this Paragraph;

*Provided further however,* that Cardinal Health shall include in any such extension, renewal, or material modification to such Existing Customer Contract a specific and prominent acknowledgment that if the Customer executes the extension, renewal, or material modification, Cardinal Health will not be required to terminate the Existing Customer Contract pursuant to this Paragraph.

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

- A. Each Divestiture Agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof. Further, nothing in any Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of Cardinal Health under a Divestiture Agreement. Cardinal Health shall comply with the terms of each Divestiture Agreement, and a breach by Cardinal Health of any term of a Divestiture Agreement shall constitute a violation of this Order. To the extent that any term of a Divestiture Agreement conflicts with a term of this Order such that Cardinal Health cannot fully comply with both, Cardinal Health shall comply with the term of this Order; and
- B. Cardinal Health shall include in each Divestiture Agreement a specific reference to this Order, the

## Decision and Order

remedial purposes thereof, and provisions to reflect the full scope and breadth of Cardinal Health's obligations to the Acquirer pursuant to this Order.

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

- A. Beginning from the Closing Date for each Reconstituted Pharmacy until ninety (90) days after such Closing Date, Cardinal Health shall:
1. facilitate employment interviews between each Designated Employee and the Acquirer of each Reconstituted Pharmacy, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the relevant Acquirer, and shall not discourage such employee from participating in such interviews;
  2. not interfere in employment negotiations between each Designated Employee and the relevant Acquirer;
  3. with respect to each Designated Employee who receives an offer of employment from the relevant Acquirer:
    - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the relevant Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the relevant Acquirer;
    - b. cooperate with the relevant Acquirer in effecting transfer of the Designated Employee to the employ of the relevant Acquirer, if the Designated Employee accepts an offer of employment from the relevant Acquirer;

## Decision and Order

- c. eliminate any contractual provisions or other restrictions entered into or imposed by Cardinal Health (such as noncompetition agreements) that would otherwise prevent the Designated Employee from being employed by the relevant Acquirer;
  - d. eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the relevant Acquirer any information relating to the operation of the relevant Reconstituted Pharmacy; and
  - e. unless alternative arrangements are agreed upon with the relevant Acquirer, retain the obligation for the benefit of any Designated Employee who accepts employment with the relevant Acquirer, to pay all vested bonuses, vested pensions, and other vested benefits.
- B. Cardinal Health shall not, for a period of two (2) years following each relevant Closing Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by the relevant Acquirer at the relevant Reconstituted Pharmacy to terminate his or her employment relationship with such Acquirer, unless that employment relationship has already been terminated by such Acquirer;

*Provided, however,* that Cardinal Health may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the relevant Acquirer's employees;

*Provided further, however,* Cardinal Health may hire Designated Employees who apply for employment with Cardinal Health as long as such employees were not solicited by Cardinal Health in violation of this Paragraph.

## Decision and Order

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

- A. Katherine L. Seifert of Seifert and Associates, Inc. shall serve as the Monitor pursuant to the agreement executed by the Monitor and Cardinal Health and attached as Exhibits D (“Monitor Agreement”) and Confidential Exhibit D-1 (Monitor compensation). The Monitor is appointed to assure that Cardinal Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after this Order is accepted for public comment, Cardinal Health transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform her duties and responsibilities, pursuant to and consistent with, the purposes of the Order.
- C. No later than one (1) day after this Order is accepted for public comment, Cardinal Health shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform her duties and responsibilities, pursuant to and consistent with, the purposes of the Order.
- D. Cardinal Health shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Cardinal Health’s compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in

## Decision and Order

consultation with the Commission including, but not limited to:

- a. Assuring that Cardinal Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
  - b. Monitoring any agreements between Cardinal Health and the Acquirer.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Cardinal Health's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Cardinal Health's compliance with its obligations under the Order. Cardinal Health shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Cardinal Health's compliance with the Order.
4. The Monitor shall serve, without bond or other security, at the expense of Cardinal Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Cardinal Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

## Decision and Order

5. Cardinal Health shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
  6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Cardinal Health of its obligations under the Order.
  7. Cardinal Health may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

## Decision and Order

1. The Commission shall select the substitute Monitor, subject to the consent of Cardinal Health, which consent shall not be unreasonably withheld. If Cardinal Health has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Cardinal Health of the identity of any proposed Monitor, Cardinal Health shall be deemed to have consented to the selection of the proposed Monitor.
  2. Not later than ten (10) days after appointment of the substitute Monitor, Cardinal Health shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Cardinal Health's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Cardinal Health has not fully complied with the obligations as required by Paragraphs II.A, II.B and II.C of this Order, the Commission may appoint a Divestiture Trustee to reconstitute the Former Cardinal Health Nuclear Pharmacies and divest the Reconstituted Pharmacies and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

## Decision and Order

- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Cardinal Health shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II.A, II.B and II.C. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VIII 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 Cardinal Health to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Cardinal Health, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Cardinal Health has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Cardinal Health of the identity of any proposed Divestiture Trustee, Cardinal Health shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Not later than ten (10) days after the appointment of a Divestiture Trustee, Cardinal Health 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.

## Decision and Order

- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VIII, Cardinal Health 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 reconstitute the Former Cardinal Health Nuclear Pharmacies and divest the Reconstituted Pharmacies and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and VI of this Order.
  2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to reconstitute the Former Cardinal Health Nuclear Pharmacies, and to divest the Reconstituted Pharmacies and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and VI of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.  
If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
  3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Cardinal Health shall

## Decision and Order

develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Cardinal Health shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Cardinal Health shall extend the time for divestiture under this Paragraph VIII in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Cardinal Health's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

*Provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Cardinal Health from among those approved by the Commission;

*Provided further, however,* that Cardinal Health shall select such entity within five (5) days after receiving notification of the Commission's approval.

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

## Decision and Order

Cardinal Health, 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 of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Cardinal Health, 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. Cardinal Health shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, 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.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.

## Decision and Order

9. The Divestiture Trustee shall report in writing to Cardinal Health and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  10. Cardinal Health 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.
  11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VIII.
- G. 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 obligations under Paragraphs II, III, IV, and VI of this Order.
- H. The Divestiture Trustee(s) appointed pursuant to Paragraph VIII of this Order may be the same Person appointed as the Monitor pursuant to Paragraph VII of this Order.

## Decision and Order

**IX.**

**IT IS FURTHER ORDERED** that for a period of ten (10) years from the date this Order becomes final:

- A. Cardinal Health shall not, without providing advance written notice to the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order. Said notification shall be given to the Secretary of the Federal Trade Commission.
- B. Cardinal Health shall not, without providing advance written notification to the Commission in the manner described in this Paragraph IX directly or indirectly, acquire:
  - 1. any stock, share capital, equity, or other interest in any Person, corporate or non corporate, that owns, operates, manages, or owns an interest in Nuclear Pharmacies in the Relevant Areas; or
  - 2. any assets used, at the time of the Acquisition, in the operation or business of Nuclear Pharmacies in the Relevant Areas.

Said notification shall be given to the Secretary of the Federal Trade Commission and shall include, at a minimum, the following information: (i) the name and address of the acquired entity or, in the case of an asset acquisition the name and address of the entity from which assets are being acquired; (ii) a description of the transaction, including the purchase price; and (iii) identification of the assets being acquired, including their physical location.

*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.

*Provided, further, however,* that prior notification shall not be required by this Paragraph IX for an acquisition, if Cardinal Health acquires not more than one percent of the outstanding

## Decision and Order

securities or other equity interest in an entity described in this Paragraph IX.

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

- A. Within thirty (30) days after the date this Order is accepted for public comment, and every sixty (60) days thereafter until Cardinal Health has fully complied with Paragraphs II.A, II.B, II.C, IV.A and VI.A of this Order, Cardinal Health shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Cardinal Health shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Cardinal Health shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Cardinal Health shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- 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, Cardinal Health shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Cardinal Health shall include in its compliance reports, among other things that are required from time to time, a full description of the

## Decision and Order

efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this Order. Additionally, Cardinal Health shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph IX. Cardinal Health shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its Nuclear Pharmacy operations.

**XI.**

**IT IS FURTHER ORDERED** that Cardinal Health shall notify the Commission at least thirty (30) days prior to any proposed:

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

**XII.**

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

- A. access, during business office hours of Cardinal Health 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

## Decision and Order

documents in the possession or under the control of Cardinal Health related to compliance with this Order, which copying services shall be provided by Cardinal Health at its expense; and

- B. to interview officers, directors, or employees of Cardinal Health, who may have counsel present, regarding such matters.

**XIII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on October 18, 2021.

By the Commission.

**CONFIDENTIAL EXHIBIT A**

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

Decision and Order

**CONFIDENTIAL EXHIBIT B**

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

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 Cardinal Health, Inc. (“Cardinal”) to remedy the anticompetitive effects stemming from Cardinal’s acquisition of Biotech’s nuclear pharmacies in the Southwestern United States. Under the terms of the Consent Agreement, Cardinal is required to reconstitute and divest to one or more Commission-approved acquirers, Cardinal’s former nuclear pharmacies in Las Vegas, Nevada, Albuquerque, New Mexico, and El Paso, Texas, and to take certain additional measures to restore competition in nuclear pharmacy markets in Las Vegas, Albuquerque, and El Paso.

On July 31, 2009, Cardinal acquired Biotech’s nuclear pharmacies in Las Vegas, Albuquerque, and El Paso (the “Acquisition”) pursuant to an Asset Purchase Agreement (“Agreement”). Prior to the Acquisition, both Cardinal and Biotech operated nuclear pharmacies in these cities. These nuclear pharmacies produced, distributed, and sold single photon emission computed tomography (“SPECT”) radiopharmaceuticals (also referred to as “low energy radiopharmaceuticals”) to hospitals and cardiology clinics. The Commission’s complaint alleges that the Acquisition and the Agreement 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, because the Acquisition and Agreement may substantially lessen competition or tend to create a monopoly in the production, sale, and distribution of low energy radiopharmaceuticals in Las Vegas, Albuquerque, and El Paso and surrounding local areas.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw the proposed Consent Agreement, modify it, or make

## Analysis to Aid Public Comment

final the Consent Agreement's proposed Decision and Order ("Order").

**II. Respondent Cardinal Health, Inc.**

Cardinal is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal executive offices at 7000 Cardinal Place, Dublin, Ohio 43017. Cardinal, a \$99 billion health care services company, is one of the leading suppliers of pharmaceuticals and medical products in the world. Cardinal is also a leading manufacturer of medical and surgical products, including gloves, surgical apparel, and fluid management products. In addition, Cardinal operates the nation's largest network of nuclear pharmacies.

**III. The Products and Structure of the Markets**

Nuclear pharmacies provide radiopharmaceuticals to local hospitals and cardiology clinics, which use the products to diagnose and treat various diseases. Radiopharmaceuticals are drugs containing a radioactive isotope combined with a chemical compound. Due to the fact that the radioactive isotopes have short half-lives and decay rapidly, a nuclear pharmacy can only serve its local area. Accordingly, competition between nuclear pharmacies occurs at the local level.

The Commission's complaint alleges that the relevant product market in which to assess the effects of the Acquisition is the production, sale, and distribution of SPECT radiopharmaceuticals or low energy radiopharmaceuticals. The Commission's complaint further alleges that the relevant geographic markets in which to analyze the effects of the Acquisition are (i) Albuquerque, New Mexico and surrounding areas (the "Albuquerque market"); (ii) El Paso, Texas and surrounding areas (the "El Paso market"); and (iii) Las Vegas, Nevada and surrounding areas (the "Las Vegas market").

The Commission's complaint alleges that Cardinal and Biotech were the only two providers of low energy radiopharmaceuticals prior to the Acquisition in the Albuquerque

## Analysis to Aid Public Comment

market. As a result of the Acquisition, Cardinal holds a monopoly in the Albuquerque market. With respect to the El Paso market, the Commission's complaint alleges that Cardinal and Biotech were the only two providers of low energy pharmaceuticals prior to the Acquisition. As a result of the Acquisition, Cardinal held a monopoly in the El Paso market, until approximately November of 2010, when Rio Grande Nuclear Pharmacy, LLC opened in El Paso. Currently, Cardinal holds a large market share in the El Paso market. Finally, regarding the Las Vegas market, the Complaint alleges that prior to the Acquisition, there were three providers of low energy radiopharmaceuticals in the market. Cardinal and Biotech were the two leading providers, followed by Advanced Isotopes of Las Vegas. As a result of the Acquisition, Cardinal obtained and has since held a large market share in the Las Vegas market.

**IV. Effects of the Acquisition**

The Commission's complaint charges that the Acquisition may substantially lessen competition in the Las Vegas, Albuquerque, and El Paso markets for the production, sale, and distribution of low energy radiopharmaceuticals, by, among other things, (i) eliminating the direct and substantial competition between Cardinal and Biotech; (ii) reducing the number of significant competitors in each relevant market giving Cardinal substantial market power; (iii) facilitating the ability of Cardinal to unilaterally exercise market power; (iv) reducing Cardinal's incentives to improve service or product quality or pursue further innovation; (v) increasing the likelihood of coordinated interaction among the remaining competitors; and (vi) allowing Cardinal, unconstrained by effective competition, to increase prices.

## Analysis to Aid Public Comment

**V. Entry**

The Commission's complaint alleges that entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Acquisition. The Commission's complaint further alleges that entrants face significant barriers in capturing sufficient business to replicate the scale and strength of either Cardinal or Biotech prior to the Acquisition.

**VI. Terms of the Order**

The Consent Agreement is designed to remedy the likely anticompetitive effects of the Acquisition by restoring, to the extent possible, the lost competition between Cardinal and Biotech in Las Vegas, Albuquerque, and El Paso. Specific terms of the Order are discussed further below.

A. Reconstitution and Divestiture of the Former Cardinal Nuclear Pharmacies to One or More Commission-Approved Acquirers

Prior to the Acquisition, both Cardinal and Biotech operated nuclear pharmacies in Las Vegas, El Paso, and Albuquerque. After the Acquisition, Cardinal relocated its nuclear pharmacy business in these cities to the former Biotech nuclear pharmacy locations and closed its Cardinal facilities. The Order requires that within six months of the date on which the Order is accepted for public comment, Cardinal must reconstitute each of the three former Cardinal nuclear pharmacies and divest each of the pharmacies to a Commission-approved acquirer.

In connection with the divestiture of the three nuclear pharmacies, Cardinal is also required to divest to each acquirer the intellectual property related to the nuclear pharmacies owned by Biotech prior to the Acquisition. Cardinal must also obtain, maintain, and transfer to the acquirer(s) all regulatory approvals, licenses, qualifications, permits, or clearances that are necessary to operate a nuclear pharmacy. Finally, although, as stated above, the Commission must approve each acquirer, the Order specifically requires that Cardinal demonstrate that each acquirer

## Analysis to Aid Public Comment

has a supply of the two vital low energy radiopharmaceutical inputs, the radioisotope technetium 99 and a heart perfusion agent.

B. Customer Rights to Terminate Contracts with Cardinal

To ensure that the acquirer(s) have the opportunity to compete for sufficient business to obtain viable scale and restore competition, the Order requires that Cardinal grant each of its customers in Las Vegas, Albuquerque, and El Paso the right to terminate, without penalty or charge, its existing contract with Cardinal for the purchase of radiopharmaceuticals. Specifically, any customer that purchased radiopharmaceuticals from either Cardinal's or Biotech's nuclear pharmacy in Las Vegas, Albuquerque, or El Paso, at any time between July 1, 2009 (30 days prior to the Acquisition) and the relevant closing date (*i.e.*, the day on which Cardinal divests the reconstituted pharmacy in the customer's market), has the right to terminate its existing contract for radiopharmaceuticals with Cardinal. However, the Order does not grant customers the right to terminate radiopharmaceutical contracts with Cardinal that relate solely to the purchase of Positron Emission Tomography radiopharmaceuticals (also referred to as high energy radiopharmaceuticals).

Pursuant to the Order, Cardinal is required to notify each relevant customer within five days after the relevant closing date of the customer's right to terminate its existing contract. The Order further requires that Cardinal will terminate any relevant customer's existing contract within 30 days upon receiving that customer's request to terminate. Relevant customers will have the option to terminate their existing contract with Cardinal for a period of 24 months from the relevant closing date.

C. Facilitating the Acquirer's Employment of Certain Cardinal and Former Biotech Employees

To provide the acquirer(s) with access to any necessary employees, the Order requires Cardinal to facilitate and not interfere with the recruitment of certain former Biotech employees and current Cardinal nuclear pharmacy employees in Las Vegas, Albuquerque, and El Paso. Such employees also are

## Analysis to Aid Public Comment

released from any restrictions on their ability to work for the acquirer(s).

**D. A Monitor Will Help Ensure Compliance**

The Order provides for the appointment by the Commission of an independent monitor with fiduciary responsibilities to the Commission, to help ensure that Cardinal carries out all of its responsibilities and obligations under the Order. The Order provides that Katherine L. Seifert, a person with significant experience in the radiopharmaceutical industry, shall serve as monitor. Ms. Seifert, currently of Seifert and Associates, Inc., provides consulting services for various clients in the radiopharmaceutical industry. In the event Cardinal fails to comply with its divestiture obligations, the Order also provides that the Commission may appoint a divestiture trustee to fulfill those requirements.

**VII. Purpose of the Analysis to Aid Public Comment**

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and Order.

## Complaint

**IN THE MATTER OF****DAVITA, INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF  
THE CLAYTON ACT**

*Docket No. C-4334; File No. 111 0103  
Filed, September 2, 2011 — Decision, October 20, 2011*

This consent order addresses the acquisition by DaVita Inc. (“DaVita”) of CDSI Holding Company, Inc. (“CDSI”). DaVita is the second largest provider of outpatient dialysis services in the United States. CDSI is the fifth largest provider of outpatient dialysis services in the United States. The complaint alleges that the acquisition of CDSI by DaVita would substantially lessen competition, result in higher prices, and diminish service and quality for outpatient dialysis services in several geographic markets throughout the United States. The order requires DaVita to divest 29 outpatient dialysis clinics and to implement certain measures to ensure the divestitures is successful.

*Participants*

For the *Commission*: *Lisa D. DeMarchi Sleigh, Amy S. Posner, and Kari A. Wallace.*

For the *Respondent*: *Joel R. Grosberg and Gregory Heltzer, McDermott Will & Emery LLP.*

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that the Respondent DaVita Inc. (“DaVita”), a company subject to the jurisdiction of the Commission, has entered into an agreement to acquire CDSI I Holding Company, Inc. (“DSI”), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in