

Complaint

IN THE MATTER OF

WESTERN DIGITAL CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4350; File No. 111 0122
Complaint, March 5, 2012 – Decision, May 7, 2013

This consent order addresses concerns that the acquisition by Western Digital of Hitachi Global Storage Technologies (“Hitachi”) violates Section 5 of the FTC Act and Section 7 of the Clayton Act. According to the complaint, the acquisition would substantially reduce competition in the worldwide market for desktop hard disk drives and would enable Western Digital to exercise market power, resulting in higher prices for consumers. The consent order requires Western Digital to divest select Hitachi assets to Toshiba within 15 days of the acquisition. The consent order further requires Western Digital to license all intellectual property needed to make and supply desktop hard disk drives to Toshiba and to be available to supply Toshiba with components needed to operate the acquired assets successfully. The consent order further appoints a monitor to oversee the sale of the assets to Toshiba and to keep the Commission informed about the status of the required divestiture.

Participants

For the Commission: Roberta Baruch, Leonor Velazquez Davila, Eric Elmore, Michael Franchak, Benjamin Gris, Sean Hughto, Janet Kim, Jennifer Lee, and Danielle Sims.

For the Respondent: George Cary and Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton LLP; W. Stephen Smith, Morrison & Foerster LLP; David Beddow and Rich Parker, O’Melveny & Myers LLP; and Alex Chang, Skadden Arps Slate Meagher & Flom 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 Respondent Western Digital Corporation (“Western Digital”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Viviti Technologies Ltd., formerly known as

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Hitachi Global Storage Technologies Ltd. (“HGST”), a wholly-owned subsidiary of Hitachi, Ltd. (“Hitachi”), 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 Western Digital is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its head office and principal place of business located at 3355 Michelson Drive, Irvine, California 92612. Respondent is engaged in, among other activities, the manufacture, marketing, and sale of hard disk drives (“HDDs”).

II. JURISDICTION

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

III. THE PROPOSED ACQUISITION

3. Pursuant to a Stock Purchase Agreement (the “Merger Agreement”) dated March 7, 2011, Western Digital proposes to acquire HGST from Hitachi in a transaction valued at approximately \$4.5 billion (“Acquisition”). Both Respondent and HGST manufacture, market, and sell HDDs, including, but not limited to, 3.5 inch desktop HDDs (“desktop HDDs”).

IV. THE RELEVANT PRODUCT MARKET

4. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is desktop HDDs. Desktop HDDs are installed in non-portable personal computers, and offer the highest storage capacities and

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lowest price per gigabyte of storage capacity of any of the different types of HDDs on the market. Other types of available HDDs, such as 2.5 inch HDDs for mobile computing, and HDDs for use in enterprise computing, are more expensive than desktop HDDs and offer additional features, at additional cost, that are generally considered unnecessary and superfluous in desktop computing. For these reasons, no other types of HDDs are reasonable substitutes for desktop HDDs.

V. THE RELEVANT GEOGRAPHIC MARKET

5. For the purposes of this Complaint, the relevant geographic area in which to analyze the likely effects of the Acquisition on the desktop HDD market is worldwide.

VI. THE STRUCTURE OF THE MARKET

6. The desktop HDD market is highly concentrated, as measured by the Herfindahl-Hirschman Index (“HHI”). The combination of Respondent’s HDD business with HGST’s HDD business would consolidate two of three remaining desktop HDD suppliers in the market. Post-Acquisition, a combined Western Digital and HGST would have a market share for desktop HDDs of approximately 50 percent, with only one remaining competitor. The post-merger HHI would be 5,000 and the Acquisition will increase the HHI level by 800. This market concentration level far exceeds the thresholds set out in the Horizontal Merger Guidelines, and thus, creates a presumption that the Acquisition will create or enhance market power.

VII. ENTRY CONDITIONS

7. Entry into the desktop HDD market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Deterrents to entry into the desktop HDD market include high capital expenditures, and intellectual property barriers. Further, the market for desktop HDDs provides limited potential for growth, making it unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter the market de novo. Existing component manufacturers in

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the HDD industry are unwilling to enter the desktop HDD market and compete with their customers, the HDD manufacturers.

VIII. EFFECTS OF THE ACQUISITION

8. The effects of the Acquisition, if consummated, may be to substantially lessen competition, and to tend 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Specifically, the Acquisition would, among other anticompetitive effects:

- a. eliminate actual, direct, and substantial competition between Western Digital and HGST in the relevant market;
- b. increase the likelihood that Western Digital will exercise market power unilaterally in the relevant market;
- c. increase the likelihood of coordinated interaction among competitors in the relevant market; and
- d. increase the likelihood that U.S. consumers would be forced to pay higher prices for desktop HDDs.

IX. VIOLATIONS CHARGED

9. The allegations contained in Paragraphs 1 through 9 above are hereby incorporated by reference as though fully set forth here.

10. The Acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

11. The Acquisition, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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12. The Merger Agreement described in Paragraph 3 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of March, 2012, issues its Complaint against said Respondent.

By the Commission.

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The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Western Digital Corporation (“WD” or “Respondent”) of Viviti Technologies Ltd. (“HGST”), a wholly owned subsidiary of Hitachi, Ltd. (“Hitachi”), 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 Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Western Digital Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3355 Michelson Drive, Irvine, California 92612.
2. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Western Digital” means Western Digital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Western Digital (including, after the Acquisition Date, HGST), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Hitachi” means Hitachi, Ltd., a corporation organized, existing, and doing business under and by

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virtue of the laws of Japan, with its headquarters address at 6-6 Marunouchi 1- chome, Chiyoda-ku, Tokyo, 100-8280, Japan. HGST is a wholly owned subsidiary of Hitachi, Ltd.

- C. “HGST” means Viviti Technologies Ltd. (“HGST”), a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its headquarters address at 3403 Yerba Buena Road, San Jose, California 95135.
- D. “Commission” means the Federal Trade Commission.
- E. “3.5 Inch HDD” means a three and a half (3.5) inch wide fixed, re-writeable, magnetic data storage device with one or more flat, circular platters coated with a magnetically sensitive material, enclosed in a vacuum sealed case with recording heads, used for the purpose of storing and retrieving electronic data.
- F. “3.5 Inch HDD Product(s)” means the HGST Mars product lines for 3.5 Inch HDDs with one, two, or three platters, used in non-portable desktops and tower personal computers.
- G. “3.5 Inch HDD Products Business” means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of 3.5 Inch HDD Products by HGST before the Acquisition Date, including any contracts, agreements or other arrangements by HGST with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.
- H. “3.5 Inch HDD Products Business Assets” means the following assets primarily related to the 3.5 Inch HDD Products Business:
 - 1. the 3.5 Inch HDD Manufacturing Assets;
 - 2. the 3.5 Inch HDD Products Business Records;

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3. the 3.5 Inch HDD Products Intellectual Property License; and
 4. the 3.5 Inch HDD Products Patents License.
- I. “3.5 Inch HDD Products Business Employee(s)” means any employee whose duties primarily related to the 3.5 Inch HDD Products Business at any time during the twelve (12) month period prior to the Closing Date.
- J. “3.5 Inch HDD Products Business Key Employee(s)” means an employee designated by the Acquirer as a Product Manager, a Design Manager, a Manufacturing Manager, and a Quality Assurance Manager.
- K. “Acquirer” means the following:
1. Toshiba; or
 2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- L. “Closing Date” means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to the 3.5 Inch HDD Products Business to an Acquirer pursuant to this Order.
- M. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the operation and management of the 3.5 Inch HDD Products Business including, but not limited to, information related to the cost, supply, sales, sales support, customers, contracts, research, development, distribution and marketing of

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3.5 Inch HDD Products; provided, however, this provision shall not include:

1. information that subsequently falls within the public domain through no violation of this Order;
2. information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
3. information that becomes known to Respondent from a Third Party not in breach of applicable law or other confidentiality obligation.

N. “Employee Access Period” means the later of:

1. one hundred fifty (150) days from the Closing Date; or
2. the date that is sixty (60) days after the date the Acquirer transfers six (6) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

O. “Geographic Territory” means worldwide.

P. “Intellectual Property” means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.

Q. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order. R. “Know-How” means all knowledge, information and know-how in the possession of Respondent or within the knowledge of any employee or consultant of Respondent on or before the Closing Date that relates to the 3.5 Inch HDDs Products.

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- S. “Monitor Agreement” means the Monitor Agreement dated February 26, 2012, between ING Financial Markets LLC, and Western Digital Corporation. The Monitor Agreement is attached as Appendix E to this Order.
- T. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- U. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- V. “Remedial Agreement(s)” means:
 - 1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to the proposed Decision and Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the proposed Decision and Order in connection with the Commission’s determination to make the proposed Decision and Order final; and/or
 - 2. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has

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been approved by the Commission to accomplish the requirements of the Order.

- W. “Third Party(ies)” means any non-governmental Person other than Respondent or the Acquirer.
- X. “Toshiba” means Toshiba Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 1-1, Shibaura 1-chrome, Minato-Ku, Tokyo 105-8001, Japan. Toshiba America Electronic Components Inc., is a wholly owned subsidiary of Toshiba Corporation, with its principal office at 19900 MacArthur Boulevard, Suite 400, Irvine, California 92612.
- Y. “Transition Services Period” means the period beginning on the Closing Date and ending on the later of:
1. the end of the Transfer Period; or
 2. if the Acquirer purchases the Shenzhen Facility Option Assets, the date the Acquirer transfers the Shenzhen Facility Option Assets and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

II.

IT IS FURTHER ORDERED that from the Acquisition Date:

- A. Respondent shall maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets, and shall prevent the destruction, removal, wasting, deterioration, or impairment of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the 3.5 Inch HDD Products Business Assets (other than in the manner prescribed in the Decision and

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Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the businesses related to the 3.5 Inch HDD Products Business Assets.

- B. Respondent shall maintain the operations of the 3.5 Inch HDD Products Business Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such businesses) and shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; employees; and others having business relations with the 3.5 Inch HDD Products Business Assets. Respondent's responsibilities shall include, but are not limited to, the following:
1. providing the 3.5 Inch HDD Products Business Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the 3.5 Inch HDD Products Business Assets;
 2. continuing, at least at their scheduled pace, any additional expenditures for the 3.5 Inch HDD Products Business Assets, authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all marketing and sales expenditures;
 3. providing such resources as may be necessary to respond to competition against the 3.5 Inch HDD Products Business Assets and/or to prevent any diminution in sales of 3.5 Inch HDD Products prior to divestiture;
 4. making available for use by the 3.5 Inch HDD Products Business Assets funds sufficient to perform all routine maintenance and all other

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maintenance as may be necessary to, and all replacements of the 3.5 Inch HDD Products Business Assets;

5. providing the 3.5 Inch HDD Products Business Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business;
 6. providing such support services to the 3.5 Inch HDD Products Business Assets as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent; and
 7. maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the 3.5 Inch HDD Products Business Assets for the last fiscal year.
- C. Until the Closing Date, Respondent shall provide all 3.5 Inch HDD Products Business Employees with reasonable financial incentives to continue in their positions and to research, develop, and manufacture the 3.5 Inch HDD Products consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the 3.5 Inch HDD Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by HGST until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by applicable law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the 3.5 Inch HDD Products Business.
- D. For the duration of the Employee Access period and within ten (10) days of request by the Acquirer, Respondent shall, to the extent permitted by law, provide to the Acquirer or proposed Acquirer, the following information regarding each 3.5 Inch HDD

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Products Business Employee whose duties relate to the 3.5 Inch HDD Products Business:

1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for the last fiscal year, value of vested and unvested deferred compensation including when any unvested portions are due to vest, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- E. For the duration of the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Acquirer of the 3.5 Inch HDD Products Business Employees, and shall remove any contractual impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent

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shall not make any counteroffer to a 3.5 Inch HDD Products Business Employee who receives a written offer of employment from the Acquirer; provided, however, this Paragraph shall not prohibit Respondent from continuing to employ any 3.5 Inch HDD Products Business Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.

- F. Respondent shall provide reasonable financial incentives to the 3.5 Inch HDD Products Business Key Employees as needed to facilitate the employment of such employees by the Acquirer.
- G. For a period of one (1) year following the Employee Access Period, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any 3.5 Inch HDD Products Business Employee(s) who have accepted offers of employment with the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the 3.5 Inch HDD Products Business general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; or (3) a 3.5 Inch HDD Products Business Employee independently applies for employment with Respondent, as long as such employee was not solicited by Respondent.
- H. Pending divestiture of the 3.5 Inch HDD Products Business Assets, Respondent shall:
 - 1. not use, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products Business other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondent's obligations to the Acquirer under the terms of any Remedial

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Agreement related to the 3.5 Inch HDD Products Business; or (3) applicable law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or Persons specifically authorized by the Acquirer or the Commission to receive such information; and
3. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products to employees associated with Respondent's own 3.5 Inch HDD business;

provided, however, that Respondent may use any Intellectual Property or Know-How that is conveyed or licensed to Respondent or that Respondent retains the right to use pursuant to any Remedial Agreement; provided further, however, to the extent that the use of such Intellectual Property or Know-How involves disclosure of Confidential Business Information to another Person, such Person must agree to maintain the confidentiality of such Confidential Business Information under terms and in a manner consistent with the requirements of this Order.

- I. Respondent shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary from or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondent under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- J. The English-language versions of all Remedial Agreements, as submitted to and approved by the Commission and attached to the proposed Decision and Order, shall be the versions of such agreements used in interpreting and enforcing this Order.

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- K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets within the Geographic Territory through their full transfer and delivery to the Acquirer, to minimize any risk of loss of competitive potential for the 3.5 Inch HDD Products Business Assets within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of their responsibilities as required by this Order to Maintain Assets, the proposed Decision and Order (collectively, “Orders”), and the Remedial Agreements.
- B. The Commission appoints ING Financial Markets LLC (“ING”) as Interim Monitor and approves the Monitor Agreement executed between ING and Respondent which agreement, inter alia, names Philip Comerford, Jr., as ING designated Project Manager.
- C. Respondent shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order to Maintain Assets, and shall take no action that interferes with or hinders the Interim Monitor’s authority, rights or responsibilities as set forth herein or any agreement between the Interim Monitor and Respondent.
- D. The Interim Monitor’s duties and responsibilities shall include the following:

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1. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with: the divestiture and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified Confidential Business Information under the Orders; and, the related requirements of the Orders. The Interim Monitor shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. the Interim Monitor shall serve until the later of (1) the Transition Services Period or (2) the termination of all Respondent's obligations under all Remedial Agreements; provided, however, the Commission may extend or modify this period as may be necessary to accomplish the purposes of the Orders;
4. subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the 3.5 Inch HDD Products Business Assets. Respondent shall cooperate with all reasonable requests of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders;

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5. the Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by an Acquirer with respect to the performance of Respondents' obligations under the Orders or any Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; and
8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants,

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accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. The Interim Monitor shall serve until termination of this Order to Maintain Assets pursuant to Paragraph VII.
- I. The Interim Monitor appointed pursuant to this Order may be the same person appointed as: (1) an Interim Monitor pursuant to Paragraph III of the proposed Decision and Order; or (2) a Divestiture Trustee pursuant to Paragraph IV of the proposed Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondent has fully

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complied with its obligations to divest, license, transfer and/or grant assets as required by the proposed Decision and Order in this matter, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related proposed Decision and Order; provided, however, that, after the proposed Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as the reports required to be submitted by Respondent pursuant to the Decision and Order.

V.

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

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

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 with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of

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Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

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

VII.

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

- A. the day after the divestiture of all 3.5 Inch HDD Products Business Assets, as required by and described in the proposed Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer, notified the Commission that all assignments, conveyances, deliveries, grants, license, transactions, transfers and other transitions related to such divestiture are complete;
- B. the day the proposed Decision and Order becomes final; or
- C. the Commission otherwise directs that this Order to Maintain Assets be terminated;

provided, however, if the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of the Commission Rule 2.34, 16 C.F.R. § 2.34, this Order to Maintain Assets shall terminate no later than three (3) days after such action by the Commission.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Western Digital Corporation (“Western Digital” or “Respondent”) of Viviti Technologies Ltd. (“HGST”), a wholly owned subsidiary of Hitachi, Ltd. (“Hitachi”), 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 Orders (“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 thereupon issued its Complaint and an Order to Maintain Assets (“Order to Maintain Assets”), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having carefully considered the comment filed by an interested person, and having modified this Decision and Order in certain respects, 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 Western Digital Corporation is a corporation organized, existing and doing business

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under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3355 Michelson Drive, Irvine, California 92612.

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. “Western Digital” means Western Digital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Western Digital (including, after the Acquisition Date, HGST), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Hitachi” means Hitachi, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 6-6 Marunouchi 1- chome, Chiyoda-ku, Tokyo, 100-8280, Japan. HGST is a wholly owned subsidiary of Hitachi, Ltd.
- C. “HGST” means Viviti Technologies Ltd. (“HGST”), a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its headquarters address at 3403 Yerba Buena Road, San Jose, California 95135.
- D. “Commission” means the Federal Trade Commission.

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- E. “3.5 Inch HDD” means a three and a half (3.5) inch wide fixed, re-writeable, magnetic data storage device with one or more flat, circular platters coated with a magnetically sensitive material, enclosed in a vacuum sealed case with recording heads, used for the purpose of storing and retrieving electronic data.
- F. “3.5 Inch HDD Manufacturing Assets” means the manufacturing equipment, machinery, tools, and other parts primarily related to the fully configured production lines for the production of 3.5 Inch HDD Products including, but not limited to:
1. sixteen (16) Primary Production Lines used to manufacture 3.5 Inch HDDs at the Shenzhen Facility;
 2. four (4) Re-Work lines used to disassemble 3.5 Inch HDDs at the Shenzhen Facility; and
 3. at the Acquirer’s option, the Shenzhen Facility Option Assets.
- G. “3.5 Inch HDD Product(s)” means the HGST Mars product lines for 3.5 Inch HDDs with one, two, or three platters, used in non-portable desktops and tower personal computers.
- H. “3.5 Inch HDD Products Business” means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of 3.5 Inch HDD Products by HGST before the Acquisition Date, including any contracts, agreements or other arrangements by HGST with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.
- I. “3.5 Inch HDD Products Business Assets” means the following assets primarily related to the 3.5 Inch HDD Products Business:

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1. the 3.5 Inch HDD Manufacturing Assets;
 2. the 3.5 Inch HDD Products Business Records;
 3. the 3.5 Inch HDD Products Intellectual Property License; and
 4. the 3.5 Inch HDD Products Patents License.
- J. “3.5 Inch HDD Products Business Employee(s)” means any employee whose duties primarily related to the 3.5 Inch HDD Products Business at any time during the twelve (12) month period prior to the Closing Date.
- K. “3.5 Inch HDD Products Business Firewalled Employees” means:
1. all employees at the Shenzhen Facility whose duties involve the contract manufacture of the 3.5 Inch HDD Products for the Acquirer;
 2. all 3.5 Inch HDD Products Business Key Employees;
 3. all employees of Respondent seconded to the Acquirer until May 15, 2015;
 4. all employees of Respondent whose duties involve the supply of Heads and/or Media to the Acquirer; and
 5. all employees of Respondent with access to Confidential Business Information related to the 3.5 Inch HDD Products whose duties relate to Respondent’s own 3.5 Inch HDD business.
- L. “3.5 Inch HDD Products Business Key Employee(s)” means an employee designated by the Acquirer as a Product Manager, a Design Manager, a Manufacturing Manager, and a Quality Assurance Manager.

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- M. “3.5 Inch HDD Products Business Records” means (i) all documents and records (including all electronic records and files wherever stored) that are exclusively used in the 3.5 Inch HDD Products Business and (ii) copies of all documents and records (including all electronic records and files wherever stored) that are primarily related to 3.5 Inch HDD Products Business including, without limitation:
1. all documents and information related to employees, contractors, and others employed or contracted by Respondent whose duties primarily relate to the 3.5 Inch HDD Products Business;
 2. all Software primarily related to 3.5 Inch HDD Products; and
 3. all 3.5 Inch HDD Products Manufacturing Documents.
- N. “3.5 Inch HDD Products Business Divestiture Agreement” means:
1. the WD-Toshiba Asset Purchase Agreement; or
 2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- O. “3.5 Inch HDD Products Contract Manufacturing Agreement” means:
1. the Manufacturing Agreement by and between Toshiba Corporation, Hitachi Global Storage Products (Shenzhen) Co. Ltd., and Western Digital Corporation, dated on the Closing Date, and any

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attachments, amendments, exhibits, and schedules related thereto as of the Closing Date. This Manufacturing Agreement is attached to this Order and contained in non-public Appendix A; or

2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the supply of 3.5 Inch HDD Products entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- P. “3.5 Inch HDD Products Intellectual Property License” means a worldwide, fully paid-up, perpetual, non-revocable and royalty-free license(s) to all documents, Intellectual Property and Know-How primarily related to 3.5 Inch HDD Products in a manner and form substantially similar to the WD-Toshiba License Agreement; provided, however, the 3.5 Inch HDD Products Intellectual Property License(s) does not include (i) corporate names or corporate trade dress of “WD,” “HGST,” or “Hitachi,” or any other trademark, trade dress, or corporate name, or (ii) patents owned by Respondent.
- Q. “3.5 Inch HDD Products Manufacturing Documents” means the books, records, files and other documentation, including electronic copies, primarily related to the research, development, production, manufacturing or testing of 3.5 Inch HDD Products including, but not limited to, tooling documentation, specifications, schematics, product designs, failure analysis data, quality data, and qualification data.
- R. “3.5 Inch HDD Products Input Supply Agreement(s)” means:
1. the Head Supply Agreement;
 2. the Media Supply Agreement; or

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3. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and the Acquirer for the supply of Heads or Media necessary for the manufacture of 3.5 Inch HDD Products.
- S. “3.5 Inch HDD Products Patents License” means a worldwide, fully paid-up, perpetual, non-revocable, non-exclusive license to all WD or HGST patents used or useful in making, using, or selling HDDs that are issued or have a first effective filing date on or before September 29, 2017 in a manner and form substantially similar to the Toshiba Cross- License Agreement; provided, however, the 3.5 Inch HDD Products Patents License shall not include design patents.
- T. “Acquirer” means the following:
1. Toshiba; or
 2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- U. “Acquisition” means the acquisition of Viviti Technologies Ltd. by Western Digital as contemplated by the Stock Purchase Agreement by and among Hitachi, Ltd., Viviti Technologies Ltd., Western Digital Corporation, and Western Digital Ireland, Ltd., dated March 7, 2011, and all attachments, amendments, exhibits, and schedules related thereto.
- V. “Acquisition Date” means the date on which the Acquisition occurs.
- W. “Closing Date” means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to

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the 3.5 Inch HDD Products Business to an Acquirer pursuant to this Order.

- X. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the operation and management of the 3.5 Inch HDD Products Business including, but not limited to, information related to the cost, supply, sales, sales support, customers, contracts, research, development, distribution and marketing of 3.5 Inch HDD Products; *provided, however*, this provision shall not include:
1. information that subsequently falls within the public domain through no violation of this Order;
 2. information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
 3. information that becomes known to Respondent from a Third Party not in breach of applicable law or other confidentiality obligation.
- Y. “Design Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the research or design of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- Z. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provided the relevant assistance or service.
- AA. “Divestiture Trustee” means the person appointed to act as trustee by the Commission pursuant to Paragraph IV of this Order.

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- BB. “Employee Access Period” means the later of:
1. one hundred fifty (150) days from the Closing Date;
or
 2. August 15, 2013.
- CC. “Geographic Territory” means worldwide.
- DD. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- EE. “Heads” means the components of 3.5 Inch HDDs that move above the Media and are used to write data onto Media by transforming an electrical current into a magnetic field and to read data from Media by transforming a magnetic field into an electrical current.
- FF. “Heads Supply Agreement” means the Heads Supply Agreement by and between Toshiba Corporation, Western Digital (Malaysia) SDN BHD, Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Heads Supply Agreement is attached to this order and contained in non-public Appendix C.
- GG. “Intellectual Property” means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.
- HH. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order. II. “Know-How” means all knowledge, information and know-how in the possession of Respondent or within the knowledge of any employee or consultant of

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Respondent on or before the Closing Date that relates to the 3.5 Inch HDDs Products.

- JJ. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- KK. “Manufacturing Period” means the period beginning on the Closing Date and ending on the later of:
1. one (1) year after the Closing Date; or
 2. the date the Acquirer transfers twelve (12) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.
- LL. “Manufacturing Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the manufacture or production of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- MM. “Media” means the components of 3.5 Inch HDDs that consist of a flat, circular platter coated with a magnetically sensitive material used for storing electronic data.
- NN. “Media Supply Agreement” means the Media Supply Agreement by and between Toshiba Corporation, WD Media (Malaysia) SDN, and Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Media Supply Agreement is attached to this order and contained in non-public Appendix D.
- OO. “Monitor Agreement” means the Monitor Agreement dated February 26, 2012, between ING Financial

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Markets LLC, and Western Digital Corporation. The Monitor Agreement is attached as Appendix E to this Order.

- PP. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- QQ. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- RR. “Primary Production Lines” means prime production lines used to manufacture and test HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.
- SS. “Product Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the management of a HDD product line within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- TT. “Quality Assurance Manager” means employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the testing or quality assurance of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- UU. “Remedial Agreement(s)” means:
1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be

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assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; and/or

2. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.

VV. "Reserved Capacity" means productive capacity that Respondent is obligated to reserve on behalf of the Acquirer including, at a minimum:

1. for 3.5 Inch HDD Products, the capacity of seven (7) fully configured Primary Production Lines initially, increasing to ten (10) fully configured Primary Production Lines; provided, however, that after the Rolling Manufacturing Asset Transfer Date, Respondent may reduce the number of lines on a rolling basis to enable the transfer of lines; and
2. for Heads and/or Media, the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from sixteen (16) fully configured Primary Production Lines; provided, however, Respondent shall also reserve the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from

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any of the six (6) additional fully configured primary production lines from the Shenzhen Option Assets that are purchased by the Acquirer.

- WW. “Re-Work Lines” means re-work production lines used to disassemble HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.
- XX. “Rolling Manufacturing Asset Transfer Date” means the date ten (10) fully configured Primary Production Lines are reserved, after which Respondent may reduce the number of lines on a one-for-one basis as additional lines are qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.
- YY. “Shenzhen Facility” means Hitachi’s production plant located at 119-121, Block 1, International Commerce Centre, 1001 Honghua Road, Futian Free Trade Zone, Shenzhen, China, used primarily for the manufacture of 3.5 Inch HDDs for use in desktop and consumer electronics including, without limitation, real estate, buildings, warehouses, storage facilities, structures, manufacturing equipment, other equipment, machinery, tools, spare parts, personal property, furniture, fixtures, supplies and other tangible property.
- ZZ. “Shenzhen Facility Option Assets” means the following assets as referenced in Schedule 2.10 of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement:
1. the six (6) additional production lines used to manufacture HDDs at the Shenzhen Facility; and
 2. the two (2) additional re-work lines used to disassemble HDDs at the Shenzhen Facility. AAA. “Software” means any and all computer programs in both source and object code form, including all modules, routines and sub-routines thereof and all related source and other preparatory materials

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including functional specifications and programming specifications, programming languages, algorithms, flow charts, logic diagrams, orthographic representations, file structures, coding sheets, coding and manuals or other documentation related thereto.

BBB. "Supply Cost" means:

1. for 3.5 Inch HDD Products, the transfer price as determined under the 3.5 Inch HDD Products Contract Manufacturing Agreement; or
2. for Heads and/or Media, the price as determined under the 3.5 Inch HDD Products Input Supply Agreement(s).

CCC. "Third Party(ies)" means any non-governmental Person other than Respondent or the Acquirer.

DDD. "Toshiba" means Toshiba Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 1-1, Shibaura 1-chrome, Minato-Ku, Tokyo 105-8001, Japan. Toshiba America Electronic Components Inc., is a wholly owned subsidiary of Toshiba Corporation, with its principal office at 19900 MacArthur Boulevard, Suite 400, Irvine, California 92612.

EEE. "Toshiba Cross-License Agreement" means the Form of Amended and Restated Patent Cross-License Agreement by and between Toshiba Corporation and Western Digital Technologies, Inc., dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Toshiba Cross-License Agreement is attached to this order and contained in non-public Appendix F.

FFF. "Transfer Period" means the period beginning on the Closing Date and ending on the later of:

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1. one (1) year after Closing Date; or
2. the date the Acquirer transfers sixteen (16) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

GGG. “Transition Services Agreement” means:

1. the Transition Services Agreement by and between Western Digital Corporation and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Transition Services Agreement is attached to this order and contained in non-public Appendix G; or
2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the provision of transition services related to the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

HHH. “Transition Services Period” means the period beginning on the Closing Date and ending on the later of:

1. the end of the Transfer Period; or
2. if the Acquirer purchases the Shenzhen Facility Option Assets, the date the Acquirer transfers the Shenzhen Facility Option Assets and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

III. “WD-Toshiba Asset Purchase Agreement” means the Asset Purchase Agreement by and between Western

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Digital Corporation and Toshiba Corporation, dated January 20, 2012, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase Agreement is attached to this order and contained in non-public Appendix H.

- JJJ. “WD-Toshiba License Agreement” means the Form of Intellectual Property License and Sublicense Agreement by and between Western Digital Technologies, Inc., Hitachi Global Storage Technology Netherlands BV, and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This WD- Toshiba License Agreement is attached to this order and contained in non-public Appendix I.

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

- A. Respondent shall divest, license, transfer and/or grant absolutely, and in good faith, the 3.5 Inch HDD Products Business Assets to Toshiba pursuant to and in accordance with the 3.5 Inch HDD Products Business Divestiture Agreement, the 3.5 Inch HDD Products Patents License, and the 3.5 Inch HDD Products Business Intellectual Property License (which agreements shall not limit or contradict, or be construed to vary from or contradict, the terms of this Order), and each such agreement, if it becomes a Remedial Agreement related to the 3.5 Inch HDD Products Business Assets is incorporated by reference into this Order and made a part hereof, by the earlier of:
1. within five (5) days after Respondent has obtained the prior approval from all Government Entities of the divestiture of the 3.5 Inch HDD Products Business Assets to Toshiba and all related Remedial Agreements; or

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2. June 20, 2012;

provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Toshiba is not an acceptable Acquirer of the 3.5 Inch HDD Products Business Assets then Respondent shall immediately rescind the transaction with Toshiba, in whole or in part, as directed by the Commission, and shall divest, license, transfer and/or grant the 3.5 Inch HDD Products Business Assets within six (6) months from date of determination, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondent has complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture to Toshiba (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. At the Acquirer's option and upon reasonable notice, for the duration of the Manufacturing Period, Respondent shall supply 3.5 Inch HDD Products pursuant to a 3.5 Inch HDD Products Contract Manufacturing Agreement to allow the Acquirer, or a Third Party affiliated with the Acquirer, time sufficient to obtain all necessary Government Entity approvals and transfer the 3.5 Inch HDD Manufacturing Assets to a new location to manufacture in commercial quantities, and in a manner consistent with past

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practices, the 3.5 Inch HDD Products independently of Respondent.

- C. At the Acquirer's option and upon reasonable notice, for a period of three (3) years from the Closing Date, Respondent shall supply Heads and/or Media, pursuant to a 3.5 Inch HDD Products Input Supply Agreement(s) to allow the Acquirer, or a Third Party affiliated with the Acquirer, time to secure a supply of Heads and/or Media from sources other than Respondent.
- D. In accordance with the 3.5 Inch HDD Products Contract Manufacturing Agreement and/or any 3.5 Inch HDD Products Input Supply Agreement, Respondent shall:
 - 1. deliver, in a timely manner and under reasonable terms and conditions, a supply of 3.5 Inch HDD Products, Heads, and/or Media at a price not to exceed Supply Cost;
 - 2. represent and warrant to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for liabilities resulting from the failure by Respondent to deliver the 3.5 Inch HDD Products, Heads, and/or Media in the following manner:
 - a. for 3.5 Inch HDD Products, as specified in the 3.5 Inch HDD Products Contract Manufacturing Agreement Articles VIII through X and Article XIII; and
 - b. for Heads and/or Media, as specified in the 3.5 Inch HDD Input Supply Agreements Articles VII through IX and Article XII;
 - 3. give priority to supplying a Reserved Capacity of 3.5 Inch HDD Product, Head, and/or Media to the Acquirer over manufacturing and supplying of products for Respondent's own use or sale;

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4. during the term of any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, upon written request of the Acquirer or the Interim Monitor, make available to the Acquirer or the Interim Monitor all records that relate to the manufacture or supply of the 3.5 Inch HDD Products, Heads used in 3.5 Inch HDD Products, and/or Media used in 3.5 Inch HDD Products that are generated or created after the Closing Date; and
 5. not seek, pursuant to any dispute resolution mechanism incorporated in any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, a result that would be inconsistent with the terms or the remedial purposes of this Order.
- E. Within twenty (20) days of the Closing Date, Respondent shall:
1. submit to the Acquirer, at Respondent's expense, all 3.5 Inch HDD Products Business Records related to the 3.5 Inch HDD Products;
 2. deliver, in good faith, such 3.5 Inch HDD Products Business Records to the Acquirer;
 - a. in a timely manner, i.e., as soon as practicable, avoiding any delays in transmission of the respective information; and
 - b. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such 3.5 Inch HDD Products Business Records to the Acquirer, provide the Acquirer and the Interim Monitor with access to all such 3.5 Inch HDD Products Business Records and employees who possess or are able to locate such information for the purposes of

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identifying the books, records, and files directly related to the 3.5 Inch HDD Products that contain such 3.5 Inch HDD Products Business Records and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any Confidential Business Information related to the research, development, manufacturing, marketing, or sale of the 3.5 Inch HDD Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to the Acquirer under the terms of any Remedial Agreement related to the 3.5 Inch HDD Products; or c. applicable Law;
5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information; and
6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products to employees associated with Respondent's own 3.5 Inch HDD business;

provided, however, that Respondent may use any Intellectual Property or Know-How that is conveyed or licensed to Respondent or that Respondent retains the right to use pursuant to any Remedial Agreement; provided further, however, to the extent that the use of such Intellectual Property or Know-How involves disclosure of Confidential Business Information to another Person, such Person must agree to maintain the confidentiality of such Confidential Business

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Information under terms and in a manner consistent with the requirements of this Order.

- F. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all 3.5 Inch HDD Products Business Employee and all 3.5 Inch HDD Products Business Firewalled Employees. Respondent shall:
1. give such notification by e-mail with return receipt requested or similar transmission and keep a file of such receipts for one (1) year after the Closing Date;
 2. maintain complete records of all such agreements at Respondent's corporate headquarters and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with; and
 3. shall provide an Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.
- G. Respondent shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each 3.5 Inch HDD Products Business Firewalled Employee retained by Respondent, the direct supervisor of any such employee, and any other employee retained by Respondent and designated by the Interim Monitor sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information strictly confidential, including the non-disclosure of such information to any other employee, executive or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

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- H. Any 3.5 Inch HDD Products Business Firewalled Employee identified in Paragraph I.K.3, as a condition of continued employment by Respondent, shall be prohibited from working on Respondent's own 3.5 Inch HDD business for a period of six (6) months after such employee ceases to work with the Acquirer.
- I. For the duration of the Employee Access Period and within ten (10) days of request by the Acquirer, Respondent shall, to the extent permitted by law, provide to the Acquirer or proposed Acquirer, the following information regarding each 3.5 Inch HDD Products Business Employee whose duties relate to the 3.5 Inch HDD Products Business:
1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for the last fiscal year, value of vested and unvested deferred compensation including when any unvested portions are due to vest, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

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- J. For the duration of the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Acquirer of the 3.5 Inch HDD Products Business Employees, and shall remove any contractual impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to a 3.5 Inch HDD Products Business Employee who receives a written offer of employment from the Acquirer; *provided, however*, this Paragraph shall not prohibit Respondent from continuing to employ any 3.5 Inch HDD Products Business Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.
- K. Respondent shall provide reasonable financial incentives to the 3.5 Inch HDD Products Business Key Employees as needed to facilitate the employment of such employees by the Acquirer.
- L. For a period of one (1) year following the Employee Access Period, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any 3.5 Inch HDD Products Business Employee(s) who have accepted offers of employment with the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the 3.5 Inch HDD Products Business Employee's employment has been terminated by the Acquirer; (2) Respondent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; or (3) a 3.5 Inch HDD Products Business Employee independently

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applies for employment with Respondent, as long as such employee was not solicited by Respondent.

- M. During the Transition Services Period, Respondent shall provide, at no greater than Direct Cost, assistance from knowledgeable employees of Respondent in the transfer of the 3.5 Inch HDD Products Business Assets from Respondent to the Acquirer in a timely and orderly manner pursuant to a Transition Services Agreement.
- N. Until Respondent completes the divestiture required by Paragraph II.A, Respondent:
1. shall take such actions as necessary to:
 - a. maintain the full economic viability and marketability of the 3.5 Inch HDD Products Business;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the 3.5 Inch HDD Products Business;
 - d. ensure the assets required to be divested are transferred and delivered to the Acquirer in a manner without disruption, delay, or impairment of the 3.5 Inch HDD Products Business; and
 2. shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the 3.5 Inch HDD Products Business.

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- O. The purpose of the divestiture of the 3.5 Inch HDD Products Business and the related obligations imposed on Respondent by this Order is:
1. to ensure the continued use of such assets in the research, development, manufacture, and sale of the 3.5 Inch HDD Products within the Geographic Territory; and
 2. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. The Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets, and any Remedial Agreement.
- B. The Commission appoints ING Financial Markets LLC ("ING") as Interim Monitor and approves the Monitor Agreement between ING and Respondent which agreement, inter alia, names Philip Comerford, Jr., as ING designated Project Manager.
- C. No later than one (1) day after the Closing Date, Respondent shall, pursuant to the Monitor Agreement and to this Order, transfer to the Interim Monitor all the rights, powers, and authorities necessary to permit the Interim Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Order.
- D. The Interim Monitor shall serve until the later of (1) the Transition Services Period or (2) the termination of all Respondent's obligations under all Remedial Agreements; *provided, however*, the Commission may

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extend or modify this period as may be necessary to accomplish the purposes of this Order and the Order to Maintain Assets.

- E. In the event a substitute Interim Monitor is required, the Commission shall select the Interim Monitor, 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 a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor. Not later than ten (10) days after appointment of a substitute Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreements in a manner consistent with the purposes of this Order.
- F. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. assuring that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required

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by the this Order, the Order to Maintain Assets,
and the Remedial Agreements;

- b. monitoring any Transition Services Agreement;
 - c. assuring that Confidential Business Information is not received or used by Respondent or the Acquirer, except as allowed in this Order and in the Order to Maintain Assets, in this matter.
- 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. the Interim Monitor shall serve for such time as is necessary to monitor Respondent's compliance with the provisions of this Order, the Order to Maintain Assets, and the Remedial Agreements.
 - 4. subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order, the Order to Maintain Assets, and the Remedial Agreements.
 - 5. the Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants,

Decision and Order

accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.
8. Within one (1) month from the date the Interim Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.

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9. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; Provided, however, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- G. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- H. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph III.
- I. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Order to Maintain Assets, and the Remedial Agreements.
- J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Interim Monitor under the Order to Maintain Assets.

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

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, all of the 3.5 Inch HDD Products Business Assets pursuant

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to Paragraph II of this Order, the Commission may appoint a trustee to divest, license, transfer and/or grant any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

- B. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
- C. Within ten (10) days after appointment of a trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.

Decision and Order

- D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order.
 2. the trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period 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 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 trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

Decision and Order

4. the trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent'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 or Acquirers that receives the prior approval of the Commission, as required by this Order; *provided, however*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity 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.
5. the trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The 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 the trustee's services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement

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contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
 7. the trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. the trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
 9. Respondent may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the trustee from providing any information to the Commission.
- E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV.
- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or

Decision and Order

directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

- G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

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

- A. Within five (5) days after the Acquisition Date, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondent shall submit to the Commission and, if appointed, the Interim Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, are complying, and have complied with this Order:
1. within thirty (30) days after the date this Order becomes final;
 2. every thirty (30) days thereafter until Respondent has fully divested, licensed, transferred and/or granted the 3.5 Inch HDD Products Business Assets to an Acquirer; and
 3. every six (6) months thereafter so long as Respondent has a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer.
- C. One (1) year from the date this Order becomes final, and annually for the next nine (9) years thereafter on the anniversary of the date this Order becomes final, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with

Decision and Order

this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall submit at the same time a copy of these reports to the Interim Monitor.

VI.

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

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

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 with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview

Decision and Order

officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 7, 2023.

By the Commission, Commissioner Ohlhausen not participating and Commissioner Wright recused.

CONFIDENTIAL APPENDIX A

**3.5 INCH HDD PRODUCTS CONTRACT
MANUFACTURING AGREEMENT**

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

Decision and Order

CONFIDENTIAL APPENDIX B

3.5 Inch HDD Products Business Key Employees

**[Redacted from the Public Record Version, But Incorporated
by Reference]**

CONFIDENTIAL APPENDIX C

Heads Supply Agreement

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

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CONFIDENTIAL APPENDIX D

Media Supply Agreement

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

Decision and Order

CONFIDENTIAL APPENDIX E

Monitor Agreement

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

Decision and Order

CONFIDENTIAL APPENDIX F

Toshiba Cross-License Agreement

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

CONFIDENTIAL APPENDIX G

Transition Services Agreement

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

Decision and Order

CONFIDENTIAL APPENDIX H

WD-Toshiba Asset Purchase Agreement

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

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CONFIDENTIAL APPENDIX I

WD-Toshiba License Agreement

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

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted from Western Digital Corporation (“Western Digital”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”), designed to remedy the likely anticompetitive effects resulting from Western Digital’s proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies Ltd. (“HGST”), a wholly-owned subsidiary of Hitachi, Ltd. (“Hitachi”)

Pursuant to an agreement dated March 7, 2011, Western Digital intends to acquire HGST from Hitachi for approximately \$4.5 billion in cash and Western Digital stock. The proposed merger would result in a merger to duopoly in the market for 3.5 inch hard disk drives used in desktop computers (“desktop HDDs”). 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 desktop HDDs.

The Consent Agreement remedies the alleged violation by replacing the lost competition in the desktop HDD market that would result from the proposed acquisition. Under the terms of the Consent Agreement, Western Digital will divest to Toshiba Corporation (“Toshiba”) all of the assets relating to the manufacture and sale of desktop HDDs necessary to replicate HGST’s position in the desktop HDD business. The Consent Agreement requires Western Digital to provide Toshiba with access to employees involved in the research, development, and production of desktop HDDs, cross license all intellectual property necessary to manufacture and sell desktop HDDs, and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. In addition, the Consent Agreement requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own.

Analysis to Aid Public Comment

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

II. The Products and Structure of the Market

HDDs are key inputs into computers and other electronic devices used to store and allow fast access to data. HDDs are used in various end-use applications including desktop and mobile computers, and in enterprise computing applications.

The relevant line of commerce in which to analyze the effects of the Acquisition is desktop HDDs. Desktop HDDs are utilized in non-portable desktop or tower personal computers. Consumers of these products demand HDDs with the highest available capacity at the lowest price per gigabyte. Desktop HDDs are the only HDDs that meet these specifications. As a result, customers would likely not switch to a different kind of HDD in response to a five to ten percent increase in the price of desktop HDDs in sufficient numbers to make that price increase unprofitable for a hypothetical monopolist.

The relevant geographic market for desktop HDDs is worldwide. Most HDDs, including desktop HDDs, are manufactured in Asia and are shipped to customers worldwide. Also, most large customers negotiate the purchase price of desktop HDDs at a global level.

The desktop HDD market is highly concentrated, with three manufacturers currently in the market. After Western Digital's acquisition of HGST, Western Digital's market share would increase to approximately 50 percent, and the number of suppliers of desktop HDDs would decrease from three to two.

Analysis to Aid Public Comment

III. Entry

Neither new entry nor repositioning and expansion sufficient to deter or counteract the likely anticompetitive effects of the proposed acquisition in the desktop HDD market is likely to occur. Deterrents to entry into the desktop HDD market include high capital expenditures and intellectual property barriers. Because the market for desktop HDDs is mature with limited growth potential, it is unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter this market.

IV. Effects of the Acquisition

The proposed acquisition likely would result in anticompetitive effects in the market for desktop HDDs. The structure and characteristics of this highly concentrated and mature market, where competitors sell largely homogenous products and have substantial insight into their competitors' price and output levels, suggests that the two remaining firms in the market would likely find it possible and profitable to coordinate on pricing or output. In addition, HDD customers generally wish to have at least three suppliers available to them. The fact that customers have a strong desire to source their desktop HDD purchases from several suppliers simultaneously in order to obtain competitive pricing and adequate supply suggests that the transaction could result in unilateral effects as well.

V. The Consent Agreement

The Consent Agreement resolves the competitive concerns raised by Western Digital's proposed acquisition of HGST by requiring the divestiture of HGST's assets relating to the manufacture and sale of desktop HDDs to Toshiba. This divestiture must occur within fifteen days after the acquisition but may be extended an additional fifteen days, if necessary, to allow for regulatory approval in other jurisdictions.

Toshiba has the industry experience, reputation, and resources to replace HGST as an effective competitor in the desktop HDD market. Headquartered in Tokyo, Japan, Toshiba is a diversified

Analysis to Aid Public Comment

manufacturer and marketer of advanced electronic and electrical products spanning digital consumer products, electronic devices and components, power systems, industrial and social infrastructure systems, and home appliances. Toshiba does not currently compete against Western Digital or HGST in the sale of desktop HDDs, but it does manufacture HDDs for use in mobile and enterprise applications. Because Toshiba has extensive experience manufacturing these other types of HDDs, and has a worldwide infrastructure for the research, development, and sale of desktop HDDs, Toshiba is well-positioned to replace the competition that will be eliminated as a result of the proposed transaction.

Pursuant to the Consent Agreement, Toshiba would receive all of the assets necessary to replicate HGST's market position in the desktop HDD business, including sixteen desktop HDD production lines, representing the capacity to produce more than twenty million desktop HDD units per year, along with the product designs for HGST's most recent and advanced desktop HDD products. The Consent Agreement further requires Western Digital to provide Toshiba with access to HGST and/or Western Digital employees involved in the research, development, and production of desktop HDDs. In addition, the Consent Agreement also requires Western Digital to cross license all intellectual property necessary to manufacture and sell desktop HDDs and to supply Toshiba with up to 50 percent of certain critical components needed for the divested business. The Consent Agreement also requires Western Digital to contract manufacture desktop HDDs for Toshiba at cost until Toshiba is able to manufacture these products on its own. A divestiture of HGST's desktop HDD assets to Toshiba will enable Toshiba to compete immediately with the merged entity.

The Commission has appointed Phillip Comerford, Jr., Managing Director and Head of the Mergers & Acquisitions Group of ING Capital LLC, as Interim Monitor to oversee the divestiture of the desktop HDD assets. In order to ensure that the Commission remains informed about the status of the proposed divestiture, the Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished.

Analysis to Aid Public Comment

If, after the public comment period, the Commission determines that Toshiba is not an acceptable acquirer of the assets to be divested, or that the manner of the divestiture is not acceptable, Western Digital must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If Western Digital fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

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

Statement of the Commission

STATEMENT OF THE COMMISSION

After a thorough investigation the Federal Trade Commission has challenged Western Digital Corporation's ("Western Digital") proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies ("HGST"). This challenge comes several months after the Federal Trade Commission closed its investigation of Seagate Technology LLC's ("Seagate") acquisition of Samsung Electronics Co. Ltd.'s hard disk drive assets ("Samsung"). The two proposed transactions were announced within weeks of each other, and both had potential implications for competition in the same product markets. Commission staff reviewed both matters at the same time in order to understand the effects on competition resulting from each transaction on its own, as well as the cumulative effect on the relevant markets if both transactions were allowed to be consummated.

The evidence gathered in the Commission's investigation revealed that the relevant product markets in which to assess the competitive impact of the proposed transactions are based on specific end-uses for hard disk drives ("HDDs") -- such as desktop, notebook, and enterprise -- because product features, pricing, and competition differ by end-use applications. For many of these end-uses, we did not have reason to believe that the proposed transactions would result in effects that would have justified a challenge. In the 3.5 inch desktop HDD ("desktop HDD") market, however, we had reason to believe the consummation of both of these acquisitions would result in likely anticompetitive effects. The Commission came to this conclusion based on the evidence from interviews with market participants, testimony of the parties' executives, and documents produced by the parties and other industry participants.

The Commission determined after its investigation that there were significant differences between the competitive implications of the two proposed mergers. Since in each case the acquiring firm was a strong competitor, attention turned to the characteristics of the two firms that were to be acquired in these proposed transactions -- HGST and Samsung. Based on this analysis, it was clear that an independent HGST was much more

Statement of the Commission

likely to be an effective competitive constraint in the desktop HDD market than would an independent Samsung.

In particular, HGST has been a strong, high quality and innovative competitor in the desktop HDD market. Moreover, HGST has been identified by a number of industry participants as a key driver of aggressive price competition in the desktop HDD market in 2010, and was well-positioned to grow its desktop HDD business in the near future. In contrast, Samsung had struggled to be competitive in the desktop HDD market. In a market for desktop HDDs containing only Western Digital, HGST, and the combined Seagate/Samsung entity, HGST would retain the ability and incentive to act as an effective constraint on desktop HDD pricing. By contrast, Samsung would be less likely to serve as a meaningful constraint on pricing in a desktop HDD market consisting of Western Digital/Hitachi, Seagate, and Samsung. Based on these considerations, the Commission made the decision to challenge the Western Digital/HGST transaction while clearing the Seagate/Samsung transaction, and to preserve the competitiveness of the desktop HDD market by requiring Western Digital to divest HGST's desktop HDD assets to Toshiba Corporation under the terms of a proposed Consent Agreement.

As we have explained in other cases, each merger that comes before the Commission is investigated and considered based on the particular facts presented. These investigations bear out the assertion in our Horizontal Merger Guidelines that our review of mergers “is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.”¹

In addition to the scrutiny they have received from the Commission, many other antitrust enforcement agencies investigated these mergers. Commission staff cooperated with agencies in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey, and worked closely with the agencies' investigative teams on the

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1 (2010), *available at* <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

Statement of the Commission

timing of review, substantive analyses, and potential remedies, during the pendency of these investigations. This close cooperation with foreign antitrust enforcers helped ensure an outcome that benefited consumers in the United States.

Complaint

IN THE MATTER OF

**CHARLOTTE PIPE AND FOUNDRY COMPANY
AND
RANDOLPH HOLDING COMPANY LLC****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT**

*Docket No. C-4403; File No. 111 0034
Complaint, May 9, 2013 – Decision, May 9, 2013*

This consent order addresses allegations that the 2010 purchase by Charlotte Pipe and Foundry Company of Star Pipe Products, Inc.'s cast iron soil pipe ("CISP") business was anticompetitive. CISP products are used throughout domestic pipeline systems to transport wastewater from buildings to municipal sewage systems, to vent plumbing systems, and to transport rainwater to storm drains. According to the complaint, Charlotte Pipe is one of the largest producers and sellers of CISP products in the United States. The complaint alleges that the acquisition eliminated Star Pipe as the "maverick" firm and enabled Charlotte Pipe to raise prices for CISP products to its consumers. The consent order requires Charlotte Pipe to provide the Commission with prior notification of any acquisitions of any entity engaged in the manufacture or sale of CISP products in the United States. The consent order further prohibits Charlotte Pipe from enforcing a confidentiality and non-compete agreement with Star Pipe and requires Charlotte Pipe to disclose publicly its prior acquisitions of other CISP importers.

Participants

For the *Commission*: William L. Lanning and Tejasvi Srimushnam.

For the *Respondents*: Mark W. Merritt, Robinson Bradshaw & Hinson, P.A.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondents Charlotte Pipe and Foundry Company (hereinafter "CP&F"), and its wholly-owned subsidiary, Randolph Holding Company, L.L.C. (hereinafter