

Complaint

IN THE MATTER OF

**BECTON, DICKINSON AND COMPANY
AND
C. R. BARD, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4637 File No. 171 0140
Complaint, December 22, 2017 – Decision, January 19, 2018*

This consent order addresses the \$24 billion acquisition by Becton, Dickinson and Company (“BD”) of certain assets of C. R. Bard, Inc. The complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the U.S. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The consent order requires the respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc.

Participants

For the *Commission*: *Kenneth A. Libby*.

For the *Respondents*: *Michael Sheerin, Lindsey Strang, and Steve Sunshine, Skadden; Nelson Fitts, Wachtell*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Becton, Dickinson and Company (“BD”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the issued and outstanding shares of Respondent C. R. Bard, Inc. (“Bard”) by means of a merger, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that

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a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 1 Becton Drive, Franklin Lakes, New Jersey, 07417.

2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters located at 730 Central Avenue, Murray Hill, New Jersey 07974.

3. Each 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 company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, proposed to acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

5. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, manufacture, marketing, distribution, and sale of tunneled home drainage catheter systems and soft tissue core needle biopsy devices.

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- a. Tunneled home drainage catheter systems treat recurrent fluid buildup in the lungs or the abdomen of patients suffering from certain diseases, such as cancer. These systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. Once a medical doctor places the indwelling catheter into a patient, fluid drainage can take place in a patient's home or in a hospice setting.
- b. Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-assisted biopsy devices which are used only for breast biopsies and employ a vacuum to remove larger tissue samples.

6. For the purposes of this Complaint, the United States is the relevant geographic market in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

IV. STRUCTURE OF THE MARKET

7. Respondents BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States. BD and Bard have the number one and number two market share positions, respectively. Post-merger, the Respondents would have a combined market share of approximately 98% in the United States. Two other firms comprise the small balance of the relevant market. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for tunneled home drainage catheter systems.

8. Respondents BD and Bard are the two largest manufacturers of soft tissue core needle biopsy devices in the United States. Bard and BD have the number one and number two market share positions, respectively. Post-merger, the

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Respondents would have a combined market share of approximately 60% or greater in the United States. Other firms in this market have considerably smaller shares than the Respondents combined. The Acquisition would substantially increase concentration in the already highly concentrated U.S. market for soft tissue core needle biopsy devices.

V. EFFECTS OF THE ACQUISITION

9. The Acquisition, if consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between BD and Bard in the markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition, if consummated, would increase the likelihood that (1) a combined BD and Bard would be able to unilaterally exercise market power, (2) customers would be forced to pay higher prices, and (3) customers would experience lower levels of innovation for each relevant product.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. *De novo* entry would be costly and not take place in a timely manner because of the time required for product development, U.S. Food and Drug Administration approval, establishment of a sales and marketing infrastructure, and market adoption. No entry is likely to occur that would deter or counteract the competitive harm likely to result from the Acquisition.

VII. VIOLATIONS CHARGED

11. The Agreement and Plan of Merger described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

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12. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of December 2017, issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint (“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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid 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 BD is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.
2. Respondent Bard is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
3. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, 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 and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “BD” means Becton, Dickinson and Company; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Becton, Dickinson and Company ,

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and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, BD shall include Bard.

- B. “Bard” means C. R. Bard, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means BD and Bard, individually and collectively.
- E. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 - 2. Final Decision and Order following its issuance and service by the Commission in this matter.
- F. “Divestiture Product(s)” means the following, individually and collectively:
 - 1. the Tunneled Home Drainage Catheter System Products; and
 - 2. the Soft Tissue Core Needle Biopsy Products.
- G. “Divestiture Product Assets” means the following, individually and collectively:
 - 1. the Tunneled Home Drainage Catheter System Assets To Be Divested; and

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2. the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- H. “Divestiture Product Business(es)” means the Business of a Respondent (as that Respondent is specified in the definition of each Divestiture Product) related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondent and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to the Respondent.
- I. “Manufacturing Technology” means the following, individually and collectively:
1. the Tunneled Home Drainage Catheter System Manufacturing Technology; and
 2. the Soft Tissue Core Needle Biopsy Manufacturing Technology.
- J. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- K. “Transition Period” means, for each Divestiture Product, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the relevant Acquirer directs the Respondent(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date four (4) months after the Closing Date for such Divestiture Product(s).
- L. “Orders” means the Decision and Order and this Order to Maintain Assets.

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II.

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

- A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the related Divestiture Product Businesses.
- B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

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1. providing each of the respective Divestiture Product Businesses 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 such Divestiture Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;
3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition);
5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such Divestiture Product Business; and

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6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such Divestiture Product Business by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force that is (i) substantially as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- D. For each Acquirer of a Divestiture Product, Respondents shall:
1. no later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:
 - a. name, job title or position, date of hire by the relevant Respondent, and effective service date;
 - b. specific description of the employee's responsibilities and primary work location;
 - c. the base salary or current wages;

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- d. most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
 - e. employment and leave status (i.e., active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
 - f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
 - g. at the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
- 2. no later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;
 - 3. not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere

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with the recruitment or employment of an Employee by the Proposed Acquirer;

4. remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; provided, however, that Respondents may:
 - a. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
 - b. hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.D.

provided, however, that this Paragraph II.D. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended

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for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

6. until the Closing Date, provide all Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law).
- E. During the Transition Period, with respect to each Divestiture Product that is marketed or sold before the Closing Date for that Divestiture Product, Respondents, in consultation with the relevant Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:
1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Divestiture Products by the Acquirer is not delayed or impaired by the Respondents;
 2. designate employees of Respondents knowledgeable about the marketing, distribution, and sale related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Business related to the Divestiture Products;

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3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;
 4. continue to market, distribute, and sell the Divestiture Products;
 5. allow the Acquirer access at reasonable business hours to all Confidential Business Information related to the Divestiture Products and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;
 6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) on a regular basis and in a timely manner;
 7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer on a regular basis and in a timely manner; and
 8. establish projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.
- F. Pending divestiture of the Divestiture Product Assets, Respondents shall:

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1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, (iv) the Monitor (if any has been appointed), *except* to the extent necessary to comply with applicable law; and
 3. ensure that Confidential Business Information related exclusively to the Divestiture Products is not disseminated among the employees of the Respondents and institute procedures and requirements to ensure that the Respondents employees:
 - a. do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain

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Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

- H. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the notification to the relevant Acquirer. Respondents shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgment program. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.
- I. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.
- J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or

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impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

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

- A. Mazars LLP shall serve as Monitor to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Decision and Order and the Order to Maintain Assets (collectively “Orders”), and the Remedial Agreements, pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix I and Confidential Appendix I-1 to the Order to Maintain Assets. The Monitor Agreement shall become effective on the date the Order to Maintain Assets is issued. Respondents shall transfer to and confer upon the Monitor all the rights and powers necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders. Respondents shall assure, and the Monitor Agreement shall provide, that:
1. The Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve until the latter of:
 - a. the date the Respondents complete the transfer of all Divestiture Product Assets, and the transfer and delivery of the related

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Manufacturing Technology, Divestiture
Product IP and Divestiture Product IP License;
or

- b. the date on which the relevant Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s);

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- B. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to the Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor the Respondents' compliance with the Orders.
- C. The 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 Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- D. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages,

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liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

- E. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent and any information submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.
- F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- G. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the

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Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

- I. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- J. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.
- K. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every thirty (30) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of its report concerning compliance with the Orders to the Monitor, if any Monitor has been appointed. Respondents shall include in its reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including:

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by the relevant Respondent to the relevant Acquirer; and
- B. a detailed description of the timing for the completion of such obligations;

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provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports of compliance required to be submitted by Respondents pursuant to the Decision and Order.

V.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger, or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of that 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 that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of

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the authorized representative(s) of the Commission and at the expense of that Respondent; and

- B. to interview officers, directors, or employees of that 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. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34;
- B. the day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed; *provided, however*, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final;
- C. the day after the Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer and the Monitor (if one has been appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the Manufacturing Technology are complete; or
- D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Becton, Dickinson and Company (“BD”) of Respondent C. R. Bard, Inc. (“Bard”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, 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 modified the 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 Becton, Dickinson and Company is a corporation organized, existing and doing business

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under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 1 Becton Drive, Franklin Lakes, NJ 07417.

2. Respondent C. R. Bard, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 730 Central Avenue, Murray Hill, NJ 07974.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, 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. “BD” means Becton, Dickinson and Company, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BD, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, BD will include Bard.
- B. “Bard” means C. R. Bard, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Bard, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means BD and Bard, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

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E. “Acquirer” means the following:

1. Merit; or
2. Any other Person that receives the prior approval of the Commission to acquire the Assets To Be Divested.

Provided, however, that if Merit is not approved by the Commission as the Acquirer, the Soft Tissue Core Needle Biopsy Assets To Be Divested and the Tunneled Home Drainage Catheter System Assets To Be Divested may, in the Commission’s sole discretion, be divested to two different Acquirers that receive the prior approval of the Commission.

F. “Acquisition” means BD’s acquisition of Bard through a series of transactions as contemplated by and pursuant to the Agreement and Plan of Merger dated April 23, 2017, among BD, Bard, and Lambda Corp. that was submitted by the Respondents to the Commission.

G. “Acquisition Date” means the date on which the Acquisition is consummated.

H. “Actual Cost” means the actual cost incurred to provide the relevant goods or services, including the cost of direct labor and direct material used and allocation of overhead that is consistent with past custom and practice.

Provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order; and (ii) an agreement becomes a Remedial Agreement for the Assets to be Divested, “Actual Cost” means such cost as is provided in such Remedial Agreement.

I. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for

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granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of the Tunneled Home Drainage Catheter System Products and Soft Tissue Core Needle Biopsy Products, as the case may be. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).

- J. “Application(s)” means all submissions and applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Parts 800 to 898, including all premarket notifications (Section 510(k) submissions) and premarket approvals (“PMA”), and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto.
- K. “Assets To Be Divested” means the Tunneled Home Drainage Catheter System Assets To Be Divested and the Soft Tissue Core Needle Biopsy Assets To Be Divested.
- L. “Business” means the research, Development, manufacture, commercialization, distribution, marketing, promotion, importation, exportation, advertisement, and/or sale of a Product.
- M. “Business Records” means all books, records, files, databases, printouts, and all other documents of any kind, whether stored or maintained in hard copy paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: customer files, customer lists, customer purchasing histories, supplier and vendor files, vendor lists, correspondence, advertising and marketing materials, marketing analyses, sales materials, price lists, cost information, employee lists and contracts,

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salary and benefits information, personnel files, financial and accounting records and documents, financial statements, financial plans and forecasts, operating plans, studies, reports, regulatory materials, Applications, Agency filings and submissions, Agency correspondence, operating guides, technical information, manuals, policies and procedures, service and warranty records, maintenance logs, equipment logs, registrations, and permits.

- N. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- O. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a product, and includes, without limitation, such clinical trials as are designed to satisfy the requirements of an Agency in connection with any product and any other human study used in research and Development of a product.
- P. “Closing Date” means the date Respondents (or a Divestiture Trustee) consummate a transaction to divest any of the Assets To Be Divested to an Acquirer pursuant to this Order.
- Q. “Confidential Business Information” means competitively sensitive, proprietary, and all information owned by, or in the possession or control of, any Respondent that is not in the public domain and to the extent that it is directly related to the conduct of the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business. The term “Confidential Business Information” excludes the following:
 - 1. Information relating to any Respondent’s general business strategies or practices that does not discuss with particularity the Tunneled Home

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Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business;

2. Information that is contained in documents, records or books of any Respondent that are provided to an Acquirer by a Respondent that is unrelated to either the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business or that is exclusively related to the Retained Business;
3. Information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws;
4. Information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality and non-disclosure agreement with respect to such information by Respondents;
5. Information that is required by Law to be disclosed;
6. Information that does not directly relate to the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business; and
7. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:
 - a. Is necessary to be included in Respondents' mandatory regulatory filings, *provided, however*, that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

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- b. Is information the disclosure of which is consented to by the Acquirer;
 - c. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement; or
 - d. Is disclosed in complying with this Order.
- R. “Contract Manufacturing Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, sufficient quantities of Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture the Soft Tissue Core Needle Biopsy Products and Tunneled Home Drainage Catheter System Products in commercial quantities, and in a manner consistent with cGMP, independently of Respondents.
- S. “Development” means all preclinical and clinical medical device development activities, including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a product, product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- T. “Divestiture Product IP” means (a) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date

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(other than trademarks or trade dress), that are used in or would otherwise be infringed by the Soft Tissue Core Needle Biopsy Business as of the Closing Date but that are not included in the Soft Tissue Core Needle Biopsy Assets To Be Divested; and (b) all patents, copyrights, trade secrets or other intellectual property rights owned by Respondents as of the Closing Date (other than trademarks or trade dress), that are used in or would otherwise be infringed by the Tunneled Home Drainage Catheter System Business as of the Closing Date but that are not included in the Tunneled Home Drainage Catheter System Assets To Be Divested.

- U. “Divestiture Product IP License” means a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license to the Acquirer under any Divestiture Product IP to operate the Soft Tissue Core Needle Biopsy Business, including the research, Development, manufacture, distribution, marketing or sale of Soft Tissue Core Needle Biopsy Products anywhere in the world, and the Tunneled Home Drainage Catheter System Business, including the research, Development, manufacture, distribution, marketing or sale of Tunneled Home Drainage Catheter System Products anywhere in the world.
- V. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- W. Employee(s)” means:
 - 1. If Merit is approved by the Commission to be the Acquirer, the employees identified in the Merit Agreement; or
 - 2. If the Acquirer(s) is not Merit, any individual employed on a full-time, part-time, or contract basis as of, and at any time after, April 23, 2017,

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the date of the announcement of the Acquisition,
by:

- a. BD, where such employee's job responsibilities relate or related primarily to the Soft Tissue Core Needle Biopsy Business; and
 - b. Bard, where such employee's job responsibilities relate or related primarily to the Tunneled Home Drainage Catheter System Business.
- X. "Exclusive Supplier Contract" means any contract for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products where under the terms of the contract with Respondents, the Acquirer would be prevented from entering into a contract for the supply of such finished goods, inputs, or instrumentation with such Supplier.
- Y. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, Agency, or government commission, or any judicial or regulatory authority of any government.
- Z. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- AA. "Merit" means Merit Medical Systems, Inc., a corporation organized under the laws of the state of Utah with its principal place of business at 1600 West Merit Parkway, South Jordan, Utah 64095.
- BB. "Merit Agreement" means the "Asset Purchase Agreement" by and between BD and Merit, dated as of November 15, 2017, and all amendments, exhibits, attachments, agreements and schedules, in each case thereto or contemplated thereby, related to the Assets

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To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order. The Merit Agreement is attached to this Order as Non-Public Appendix A.

- CC. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- DD. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- EE. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention, applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date, and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.
- FF. “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.
- GG. “Product(s)” means any medical device or system regulated by the FDA as a Class II (Special Controls) or Class III (PMA) medical device pursuant to 21 C.F.R. Parts 800 to 898, *i.e.*, an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory, which is:

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1. recognized in the official National Foundry, or the United States Pharmacopoeia, or any supplement to them:
 2. intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or
 3. intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes.
- HH. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any Application related to that Product.
- II. “Proposed Acquirer” means any proposed acquirer of the Assets To Be Divested that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order. “Proposed Acquirer” includes Merit.
- JJ. “Remedial Agreement(s)” means the following:
1. The Merit Agreement;
 2. Any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer that has received the prior approval of the

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Commission) to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.

KK. “Retained Business” means:

1. All right, title and interest in and to the names “BD” and “Bard,” together with all variations thereof and all trademarks and trade dress containing, incorporating or associated with any of the foregoing, and any trademark and trade dress other than what is included in the Tunneled Home Drainage Catheter System Assets To Be Divested or the Soft Tissue Core Needle Biopsy Assets To Be Divested;
2. Any of the assets, tangible or intangible, businesses or goodwill that relate to the Retained Products or that are not related to the Assets to be Divested; and
3. Cash and cash equivalents; tax assets; stock in any entity; corporate and tax records of any entity; insurance policies; benefit plans; and accounts receivable arising prior to the Closing Date.

LL. “Retained Products” means any Product researched, Developed, manufactured, marketed, sold or distributed by Respondents other than the Tunneled Home Drainage Catheter System Products and the Soft Tissue Core Needle Biopsy Products.

MM. “Soft Tissue Core Needle Biopsy Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Soft Tissue Core Needle Biopsy Business, including any improvements as of the Closing Date, and all such products under

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Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:

1. Finished product inventory;
2. Advertising, marketing and promotional materials for the Soft Tissue Core Needle Biopsy Products;
3. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Soft Tissue Core Needle Biopsy Products;
4. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Soft Tissue Core Needle Biopsy Products;
5. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Soft Tissue Core Needle Biopsy Products;
6. Copies of all Soft Tissue Core Needle Biopsy Products Manufacturing Technology;
7. All equipment and machinery (including all molds) and the spare parts held by BD as of the Closing Date for use in such equipment and machinery;
8. Copies of all Soft Tissue Core Needle Biopsy Scientific and Regulatory Material;
9. Soft Tissue Core Needle Biopsy Intellectual Property;

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10. A list of existing and past customers for the Soft Tissue Core Needle Biopsy Products;
11. Copies of customer credit and other records for the Soft Tissue Core Needle Biopsy Products;
12. Copies of all books, ledgers and other business records for the Soft Tissue Core Needle Biopsy Products;
13. Copies of clinical, regulatory, and customer sales databases for the Soft Tissue Core Needle Biopsy Products; and
14. All licenses, permits and authorizations related to the Soft Tissue Core Needle Biopsy Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Soft Tissue Core Needle Biopsy Products.

provided, however, that “Soft Tissue Core Needle Biopsy Business” does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Soft Tissue Core Needle Biopsy Business that contain information (a) that relates both to Soft Tissue Core Needle Biopsy Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Soft Tissue Core Needle Biopsy Products.

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- NN. “Soft Tissue Core Needle Biopsy Business” means the Business conducted by BD as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Soft Tissue Core Needle Biopsy Products.
- OO. “Soft Tissue Core Needle Biopsy Intellectual Property” means all of the following to the extent owned by BD and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products:
1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
 2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).
- PP. “Soft Tissue Core Needle Biopsy Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent related exclusively or predominantly to the manufacture of Soft Tissue Core Needle Biopsy Products for sale, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions,

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annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

- QQ. “Soft Tissue Core Needle Biopsy Products” means BD’s soft tissue core needle biopsy devices as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the following Trademarks: Achieve™, Pink Achieve™, Temno™, Original Temno™, Temno Evolution™, Adjustable Coaxial Temno™ and Tru-Cut™, and all such Products under Development, including but not limited to Sontina.
- RR. “Soft Tissue Core Needle Biopsy Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are related to the research, Development, manufacture, marketing, distribution, or sale of Soft Tissue Core Needle Biopsy Products.
- SS. “Supplier” means any Third Party provider of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products.
- TT. “Transition Services” means technical services, personnel, assistance, training, and other logistical, administrative and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Assets To Be Divested from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and

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repair of facilities and equipment, manufacturing, purchasing, quality control, R&D support, technology transfer, regulatory compliance, sales and marketing, customer service, and supply chain management and customer transfer logistics.

- UU. “Transition Services Agreement(s)” means any agreement(s) that receives the prior approval of the Commission between the Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for the Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.
- VV. “Third Party(ies)” means any non-governmental Person other than the Respondents, or the Acquirer.
- WW. “Tunneled Home Drainage Catheter System Assets To Be Divested” means all of the rights, titles and interest in, to and under the following, in each case exclusively or predominantly related to the Tunneled Home Drainage Catheter System Business, including any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale including, but not limited to:
1. Finished product inventory;
 2. Instrumentation inventory for the Tunneled Home Drainage Catheter System Products;
 3. Advertising, marketing and promotional materials for the Tunneled Home Drainage Catheter System Products;
 4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation,

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packaging specifications, quality control standards and regulatory records for the Tunneled Home Drainage Catheter System Products;

5. Demonstration models, prototypes, samples, instruments, and supporting equipment that are used for training purposes and copies of all training materials that are used for training in the proper use of the Tunneled Home Drainage Catheter System Products;
6. Copies of all testing and clinical performance reports, market research reports and other marketing related information and materials for the Tunneled Home Drainage Catheter System Products;
7. Copies of all Tunneled Home Drainage Catheter System Products Manufacturing Technology;
8. All equipment and machinery (including all molds) and the spare parts held by Bard at the Closing Date for use in such equipment and machinery;
9. Copies of all Tunneled Home Drainage Catheter System Scientific and Regulatory Material;
10. Tunneled Home Drainage Catheter System Intellectual Property;
11. A list of existing and past customers for the Tunneled Home Drainage Catheter System Products;
12. Copies of customer credit and other records for the Tunneled Home Drainage Catheter System Products;
13. Copies of all books, ledgers and other business records for the Tunneled Home Drainage Catheter System Products;

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14. Copies of clinical, regulatory, and customer sales databases for the Tunneled Home Drainage Catheter System Products; and
15. All licenses, permits and authorizations related to the Tunneled Home Drainage Catheter System Products, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Tunneled Home Drainage Catheter System Products.

provided, however, that “Tunneled Home Drainage Catheter System Business” does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Tunneled Home Drainage Catheter System Business that contain information (a) that relates both to Tunneled Home Drainage Catheter System Products and to other products of Respondents or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or, at their option, relevant excerpts of such documents and materials, but Respondents shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this provision to ensure that Respondents not be required to divest themselves completely of records or information that relate to products other than Tunneled Home Drainage Catheter System Products.

- XX. “Tunneled Home Drainage Catheter System Business” means the Business conducted by Bard as of immediately prior to the Acquisition Date, and as maintained by Respondents up to the Closing Date, with respect to the Tunneled Home Drainage Catheter System Products.
- YY. “Tunneled Home Drainage Catheter System Intellectual Property” means all of the following to the

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extent owned by Bard and used exclusively or predominantly in the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter Products:

1. Patents and patent applications in each case filed, or in existence, on or before the Closing Date, and any renewal, derivation, divisions, reissues, continuations, continuations in-part, modifications, or extensions thereof; and
2. Trademarks, trade dress, copyrights, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; in each case, other than patents or patent applications (which are addressed in Item 1, above).

ZZ. “Tunneled Home Drainage Catheter System Manufacturing Technology” means all tangible technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise), in each case to the extent exclusively or predominantly related to the manufacture of Tunneled Home Drainage Catheter System Products for sale, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Product Approval(s) conformance, and labeling and all other information related to the manufacturing process, and supplier lists.

AAA. “Tunneled Home Drainage Catheter System Products” means Bard’s tunneled home drainage catheter

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systems used to reduce symptoms associated with malignant pleural effusion or malignant ascites as of immediately prior to the Acquisition Date, including but not limited to all Products marketed or sold under the trademark Aspira, and all such Products under Development.

- BBB. “Tunneled Home Drainage Catheter System Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are exclusively or predominantly related to the research, Development, manufacture, marketing, distribution, or sale of Tunneled Home Drainage Catheter System Products.

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

- A. Not later than the earlier of: (a) February 14, 2018, or (b) three (3) days after Respondents receive all regulatory approvals necessary for the divestiture of the Assets To Be Divested, Respondents shall divest the Assets To Be Divested and grant the Divestiture Product IP License, absolutely and in good faith, to Merit pursuant to, and in accordance with, the Merit Agreement(s) (which agreement(s) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondents under such agreement(s)), and each such agreement, if it becomes a Remedial Agreement, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Assets To Be Divested to Merit prior to the Order Date, and if, at the time the Commission determines to

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make this Order final and effective, the Commission notifies Respondents that Merit is not an acceptable purchaser of the Assets To Be Divested, then Respondents shall immediately rescind the transaction with Merit, in whole or in part, as directed by the Commission, and shall divest the Assets To Be Divested within one hundred eighty (180) days from the Order Date, 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 Respondents have divested the Assets To Be Divested to Merit prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Assets To Be Divested to Merit (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;

provided further, however, that subject to the approval of the Commission, Respondents may obtain a royalty-free, fully paid-up, perpetual, irrevocable, worldwide, non-exclusive license from the Acquirer to the Tunneled Home Drainage Catheter System Intellectual Property and the Soft Tissue Core Needle Biopsy Intellectual Property for use in the research, Development, manufacture, distribution, marketing or sale of Retained Products, anywhere in the world, to the extent and only to the extent that the Tunneled Home Drainage Catheter System Intellectual Property or the Soft Tissue Core Needle Biopsy Intellectual Property was used in or would otherwise be infringed by the Retained Products as of the Closing Date.

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- B. Prior to the Closing Date, Respondents shall, at their sole expense, obtain all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Assets To Be Divested to the Acquirer(s), and to permit the Acquirer(s) to continue to operate the Businesses related to the Assets To Be Divested in a manner that will achieve the purposes of this Order; *provided, however*, that the Respondents may satisfy this requirement by certifying that the Acquirer(s) has executed agreements or entered into equivalent arrangements directly with the relevant Third Party(ies).
- C. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for a period of thirty (30) months from the Closing Date; *provided, however*, that such Agreement shall provide that (1) the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents; and (2) at the Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of a Transition Services Agreement as provided in this Paragraph. The Transition Services provided pursuant to a Transition Services Agreement shall be at no greater than Respondents' Actual Costs for such personnel, technical support, assistance, training, and other services as are necessary to transfer the Assets To Be Divested to the Acquirer and enable the Acquirer to operate the Assets To Be Divested in a manner consistent with the purposes of this Order.
- D. Respondents shall, at the option of the Acquirer, and subject to the prior approval of the Commission, enter into a Contract Manufacturing Agreement to supply the Acquirer with the Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products for a period of two (2) years from the Closing Date; *provided, however*, that such Agreement

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shall provide that the Acquirer may terminate the Agreement at any time, without cost or penalty to the Acquirer, upon commercially reasonable notice to Respondents. The Soft Tissue Core Needle Biopsy Products and the Tunneled Home Drainage Catheter System Products supplied by Respondents to the Acquirer pursuant to such Contract Manufacturing Agreement shall be at no greater than Respondents' Actual Costs.

E. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Assets To Be Divested;
2. deliver all Confidential Business Information related to the Assets To Be Divested to the Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

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4. Not use, directly or indirectly, any Confidential Business Information, other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Assets to be Divested; or (iii) applicable Law, including mandatory regulatory filings;
5. Not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer to receive such information, (iii) the Commission, and (iv) the Monitor, if any, and the Divestiture Trustee, if any; and
6. No later than thirty (30) days after the Closing Date, provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacture, distribution, sale, or marketing of the Assets to be Divested or who may have or have access to Confidential Business Information ("Designated Employees"); Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for at least one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records at its principal place of business regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to Designated Employees.

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provided however, that this Paragraph II.E. shall not apply:

- a. To any Confidential Business Information related to the Tunneled Home Drainage Catheter System Business that Respondents can demonstrate to the Commission that BD obtained other than in connection with the Acquisition;
- b. To any Confidential Business Information related to the Soft Tissue Core Needle Biopsy Business that Respondents can demonstrate to the Commission that Bard obtained other than in connection with the Acquisition;
- c. To any Confidential Business Information to the extent related to Retained Products or the Retained Business; and
- d. To the use of Confidential Business Information by Respondents to defend against legal claims brought by any Third Party, or investigations or enforcement actions by Government Entities.

F. Respondents shall:

1. No later than the earlier of ten (10) days after a request from the Proposed Acquirer or ten (10) days before the Closing Date if requested by a Proposed Acquirer, provide to the Proposed Acquirer a list of all Employees and, in compliance with and to the extent permitted by all Laws, and an opportunity to inspect the personnel files and other documentation relating to such Employees. The list of Employees that Respondents shall provide shall include the following information for each Employee, as requested by the Proposed Acquirer, and to the extent permitted by Law:

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- a. Name, job title or position, date of hire by the relevant Respondent, and effective service date;
 - b. Specific description of the employee's responsibilities and primary work location;
 - c. The base salary or current wages;
 - d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, current target or guaranteed annual bonus or commission opportunities and target long term incentive opportunities, if applicable;
 - e. Employment and leave status (*i.e.*, active or on leave or disability); full-time or part-time; reason for leave and expected date of return from leave, in each case, if applicable; accrued and unused vacation, sick leave, and personal time off days;
 - f. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
 - g. At the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Employee.
2. No later than ten (10) days before the Closing Date, allow the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of Respondents with any Employee, and to make offers of employment to any one or more of the Employees;

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3. Not interfere, directly or indirectly, with the hiring or employing of any Employee by the Proposed Acquirer, not offer any incentive to any Employee to decline employment with the Proposed Acquirer, not make any counter-offer to any Employee who has an outstanding offer of employment from the Proposed Acquirer or who has accepted an offer of employment from the Proposed Acquirer, and not otherwise interfere with the recruitment or employment of an Employee by the Proposed Acquirer;
4. Remove any impediments within the control of Respondents that may deter any Employee from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of the Employee(s) to accept employment with the Proposed Acquirer;
5. Not, for a period of one (1) year from the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any Employee who has accepted an offer of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:
 - a. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, as long as this is not targeted specifically at Employees; or
 - b. Hire Employees who apply for employment with Respondents, as long as such Employees were not solicited by Respondents in violation of this Paragraph II.F.

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Provided, however, that this Paragraph II.F. shall not prohibit Respondents from making offers of employment to or employing any Employee after the Closing Date where: (i) the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Employee; (ii) the Acquirer has terminated the employment of the Employee; or (iii) where the Employee's employment with the Acquirer ended for any reason more than ninety (90) days prior to Respondents' solicitation of the Employee.

- G. Until the Closing Date, Respondents shall take such actions as are necessary to:
1. maintain the full economic viability and marketability of the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
 2. minimize any risk of loss of competitive potential for the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business;
 3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Tunneled Home Drainage Catheter System Business and the Soft Tissue Core Needle Biopsy Business; and
 4. not sell, transfer, encumber, or otherwise impair the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Tunneled Home Drainage Catheter System Business or the Soft Tissue Core Needle Biopsy Business.

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Provided, however, that Respondents are required to maintain, for the term of the Contract Manufacturing Agreement, the full economic viability and marketability, other than ordinary wear and tear, of any equipment or machinery included in the Assets To Be Divested that remain in any facility of Respondents during the term of the Contract Manufacturing Agreement.

- H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Acquirer from entering into a contract with the Supplier for the supply of finished goods of, inputs to, or instrumentation for, the Tunneled Home Drainage Catheter System Products or the Soft Tissue Core Needle Biopsy Products. No later than three (3) days after the Closing Date, Respondents shall notify in writing any Supplier that is party to an Exclusive Supplier Contract of such waiver.
- I. The purpose of the divestiture of the Assets To Be Divested to an Acquirer is to create an independent, viable and effective competitor in the markets for the Development, license, manufacture, marketing, distribution, and sale of (1) tunneled home drainage catheter systems and (2) soft tissue core needle biopsy devices, and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

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

- A. Mazars LLP shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of

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their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement(s).

- B. The Monitor Agreement shall require that, not later than three (3) days after the Commission accepts the Order for comment, Respondents transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order, and Respondents shall effectuate such transfer.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - 3. The Monitor shall serve at least until Respondents have fulfilled all their obligations under Paragraphs II.A., II.B., II.C., II.D., and II.E. of this Order.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order, including, but not limited

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to, their obligations related to the Assets To Be Divested. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

- E. The 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 Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- F. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the willful default, recklessness, gross negligence or bad faith of the Monitor, its employees, agents or advisors.
- G. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer, with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.

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- H. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- I. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- J. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
- K. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- L. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not fully complied with the obligations to divest the Assets To Be Divested as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission,

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Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the Assets To Be Divested. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive

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power and authority to divest the Assets To Be Divested.

2. The Divestiture Trustee shall have one (1) year after 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 one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Assets To Be Divested, and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no

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minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of the Assets To Be Divested.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or

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expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be

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necessary or appropriate to accomplish the Divestiture required by this Order.

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.
- D. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Assets To Be Divested, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with Paragraphs II.A. and II.E., of this Order, and every sixty (60) days thereafter until Respondents have fully complied with the Paragraphs II.C. and II.D. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time:
 - 1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;
 - 2. A detailed plan to deliver all Confidential Business Information required to be delivered to the Acquirer pursuant to Paragraph II.E., and agreed upon by the relevant Acquirer and the Monitor (if applicable) and any updates or changes to such plan;
 - 3. A description of all Confidential Business Information delivered to the Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;
 - 4. A description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and

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5. A description of all technical assistance provided to the Commission-Approved Acquired during the reporting period.

VII.

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

VIII.

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 and with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by such 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 Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 19, 2028.

By the Commission.

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Becton, Dickinson and Company (“BD”) and C. R. Bard, Inc. (“Bard”) (collectively, the “Respondents”) that is designed to remedy the anticompetitive effects that would likely result from BD’s proposed acquisition of Bard. The proposed Decision and Order (“Order”) requires the Respondents to divest all rights and assets related to Bard’s tunneled home drainage catheter business and BD’s soft tissue core needle biopsy device business to Merit Medical Systems, Inc. (“Merit”). The Order To Maintain Assets requires Respondents to maintain the viability and competitiveness of the businesses pending divestiture.

Pursuant to an Agreement and Plan of Merger, dated as of April 23, 2017, BD and Lambda Corp., a wholly-owned subsidiary of BD, will acquire the issued and outstanding shares of Bard by means of a merger in exchange for cash and stock valued at approximately \$24 billion (the “Acquisition”). The Commission’s Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for tunneled home

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drainage catheter systems and soft tissue core needle biopsy devices. The Consent Agreement is designed to remedy the alleged violations by preserving the competition that otherwise would be lost in these markets as a result of the proposed Acquisition.

The Commission has placed the Consent Agreement 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, along with any comments received, and decide whether it should withdraw from the Consent Agreement, modify the Consent Agreement or Order, or make the Order final.

II. THE RESPONDENTS

BD, headquartered in Franklin Lakes, New Jersey, is a medical technology company that manufactures and sells a broad range of medical supplies, devices, laboratory equipment, and diagnostic products throughout the world. Its operations consist of two business segments: BD Medical and BD Life Sciences. BD Medical provides a broad array of medical technologies and devices to hospitals, clinics, physicians' office practices, pharmacies, pharmaceutical companies, and healthcare workers.

Bard, headquartered in Murray Hill, New Jersey, is a medical technology company that manufactures medical, surgical, diagnostic, and patient care devices sold to hospitals, healthcare professionals, extended care facilities, and other medical facilities throughout the world. Its operations consist of four principal divisions: Bard Access Systems, Inc., Bard Medical Division, Bard Peripheral Vascular, Inc., and Bard Biopsy Systems.

III. THE RELEVANT MARKETS AND STRUCTURE OF THE MARKETS

A. Tunneled Home Drainage Catheter Systems

Tunneled home drainage catheter systems are medical devices used to treat recurrent fluid buildup in the lungs and abdomen,

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conditions known as pleural effusions and malignant ascites, respectively. Patients suffering from these conditions, often due to cancer or other serious illnesses, commonly require frequent fluid drainage. Tunneled home drainage catheter systems drain fluid from the lungs (pleural drainage) or abdomen (peritoneal drainage) through a tunneled, indwelling catheter connected to a disposable receptacle. After a medical doctor places the indwelling catheter, the device allows fluid drainage to take place conveniently in a patient's home or in a hospice setting where the patient or a caregiver can attach, remove, replace, and dispose of the drainage receptacle as frequently as needed. Although patients requiring pleural or peritoneal drainage can undergo an outpatient medical procedure when fluid build-up becomes severe, such procedures are not suitable alternatives to tunneled home drainage catheter systems, because they require a patient to make repeated trips to a healthcare facility to see a doctor. Customers likely would not substitute outpatient medical procedures in response to a small but significant increase in the price of tunneled home drainage catheter systems.

BD and Bard are the two largest manufacturers of tunneled home drainage catheter systems in the United States, with a combined market share of approximately 98%. The remaining market share is divided between Rocket Medical plc ("Rocket Medical") and B. Braun Medical Inc. ("B. Braun"). Rocket Medical is a new entrant to the U.S. market, and both Rocket Medical and B. Braun, in addition to having a much smaller share of the market than BD and Bard, have far less recognition among U.S. customers.

B. Soft Tissue Core Needle Biopsy Devices

Soft tissue core needle biopsy devices are used by medical clinicians, typically interventional radiologists or oncologists, to remove small samples of tissue from soft tissue organs for examination and diagnosis. There are no practical alternatives to soft tissue core needle biopsy devices for clinicians seeking to perform a soft tissue biopsy. Other biopsy devices, such as bone or bone marrow biopsy devices, are not approved or intended to be used for soft tissue biopsies. Soft tissue core needle biopsy devices do not include, and are distinguished from, vacuum-

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assisted biopsy (“VAB”) devices which employ a vacuum to remove larger tissue samples. VAB devices are used for breast biopsies involving lesions that are difficult to locate and are not used to perform biopsies of other soft tissues and organs. VAB devices are more complex devices that are sold at a significantly higher price than soft tissue core needle biopsy devices. Accordingly, customers likely would not switch to VAB devices in response to a small but significant increase in the price of soft tissue core needle biopsy devices.

Bard and BD are the two largest manufacturers of soft tissue core needle biopsy devices in the United States, with a combined market share of 60% or greater. Other participants in the market include Cook Medical, Argon Medical Devices, Inc., and Hologic, Inc., but each of these manufacturers has a smaller market share than either Bard or BD. In addition, there is a fringe of other manufacturers with very small market shares.

C. The Relevant Geographic Market

The relevant geographic market for both tunneled home drainage catheter systems and soft tissue core needle biopsy devices is the United States. These relevant products are medical devices regulated by the U.S. Food and Drug Administration (“FDA”). Medical devices sold outside of the United States, but not approved for sale in the United States, are not viable competitive alternatives for U.S. consumers.

IV. COMPETITIVE EFFECTS OF THE TRANSACTION

The proposed Acquisition would likely substantially lessen competition in the U.S. markets for tunneled home drainage catheter systems and soft tissue core needle biopsy devices. The Acquisition would combine the largest and second-largest suppliers of both products in the United States and would substantially increase concentration in already highly concentrated markets. Under the *Horizontal Merger Guidelines*, the Acquisition would presumptively create or enhance market power. By eliminating direct and substantial competition between Respondents, the proposed Acquisition likely would

Analysis to Aid Public Comment

allow the combined firm to exercise market power unilaterally, resulting in higher prices and/or reduced innovation.

V. ENTRY

Entry in the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. New entry into the markets for each of these devices is difficult, time-consuming, and expensive, requiring a significant investment of time and money for product research and development, regulatory approval by the FDA, and the establishment of a sales and marketing infrastructure sufficient to develop customer awareness and acceptance of the products.

VI. THE PROPOSED CONSENT AGREEMENT

The Consent Agreement remedies the competitive concerns raised by the proposed Acquisition by requiring the Respondents to divest all of the assets, facilities, and resources relating to Bard's tunneled home drainage catheter systems business and BD's soft tissue core needle biopsy devices business to Merit. The provisions of the Consent Agreement will enable Merit to become an independent, viable, and effective competitor in the respective relevant markets and maintain the competition that currently exists.

Merit, headquartered in South Jordan, Utah, is a global company with 30 years of experience in the development, manufacture, and distribution of medical devices used in interventional, diagnostic, and therapeutic procedures. Merit offers a portfolio of products that is highly complementary to the tunneled home drainage catheter systems being acquired. Merit also recently introduced its first soft tissue core needle biopsy device product. Merit possesses substantial industry expertise in these product areas and sells its products to similar customers as BD and Bard. For these reasons, Merit is well positioned to restore the benefits of competition that would be lost due to the Acquisition.

Analysis to Aid Public Comment

Pursuant to the Order, Merit will receive all rights and assets related to Bard's tunneled home drainage catheter system business and BD's soft tissue core needle biopsy device business, including all of the confidential business information used in those businesses. Merit will own or receive a license to all intellectual property necessary to run the businesses. It will also acquire the equipment used in the manufacturing of the products and all documentation and other information related to the products. Respondents will also contract manufacture products for Merit until it is able to manufacture them itself, and Respondents will provide transitional services to Merit to assist the company in establishing manufacturing capabilities for the divested products.

The Respondents must accomplish the divestitures no later than 10 days after the consummation of the proposed Acquisition. If the Commission determines that Merit is not an acceptable acquirer, or that the manner of the divestitures is not acceptable, the proposed Order requires the Respondents to unwind the sale of assets to Merit and then divest the assets to a Commission-approved acquirer(s) within 180 days of the date the Order becomes final. Pursuant to the Order To Maintain Assets, Respondents must maintain the businesses pending divestiture.

The Commission has agreed to appoint a Monitor to ensure that the Respondents comply with all of their obligations pursuant to the Consent Agreement and to keep the Commission informed about the status of the transfer of assets to Merit. The Commission has appointed Mazars LLP as the Monitor in this matter. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

VII. OPPORTUNITY FOR PUBLIC COMMENT

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Order final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Complaint

IN THE MATTER OF

**AGRIUM INC.,
POTASH CORPORATION OF SASKATCHEWAN
INC.,
AND
NUTRIEN LTD.**

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

*Docket No. C-4638; File No. 161 0232
Complaint, December 27, 2017 – Decision, February 5, 2018*

This consent order addresses the merger of Potash Corporation of Saskatchewan Inc. and Agrium Inc. whereby each such entity shall become a subsidiary of Nutrien Ltd. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the markets for: (1) superphosphoric acid (“SPA”) in North America, and (2) 65%-67% concentration nitric acid in the region near and to the east of PotashCorp’s Lima, Ohio and Agrium’s North Bend, Ohio nitric acid plants. The consent order requires the respondents to divest Agrium’s Conda, Idaho facility and related assets to Itafos and Agrium’s North Bend, Ohio facility and related assets to Trammo, Inc.

Participants

For the *Commission*: James Abell, Elizabeth Arens, Peggy Bayer Femenella, Daniel Freer, Frances Anne Johnson, Jon Nathan, and Kristian Rogers.

For the *Respondents*: Michael Egge, Latham & Watkins LLP; Phillip Proger, Jones Day.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Potash Corporation of Saskatchewan Inc. (“PotashCorp”), a corporation