

Complaint

IN THE MATTER OF

**US FOODS HOLDING CORP.,
SERVICES GROUP OF AMERICA, INC.,
II. AND
FOOD SERVICES OF AMERICA, 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-4688; File No. 181 0215
Complaint, September 10, 2019 – Decision, November 15, 2019*

This consent order addresses the \$1.8 billion acquisition by US Foods Holding Corp. (“USF”) of certain assets of Services Group of America, Inc. (“SGA”). 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 market for broadline foodservice distribution in Eastern Idaho, Western North Dakota, Eastern North Dakota, the Seattle Area, and nationwide for multi-regional and national broadline distribution customers. The consent order requires USF to divest certain of SGA’s distribution centers and broadline distribution assets, including employees and tangible assets that are necessary to the operation of the businesses in Eastern Idaho, Western and Eastern North Dakota, and the Seattle Area to Shamrock Foods Co., Cash-Wa Distributing, and Harbor Wholesale Foods, respectively.

Participants

For the *Commission*: Ryan Andrews, Gustav Chiarello, Guia Dixon, Amy Dobrzynski, Stuart Hirschfeld, Michael Mikawa, Anthony Saunders, Sophia Vandergrift, and Robert Zuver.

For the *Respondents*: Maggie D’Amico and Christine Varney, Cravath, Swaine & Moore LLP; Ronan Harty and Howard Shelanski, Davis Polk & Wardwell LLP.

COMPLAINT

Pursuant to the provisions of the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by said Acts, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondent US Foods Holding Corp. and US Foods, Inc. (together “USF”), corporations subject to the jurisdiction of the Commission, and Respondent Services Group of America, Inc., Respondent Food Services of America, Inc., and Amerifresh, Inc., Ameristar Meats, Inc., GAMPAC Express, Inc., and Systems Services of America, Inc. (collectively “SGA”), corporations subject to the jurisdiction of the Commission, have reached an agreement (the “Proposed Acquisition”) in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, pursuant to which US Foods, Inc. will acquire 100% of outstanding common stock for each of SGA’s Food Group of Companies, which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

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I. RESPONDENTS

1. US Foods Holding Corp. is a publicly traded corporation organized under the laws of Delaware with headquarters in Rosemont, Illinois. US Foods, Inc. is a wholly owned subsidiary of US Foods Holding Corp. USF is the second-largest distributor of food and food-related products in the United States. USF operates 64 distribution centers from which it provides broadline foodservice distribution throughout the United States. In its fiscal year 2017, USF generated approximately \$24 billion in sales to more than 200,000 customers nationwide.

2. Respondent SGA is a holding company made up of six operating companies. SGA's Food Group of Companies—the five companies at issue in the Proposed Acquisition—include Food Services of America, Inc. ("FSA"), a broadline foodservice distributor; Systems Services of America, Inc. ("SSA"), a systems distributor; Amerifresh, Inc., a specialty produce distributor; Ameristar Meats, Inc., a specialty meat processor; and GAMPAC Express, Inc., a supply chain and logistics company. FSA operates nine broadline distribution centers, and the other Food Group companies operate additional systems and specialty facilities. In its fiscal year 2017, SGA's Food Group of Companies generated approximately \$3.2 billion in sales, of which FSA accounted for approximately \$2.4 billion. SGA is a member of Distribution Market Advantage ("DMA"), a supply chain and marketing cooperative owned by eleven independent regional foodservice distributors that are also its members. Through DMA, FSA provides broadline foodservice distribution to national accounts in coordination with other large regional distributors.

II. JURISDICTION

3. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The Proposed Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. THE PROPOSED ACQUISITION

5. Pursuant to a Stock Purchase Agreement dated July 28, 2018, US Foods, Inc. proposes to acquire 100% of outstanding common stock for each of SGA's Food Group of Companies, for a total purchase price of approximately \$1.8 billion in cash.

IV. RELEVANT MARKETS

6. The relevant lines of commerce in which to assess the effects of the Proposed Acquisition are broadline foodservice distribution and broadline foodservice distribution to national customers. Broadline foodservice distribution entails the warehousing, sale, and distribution of a wide range of product categories to foodservice customers, along with value-added services.

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7. The relevant geographic markets in which to analyze the effects of the Proposed Acquisition are: (1) Eastern Idaho, (2) Western North Dakota, (3) Eastern North Dakota, (4) the Seattle Area, and (5) an area no larger than the United States.

V. STRUCTURE OF THE RELEVANT MARKETS

8. USF and FSA are two of the largest providers of broadline foodservice distribution to local customers in Eastern Idaho. Customers in this area are served by USF's distribution facility in Salt Lake City, Utah and FSA's distribution facility in Boise, Idaho. The Proposed Acquisition will reduce the number of major providers of broadline foodservice distribution in Eastern Idaho from four to three and result in a highly concentrated market.

9. USF and FSA are two of the largest providers of broadline foodservice distribution to local customers in Western North Dakota. Customers in this area are primarily served by USF's distribution facility in Bismarck, North Dakota and FSA's distribution facility in Fargo, North Dakota. The Proposed Acquisition will reduce the number of major providers of broadline foodservice distribution in Western North Dakota from three to two and result in a highly concentrated market.

10. USF and FSA are two of the largest providers of broadline foodservice distribution to local customers in Eastern North Dakota. Customers in this area are served by USF's distribution facility in Grand Forks, North Dakota and FSA's distribution facility in Fargo, North Dakota. The Proposed Acquisition will reduce the number of major providers of broadline foodservice distribution in Eastern North Dakota from three to two and result in a highly concentrated market.

11. USF and FSA are two of the largest providers of broadline foodservice distribution to local customers in the Seattle Area. Customers in this area are served by USF's distribution facility in Fife, Washington and FSA's distribution facilities in Kent, Washington and Everett, Washington. The Proposed Acquisition will reduce the number of major providers of broadline foodservice distribution in the Seattle Area from three to two and result in a highly concentrated market.

12. USF and DMA (a consortium of which SGA is a core member), are two of the few firms that provide nationwide broadline distribution to multi-regional and national customers. Because FSA covers an important geography within the DMA network—specifically, the Pacific Northwest—post-acquisition, without FSA, DMA's ability to compete for national customers will be significantly reduced. As a result, the already highly concentrated national market will become more so.

VI. EFFECTS OF THE PROPOSED ACQUISITION

13. The Proposed Acquisition would eliminate direct and substantial price and non-price competition between USF and FSA in the relevant markets. The elimination of this vigorous competition would allow USF to unilaterally exercise market power following consummation of the Proposed Acquisition.

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14. The ultimate effect of the Proposed Acquisition would be to increase the likelihood that prices for the provision of broadline foodservice distribution will increase and that the quality associated with such services will decrease in the relevant geographic markets.

VII. ENTRY CONDITIONS

15. New entry or expansion by existing market participants is unlikely to occur in a timely or sufficient manner to deter or counteract the likely anticompetitive effects of the Proposed Acquisition in the relevant markets.

VIII. THE VIOLATION CHARGED

16. The Proposed Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and if consummated, may substantially lessen competition in the relevant markets in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this tenth day of September, 2019, issues its complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent US Foods Holding Corp. (“US Foods”) of certain subsidiaries of Respondent Services Group of America, Inc. (“SGA”), including SGA’s Food Services of America, Inc. (“FSA”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers

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and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent US Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 9399 W. Higgins Road, Suite 100, Rosemont, Illinois, 60018.
2. Respondent SGA is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 16100 N. 71st St., Suite 500, Scottsdale, Arizona, 85254.
3. Respondent FSA is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 16100 N. 71st St., Suite 400, Scottsdale, Arizona, 85254. Respondent FSA is a subsidiary of Respondent SGA.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

- A. "US Foods" means US Foods Holding Corp., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by US Foods Holding Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the date the Acquisition is completed, "US Foods" includes FSA, and the following other SGA subsidiaries: Amerifresh, Inc., Ameristar Meats, Inc., Gampac Express, Inc., and Systems Services of America, Inc.
- B. "SGA" means Services Group of America, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Services Group of America, Inc. (including, but not limited to, FSA, Amerifresh, Inc., Ameristar

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Meats, Inc., Gampac Express, Inc., and Systems Services of America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “FSA” means Food Services of America, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by FSA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Acquisition Date” means the date the Acquisition is consummated.
- E. “Broadline Divestiture Assets” means the Boise Broadline Divestiture Assets, the Fargo Broadline Divestiture Assets, and the Kent Broadline Divestiture Assets.
- F. “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 issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- G. “Monitor” means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph VIII. of the Decision and Order or Paragraph V. of this Order to Maintain Assets.
- H. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.

II.

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

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Broadline Divestiture Assets, and shall not cause the wasting or deterioration of any of the Broadline Divestiture Assets. Respondents shall not cause the Broadline Divestiture Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Broadline Divestiture Assets.
- B. Respondents shall conduct the business of the Broadline Divestiture Assets in the regular and ordinary course of business, in accordance with past practice

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(including regular repair and maintenance efforts), and otherwise direct and ensure this result, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Broadline Divestiture Assets in the regular and ordinary course of business, in accordance with past practice.

- C. Respondents shall not terminate the operation of any of the Broadline Divestiture Assets, and shall continue to maintain the Broadline Distribution Assets related to each of the Broadline Distribution Centers in the regular and ordinary course of business, in accordance with past practice.
- D. Respondents shall maintain the organization and properties of each of the Broadline Distribution Centers, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Broadline Distribution Centers. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:
 - 1. Maintain all operations at each of the Broadline Distribution Centers in the regular and ordinary course of business, in accordance with past practice, including maintaining customary hours of operation and departments;
 - 2. Use best efforts to retain employees at each of the Broadline Distribution Centers; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not transfer any employees from any of the Broadline Distribution Centers;
 - 3. Provide each employee of the Broadline Distribution Centers with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Broadline Distribution Centers;
 - 4. Not transfer any Broadline Distribution Assets from any Broadline Distribution Center, other than in the ordinary course of business, in accordance with past practice;
 - 5. Make all payments required to be paid under any Contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Broadline Distribution Centers, in each case in a manner in accordance with past practice;
 - 6. Maintain the Business Information of each of the Broadline Distribution Centers;
 - 7. Provide each of the Broadline Distribution Centers with sufficient working capital to operate at least at current rates of operation, to meet all capital

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calls with respect to the related Broadline Distribution Business, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Broadline Distribution Centers;

8. Continue, at least at their scheduled pace, any additional expenditures for each of the Broadline Distribution Centers authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;
 9. Provide such resources as are necessary to respond to competition and to prevent any diminution in sales at each of the Broadline Distribution Centers;
 10. Make available for use by each of the Broadline Distribution Centers funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Broadline Distribution Centers;
 11. Provide support services to each of the Broadline Distribution Centers at least at the level as were being provided to such Broadline Distribution Centers by Respondents as of the date the Consent Agreement was signed by Respondents; and
 12. Maintain, and not terminate or permit the lapse of, any Governmental Authorizations necessary for the operation of any Broadline Distribution Center.
- E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Broadline Divestiture Assets as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that Respondents obtain no Confidential Business Information relating to the Broadline Divestiture Assets, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

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

- A. Respondents shall cooperate with and assist each Acquirer, when applicable, to evaluate and retain any and all Relevant Employees necessary to operate the Broadline Divestiture Assets in substantially the same manner as Respondents prior to the divestiture, including but not limited to:

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1. Within a reasonable time, but in no event later than 20 days after a request from an Acquirer, Respondents shall (i) identify all Relevant Employees, (ii) allow the Acquirer to inspect the personnel files and other documentation of all Relevant Employees, to the extent permissible under applicable laws, and (iii) allow the Acquirer, to the extent permitted by law, an opportunity to meet personally with and interview any Relevant Employee outside the presence or hearing of any employee or agent of Respondents;
 2. Respondents shall (i) not offer any incentive to any Relevant Employee to decline employment with the Acquirer, (ii) remove any contractual impediments that may deter any Relevant Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provision of employment or other Contracts with Respondents that would affect the ability of such employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Relevant Employee by the Acquirer; and
 3. Respondents shall, to the extent permissible by law, (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Relevant Employee who accepts an offer of employment from the Acquirer and (ii) provide each Relevant Employee with reasonable financial incentive, including continuation of all employee benefits and regularly scheduled raises and bonuses, as necessary to accept offers of employment with the Acquirer.
- B. For a period of 2 years after the Divestiture Date, Respondents shall not solicit or induce any Relevant Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however*, that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Relevant Employees; (ii) hire Relevant Employees if employment has been terminated by an Acquirer, or who apply for employment with Respondents, so long as such Relevant Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Relevant Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Relevant Employee, or where such an offer has been made and the Relevant Employee has declined the offer.

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

- A. Respondents shall (i) not disclose, directly or indirectly, (including as to Respondents' employees) Confidential Business Information to any Person other than (a) the relevant Acquirer; (b) other Persons authorized by that Acquirer or

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staff of the Commission to receive such information; (c) the Commission; (d) the Monitor; and (e) the Divestiture Trustee if one is appointed; and (ii) not use for any reason or purpose any Confidential Business Information received or maintained by Respondents relating to the Broadline Divestiture Assets and/or Broadline Distribution Centers; *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under this Order to Maintain Assets, the Decision and Order, or the Divestiture Agreements; or
 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Broadline Divestiture Assets or Broadline Distribution Centers, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.
- D. Prior to the Acquisition Date, Respondents shall (i) not use or disclose, and as applicable, destroy all records of DMA Confidential Business Information as instructed by DMA, including but not limited to, information related to DMA operations, governance, Third Party relationships, capabilities, business plans, strategies, and projections; and (ii) certify in the subsequent compliance report submitted to the Commission that all DMA Confidential Business Information has been destroyed, and (iii) provide notice to DMA of the same; *provided, however*, (1) DMA Confidential Business Information that is necessary to fulfill Respondents' ongoing obligations to customers shall not be destroyed until such time that it is no longer necessary to fulfill such obligations, and (2) as of the Acquisition Date, all copies of DMA Contracts shall be in the sole custody of the legal department of Respondents, which shall release information to other employees of Respondents only as needed to fulfill Respondents' ongoing obligations to customers. Respondents may retain a copy of DMA Confidential Business Information in accordance with internal policies and procedures for

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legal, regulatory and compliance purposes, and may disclose or use such DMA Confidential Business Information for the purpose of complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcement actions threatened or brought against the Broadline Divestiture Assets or Broadline Distribution Centers, or as required by law. *Provided further, however*, at the Acquirer's option, any DMA Confidential Business Information relating to the Broadline Distribution Center transferred to the requesting Acquirer shall be transferred to that Acquirer by Respondent FSA prior to being destroyed. Notice of the destruction of DMA Confidential Business Information shall be provided to DMA in writing and a copy shall be sent to the staff of the Federal Trade Commission.

V.

IT IS FURTHER ORDERED that:

- A. Bradford A. Wise shall be appointed Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders.
- B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix 1 (Monitor Agreement) and Non-Public Appendix A (Monitor Compensation) to the Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of the Orders.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the Consent of US Foods, which Consent shall not be unreasonably withheld. If US Foods has not opposed, in writing, including the reasons for opposing, the selection of a proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to US Foods of the identity of any proposed substitute Monitor, US Foods shall be deemed to have Consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, US Foods shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of the Orders and the Divestiture Agreements in a manner consistent with the purposes of the Orders.
- D. 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 terms of the Orders and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and

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responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission, including, but not limited to:

- a. Assuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by the Orders, and the Divestiture Agreements;
 - b. Monitoring any Transition Assistance and transition services agreements; and
 - c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirers, except as allowed in the Orders.
2. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in the Orders and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of the Orders and the Divestiture Agreements.
4. 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 Respondents' compliance with their obligations under the Orders and the Divestiture Agreements. 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 the Orders and the Divestiture Agreements.
5. 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.
6. 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

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connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondents shall report to the Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor, including any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Orders and the Divestiture Agreements.
 8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning the performance by Respondents of their obligations under this Order, and the Divestiture Agreements.
 9. 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*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor pursuant to Paragraph V.C., above.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders and the Divestiture Agreements.
- H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the Order.

VI.

IT IS FURTHER ORDERED that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a

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verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all the provisions of this Order to Maintain Assets; *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 required to be submitted by Respondents pursuant the Decision and Order. Respondents shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor. Respondents shall include in its reports, among other things that are required from time to time, a full description of the efforts to comply with this Order.

VII.

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

- A. Any proposed dissolution of Respondent US Foods;
- B. Any proposed acquisition, merger, or consolidation of Respondent US Foods;
- C. Any other change in Respondents, 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.

VIII.

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

- A. Access, during business hours of such 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 such Respondent 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 such Respondent; and
- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

Decision and Order

IX.

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

- A. Three 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 Respondents or a Divestiture Trustee completes the divestiture required by the Decision and Order; *provided, however*, that, if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate the day after the Decision and Order becomes final;
- C. The day after Respondents, with the concurrence of the Acquirer, certifies in writing to the Commission as to the completion of all Transition Assistance provided by Respondents to the Acquirer; or
- D. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent US Foods Holding Corp. (“US Foods”) of certain subsidiaries of Respondent Services Group of America, Inc. (“SGA”), including SGA’s Food Services of America, Inc. (“FSA”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3)

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waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent US Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 9399 W. Higgins Road, Suite 100, Rosemont, Illinois, 60018.
2. Respondent SGA is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 16100 N. 71st St., Suite 500, Scottsdale, Arizona, 85254.
3. Respondent FSA is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 16100 N. 71st St., Suite 400, Scottsdale, Arizona, 85254. Respondent FSA is a subsidiary of Respondent SGA.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and this proceeding is in the public interest.

ORDER**I. Definitions**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "US Foods" means US Foods Holding Corp., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by US Foods Holding Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the date the Acquisition is completed, "US Foods" includes FSA, and the following other SGA subsidiaries: Amerifresh, Inc., Ameristar Meats, Inc., Gampac Express, Inc., and Systems Services of America, Inc.

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- B. “SGA” means Services Group of America, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Services Group of America, Inc. (including, but not limited to, FSA, Amerifresh, Inc., Ameristar Meats, Inc., Gampac Express, Inc., and Systems Services of America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “FSA” means Food Services of America, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Food Services of America, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Acquirer” means each Person approved by the Commission to acquire, respectively, the Boise Broadline Divestiture Assets, the Fargo Broadline Divestiture Assets, and the Kent Broadline Divestiture Assets pursuant to this Order.
- E. “Acquisition” means the acquisition by US Foods of certain subsidiaries of SGA, as described in, and contemplated by, the Stock Purchase Agreement by and between US Foods, Inc., Services Group of America, Inc., Amerifresh, Inc., Ameristar Meats, Inc., Food Services of America, Inc., Gampac Express, Inc., Systems Services of America, Inc., and US Foods Holding Corp., dated July 28, 2018.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.
- G. “Boise Broadline Divestiture Assets” means the Broadline Distribution Assets relating to the Boise Distribution Center; *provided, however*, that if the Boise Broadline Divestiture Assets are divested to Shamrock pursuant to the Shamrock Divestiture Agreement, then the Boise Broadline Divestiture Assets shall not include those assets excluded by the Shamrock Divestiture Agreement, which is attached to this Order as Non-Public Appendix 3; *provided further, however*, that the Contract with each Boise Multi-Location Customer assigned to Shamrock pursuant to the Shamrock Divestiture Agreement shall provide Shamrock all of the customer ship-to location(s) historically serviced out of the Boise Distribution Center for each such Boise Multi-Location Customer.
- H. “Boise Distribution Center” means the distribution center located at 1495 North Hickory, Meridian, Idaho, 83642.
- I. “Boise Multi-Location Customer” means any customer who, as of the Divestiture Date, is serviced by Respondent FSA out of the Boise Distribution Center and is also serviced by Respondent FSA out of at least one other distribution center that is not the Boise Distribution Center; *provided, however*, the term “Boise Multi-

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Location Customer” shall exclude any customer excluded pursuant to the Shamrock Divestiture Agreement.

- J. “Brands” means all of Respondent FSA’s trademarks, trade dress, logos, service marks, trade names, brand names, and all of Respondent FSA’s rights to any Third Party proprietary names and marks.
- K. “Broadline Distribution Assets” means all of Respondents’ rights, title, and interest in and to all assets, tangible or intangible, of whatever nature and wherever located, primarily relating to or used in connection with: (i) a specified Broadline Distribution Center, including both (a) assets removed and not replaced after the announcement of the Acquisition and (b) Designated Distribution Assets; and (ii) the operation of a Broadline Distribution Business associated with that Broadline Distribution Center (including Software).
- L. “Broadline Distribution Business” means the purchasing, stocking, warehousing, logistics planning, marketing, advertising, delivery, distribution, and sale of a broad array of foodservice products, including private label offerings, and the provision of related value-added services in, from, and relating to a specified Broadline Distribution Center.
- M. “Broadline Distribution Center(s)” means the following distribution centers owned and operated by Respondents:
 - 1. Boise Distribution Center;
 - 2. Fargo Distribution Center; and
 - 3. Kent Distribution Center.
- N. “Broadline Divestiture Assets” means the following:
 - 1. Boise Broadline Divestiture Assets;
 - 2. Fargo Broadline Divestiture Assets; and
 - 3. Kent Broadline Divestiture Assets.
- O. “Business Information” means all books, records, and data, wherever located and however stored, used in the Broadline Distribution Business, including documents, written information, graphic materials, and data and information in electronic format, along with unwritten knowledge of employees, contractors, and representatives. Business Information includes records and information relating to research and development, manufacturing, process technology, production, sales, marketing, logistics, advertising, creative material, personnel, accounting, business strategy, business processes and practices, information technology

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systems, management systems, suppliers, procurement practices, bidding practices, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, policies and procedures, food safety, handling and recalls, and all other aspects of the Broadline Distribution Business. For clarity, Business Information includes all of Respondents' rights and control over information and material provided to any other Person.

- P. "Cash-Wa" means Cash-Wa Distributing Co. of Kearney, Inc., a corporation organized, existing, and doing business under and by virtue of the state of Nebraska with its executive offices and principal place of business located at 401 West 4th Street, Kearney, Nebraska, 68847.
- Q. "Cash-Wa Divestiture Agreement" means the Asset Purchase Agreement by and among Cash-Wa Distributing Co. of Kearney, Inc., Food Services of America, Inc., US Foods, Inc. and US Foods Holding Corp. dated June 24, 2019. The Cash-Wa Divestiture Agreement is attached to this Order as Non-Public Appendix 1.
- R. "Commission" means the Federal Trade Commission.
- S. "Confidential Business Information" means any non-public Business Information relating to the Broadline Divestiture Assets:
1. Obtained by Respondents prior to the Divestiture Date; or
 2. Obtained by Respondent US Foods after the Divestiture Date, in the course of performing Respondent US Foods' obligations under any Divestiture Agreement (including the provision of any Transition Assistance);
- Provided, however,* that Confidential Business Information shall not include information that:
1. Was, is, or becomes generally available to the public other than as a result of a breach of this Order;
 2. Was or is developed independently of and without reference to any Confidential Business Information; or
 3. Was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.
- T. "Consent" means any approval, consent, ratification, waiver, or other authorization.

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U. “Contract” means a contract, lease, sub-lease, or other agreement or obligation, whether written or unwritten.

V. “Designated Distribution Assets” means:

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
2. Tangible personal property (other than inventories or accounts receivable), owned or leased as of the date the Acquisition was announced (or equivalent replacements), including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, and vehicles, together with all express or implied warranties by manufacturers, sellers, or lessors, and all maintenance records and operating manuals;
3. Intangible rights and property, including Intellectual Property, owned, used, or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, telecopy and telephone listings, domain names, internet sites, web portals, and social media accounts;
4. Inventories and accounts receivable;
5. Business Information; *provided, however*, Respondents may retain a copy of Business Information as required or necessary for use in Respondents’ retained businesses or for legal, regulatory, and compliance purposes;
6. Contracts, and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto; *provided, however*, that Replacement Contracts may be substituted for Shared Contracts;
7. Governmental Authorizations and all pending applications therefor or renewals thereof;

Provided, however, that Designated Distribution Assets need not include:

1. Corporate, business, or other names of Respondents or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof, *provided, however*, at the request of an Acquirer, use of such names shall be permitted on a transitional basis;
2. Software that Respondents have not materially modified (other than through user preference settings) and that an Acquirer can readily purchase or license from sources other than Respondents;

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3. Enterprise software that Respondent FSA also uses in businesses other than the Broadline Distribution Business;
 4. The portion of any books and records that contains information about any business other than the relevant Broadline Distribution Business divested to an Acquirer;
 5. Any original document that the Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the records and shall provide an Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes;
 6. Assets that are specifically identified as excluded assets in a Divestiture Agreement that is approved by the Commission unless necessary for an Acquirer operate the relevant Broadline Distribution Business.
- W. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to an Acquirer for the labor of a Respondent’s employees shall not exceed the then-current average wage rate for such employee, including benefits.
- X. “Divestiture Agreement” means any agreement between Respondents (other than Respondent SGA after the Acquisition Date) (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer, including all amendments, exhibits (including the related transition services agreement), attachments, and schedules thereto, to purchase Broadline Divestiture Assets, that has been approved by the Commission to accomplish the requirements of this Order, including the following:
1. The Shamrock Divestiture Agreement;
 2. The Cash-Wa Divestiture Agreement; and
 3. The Harbor Divestiture Agreement.
- Y. “Divestiture Date” means the date on which each divestiture required by this Order is completed.
- Z. “Divestiture Trustee” means the person appointed pursuant to Paragraph IX of this Order.
- AA. “DMA” means Distribution Market Advantage, Inc. a for profit corporation, organized, existing and doing business under and by the virtue of the laws of

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Illinois with its executive offices and principal place of business located at 1515 E. Woodfield Road, Suite 600, Schaumburg, Illinois 60173.

BB. “DMA Broadline Distribution Customer” means a customer (i) with a Contract for broadline foodservice distribution with DMA as of the Acquisition Date; and (ii) for which DMA had submitted a bid or otherwise engaged in negotiations to provide broadline foodservice distribution anytime since January 1, 2018.

CC. “DMA Confidential Business Information” means any non-public books, records, and data, along with unwritten knowledge of employees, in the possession or control of Respondent SGA or Respondent FSA relating to DMA;

Provided, however, that DMA Confidential Business Information shall not include information that:

1. Was, is, or becomes generally available to the public other than as a result of a breach of this Order;
2. Was or is developed independently of and without reference to any DMA Confidential Business Information; or
3. Was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

DD. “Fargo Broadline Divestiture Assets” means the Broadline Distribution Assets relating to the Fargo Distribution Center; *provided, however,* that if the Fargo Broadline Divestiture Assets are divested to Cash-Wa pursuant to the Cash-Wa Divestiture Agreement, then the Fargo Broadline Divestiture Assets shall not include those assets excluded by the Cash-Wa Divestiture Agreement, which is attached to this Order as Non-Public Appendix 1; *provided further, however,* that the Contract with each Fargo Multi-Location Customer assigned to Cash-Wa pursuant to the Cash-Wa Divestiture Agreement shall provide Cash-Wa all of the customer ship-to location(s) historically serviced out of the Fargo Distribution Center for each such Fargo Multi-Location Customer.

EE. “Fargo Distribution Center” means the distribution center located at 4101 15th Ave., NW, Fargo, North Dakota, 58102.

FF. “Fargo Multi-Location Customer” means any customer who, as of the Divestiture Date, is serviced by Respondent FSA out of the Fargo Distribution Center and was also serviced by Respondent FSA out of at least one other distribution center that is not the Fargo Distribution Center; *provided, however,* the term “Fargo Multi-Location Customer” shall exclude any customer excluded pursuant to the Cash-Wa Divestiture Agreement.

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- GG. “Governmental Authorization” means any license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.
- HH. “Harbor” means Harbor Foodservice of Seattle LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of Washington with its executive offices and principal place of business located at 3901 Hogum Bar Road, NE, Lacey, Washington 98516.
- II. “Harbor Divestiture Agreement” means the asset purchase agreement by and among Harbor Foodservice of Seattle LLC, Food Services of America, Inc., US Foods, Inc. and Harbor Wholesale Grocery Inc. dated May 7, 2019. The Harbor Divestiture Agreement is attached to this Order as Non-Public Appendix 2.
- JJ. “Intellectual Property” means, without limitation, all:
1. Patents, patent applications, and inventions and discoveries that may be patentable;
 2. Know-how, trade secrets, Software, technical information, data, registrations, applications for Governmental Authorization, inventions, processes, best practices, formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information; and
 3. Rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- KK. “Kent Broadline Divestiture Assets” means the Broadline Distribution Assets relating to the Kent Distribution Center; *provided, however*, that if the Kent Broadline Divestiture Assets are divested to Harbor pursuant to the Harbor Divestiture Agreement, then the Kent Broadline Divestiture Assets shall not include those assets excluded by the Harbor Divestiture Agreement, which is attached to this Order as Non-Public Appendix 2.
- LL. “Kent Distribution Center” means the distribution center located at 18430 East Valley Highway, Kent, Washington, 98032.
- MM. “Monitor” means the Person appointed as Monitor in this Order.
- NN. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

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- OO. “Relevant Employees” means any and all full-time employees, part-time employees, or contract employees, who were employed by or under contract with the Broadline Distribution Business at any time during the ninety (90) days preceding the Acquisition Date or at any time after the Acquisition Date, and whose duties relate or related to the Broadline Distribution Business.
- PP. “Relevant Notice Area” means the areas identified in Non-Public Appendix 4 to this Order.
- QQ. “Replacement Contracts” means Contracts entered into by Respondents in advance of the Divestiture Date that: (i) replace Shared Contracts with separate Contracts for a Broadline Distribution Center included within the Broadline Divestiture Assets; and (ii) provide the associated Broadline Distribution Business with no less favorable terms, services, and economic benefits that would have been under the Shared Contracts.
- RR. “Respondents” means US Foods, SGA, and FSA, collectively and individually.
- SS. “Shamrock” means Shamrock Foods Company, a company organized, existing, and doing business under and by virtue of the laws of Arizona with its executive offices and principal place of business located at 3900 E. Camelback Road, Suite 300, Phoenix, Arizona 85018.
- TT. “Shamrock Divestiture Agreement” means the Asset Purchase Agreement by and among Shamrock Foods Company, Food Services of America, Inc. and US Foods, Inc. dated June 24, 2019. The Shamrock Divestiture Agreement is attached to this Order as Non-Public Appendix 3.
- UU. “Shared Contracts” means Contracts that relate to both (i) a Broadline Distribution Business associated with a Broadline Distribution Center that is included within the Broadline Divestiture Assets and (ii) other businesses retained by Respondents.
- VV. “Shared Intellectual Property” means Respondent’s FSA Intellectual Property (other than trademarks and domain names) that, prior to the Divestiture Date, is used by both the Broadline Distribution Business and Respondents’ retained businesses.
- WW. “Shared Intellectual Property License” means a perpetual, non-exclusive, fully paid-up, irrevocable, and royalty-free license(s) to use any Shared Intellectual Property to operate a Broadline Distribution Business.
- XX. “Software” means computer programs related to the Broadline Distribution Business, including all software implementations of algorithms, models, and methodologies, whether in source code or object code form, firmware (permanent software programmed into a read-only memory), middleware (software that acts

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as a bridge between an operating system or database and applications), databases and compilations (including any and all data and collections of data), applications, and all associated documentation (including user manuals and training materials). Software includes any data mining technology used to track customer ordering and delivery patterns.

- YY. “Third Parties” means Persons other than Respondents or the Acquirer(s).
- ZZ. “Transition Assistance” means services, assistance, cooperation, training, and access to personnel regarding the transfer and operation of the Broadline Distribution Business, including, but not limited to, accounting and finance, human resources (including employee benefits, payroll), information technology and systems, logistics (including purchasing, distribution, warehousing, supply chain management), manufacturing, quality control, operating permits and licenses, regulatory compliance, governmental regulation, research and development, and sales and marketing (including customer service, and customer transfer logistics), the use of Respondent FSA’s Brands for transitional purposes, as well as providing assistance in acquiring and obtaining access to all Software used in the provision of such services.

II. Divestitures

IT IS FURTHER ORDERED that:

- A. Respondent US Foods shall divest, no later than 30 business days after the Acquisition Date, absolutely, and in good faith each of the following:
1. The Boise Broadline Divestiture Assets, as an on-going business, to Shamrock pursuant to the Shamrock Divestiture Agreement;
 2. The Fargo Broadline Divestiture Assets, as an on-going business, to Cash-Wa pursuant to the Cash-Wa Divestiture Agreement; and
 3. The Kent Broadline Divestiture Assets, as an on-going business, to Harbor pursuant to the Harbor Divestiture Agreement;

Provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Shamrock, Cash-Wa, or Harbor is not an acceptable Acquirer, then, after receipt of such written notification, Respondents shall: (1) immediately notify each such Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, rescind the relevant Divestiture Agreement(s); and (2) within six (6) months of the date Respondents receive notice of such determination from the Commission, divest the Boise Broadline Divestiture Assets, Fargo Broadline Divestiture Assets, or Kent Broadline Divestiture Assets, as applicable, absolutely and in good faith, at no minimum price, as on-going

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businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

Provided further, however, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. At the request of an Acquirer, no later than the Divestiture Date, Respondent FSA shall grant a Shared Intellectual Property License to each such Acquirer to use Shared Intellectual Property to operate the relevant Broadline Distribution Business, including by extending existing services, developing new products and services, and expanding, constructing, or operating additional distribution facilities; and with respect to any Software included in the Shared Intellectual Property that is being used by the Acquirer during the period in which Respondent US Foods is providing Transition Assistance, such Software shall include rights to all updates and improvements made to such Software during the time that the Respondent US Foods is providing Transition Assistance to the Acquirer.
- C. No later than each Divestiture Date, Respondent US Foods shall, at its sole expense:
 - 1. Obtain any Consents necessary to permit Respondents to divest the relevant Broadline Divestiture Assets, including Contracts and Governmental Authorizations, to an Acquirer, and to permit the Acquirer to continue the Broadline Distribution Business without interruption or impairment; or
 - 2. Assist the Acquirer in obtaining any Contracts or Governmental Authorizations which Respondents have no legal right to assign, transfer, or sublicense;

Provided, however, Respondent US Foods may satisfy this requirement by certifying that the Acquirer has obtained all such Consents directly with each of the relevant Third Parties.

- D. Respondents shall cooperate and assist each Acquirer (or any other Person with whom Respondents engage in negotiations to acquire the Broadline Divestiture Assets) with a due diligence investigation of the Broadline Divestiture Assets and Broadline Distribution Business, including by providing sufficient and timely

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access to all information and employees customarily provided as part of a due diligence process.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

- A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of any Divestiture Agreement shall constitute a violation of this Order.
- B. The Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in a Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.
- C. Respondents shall not modify, replace, or extend the terms of any Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Confidential Business Information

IT IS FURTHER ORDERED that:

- A. Respondents shall (i) not disclose, directly or indirectly, (including as to Respondents' employees) Confidential Business Information to any Person other than (a) the relevant Acquirer; (b) other Persons authorized by that Acquirer or staff of the Commission to receive such information; (c) the Commission; (d) the Monitor; and (e) the Divestiture Trustee if one is appointed; and (ii) not use for any reason or purpose any Confidential Business Information received or maintained by Respondents relating to the Broadline Divestiture Assets or Broadline Distribution Centers; *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:
 - 1. Performing their obligations or as permitted under the Order to Maintain Assets, the Decision and Order, or the Divestiture Agreements; or
 - 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Broadline Divestiture Assets or Broadline Distribution Centers, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A of this Order, Respondents shall limit such disclosure or use (i) only to the extent such

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information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A, and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

- C. Respondents shall enforce the terms of this Paragraph IV as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV, including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.
- D. Prior to the Acquisition Date, Respondents shall (i) not use or disclose, and as applicable, destroy all records of DMA Confidential Business Information as instructed by DMA, including but not limited to, information related to DMA operations, governance, Third Party relationships, capabilities, business plans, strategies, and projections; and (ii) certify in the subsequent compliance report submitted to the Commission that all DMA Confidential Business Information has been destroyed, and (iii) provide notice to DMA of the same; *provided, however*, (1) DMA Confidential Business Information that is necessary to fulfill Respondents' ongoing obligations to customers shall not be destroyed until such time that it is no longer necessary to fulfill such obligations, and (2) as of the Acquisition Date, all copies of DMA Contracts shall be in the sole custody of the legal department of Respondents, which shall release information to other employees of Respondents only as needed to fulfill Respondents' ongoing obligations to customers. Respondents may retain a copy of DMA Confidential Business Information in accordance with internal policies and procedures for legal, regulatory and compliance purposes, and may disclose or use such DMA Confidential Business Information for the purpose of complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcement actions threatened or brought against the Broadline Divestiture Assets or Broadline Distribution Centers, or as required by law. *Provided further, however*, at the Acquirer's option, any DMA Confidential Business Information relating to the Broadline Distribution Center transferred to the requesting Acquirer shall be transferred to that Acquirer by Respondent FSA prior to being destroyed. Notice of the destruction of DMA Confidential Business Information shall be provided to DMA in writing and a copy shall be sent to the staff of the Federal Trade Commission.

V. Asset Maintenance

IT IS FURTHER ORDERED that from the date Respondents sign the Consent Agreement until the Divestiture Date, Respondents shall:

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- A. Maintain each of the Broadline Distribution Centers and all Broadline Distribution Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents signed the Consent Agreement;
- B. Take such actions that are consistent with the past practices of Respondents in connection with each Broadline Distribution Center and all the Broadline Distribution Assets, and that are taken in the ordinary course of business and in the normal day-to-day operations of the Broadline Distribution Centers;
- C. Keep available the services of the current officers, employees, and agents of Respondents; and maintain the relations and goodwill with suppliers, landlords, customers, employees, agents, and others having business relations with the Broadline Distribution Centers and the Broadline Distribution Assets; and
- D. Preserve the Broadline Distribution Centers and Broadline Distribution Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, or marketability of the Broadline Distribution Centers and Broadline Distribution Assets would be diminished.

The purposes of this Paragraph V are to: (1) preserve the Broadline Distribution Assets as viable, competitive, and ongoing businesses until the Divestiture Date, (2) prevent interim harm to competition pending the relevant divestitures and other relief, and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

VI. Employees

IT IS FURTHER ORDERED that:

- A. Respondents shall cooperate with and assist each Acquirer, when applicable, to evaluate and retain any and all Relevant Employees necessary to operate the Broadline Divestiture Assets in substantially the same manner as Respondents prior to the divestiture, including but not limited to:
 - 1. Within a reasonable time, but in no event later than 20 days after a request from an Acquirer, Respondents shall (i) identify all Relevant Employees (ii) allow the Acquirer to inspect the personnel files and other documentation of all Relevant Employees, to the extent permissible under applicable laws, and (iii) allow the Acquirer, to the extent permitted by law, an opportunity to meet personally with and interview any Relevant Employee outside the presence or hearing of any employee or agent of Respondents;
 - 2. Respondents shall (i) not offer any incentive to any Relevant Employee to decline employment with the Acquirer, (ii) remove any contractual impediments that may deter any Relevant Employee from accepting

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employment with the Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other Contracts with Respondents that would affect the ability of such employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Relevant Employee by the Acquirer; and

3. Respondents shall, to the extent permissible by law, (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Relevant Employee who accepts an offer of employment from the Acquirer and (ii) provide each Relevant Employee with reasonable financial incentive, including continuation of all employee benefits and regularly scheduled raises and bonuses, as necessary to accept offers of employment with the Acquirer.

Provided, however, that this Paragraph does not require, nor shall it be construed to require, any Respondent to terminate the employment of any employee or to prevent Respondents from continuing to employ any Relevant Employee(s) in connection with the Acquisition or the divestiture of the Broadline Divestiture Assets.

- B. For a period of 2 years after the Divestiture Date, Respondents shall not solicit or induce any Relevant Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Relevant Employees; (ii) hire Relevant Employees if employment has been terminated by an Acquirer, or who apply for employment with Respondents, so long as such Relevant Employees were not solicited by Respondents in violation of this Paragraph; or (iii) hire any Relevant Employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that Relevant Employee, or where such an offer has been made and the Relevant Employee has declined the offer.

VII. Transition Assistance

IT IS FURTHER ORDERED that Respondents shall:

- A. Provide the Acquirer(s) with Transition Assistance (i) to efficiently transfer the relevant Broadline Divestiture Assets to each Acquirer and (ii) to operate the relevant Broadline Divestiture Assets and Broadline Distribution Business in a manner equivalent in all material respects to the manner in which Respondents operated the Broadline Divestiture Assets and Broadline Distribution Business prior to the Acquisition, including the ability to develop new products, increase sales of current products, make reasonable modifications to the relevant Broadline Distribution Business, and maintain the competitiveness of the relevant Broadline Distribution Business;

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- B. Provide Transition Assistance:
1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);
 2. At the price set forth in a Divestiture Agreement, or if no price is set forth, at Direct Cost; and
 3. For a period sufficient to meet the requirements of this Paragraph, which shall be at least 24 months after the Divestiture Date, *provided however*, that for any Transition Assistance for the use of Respondent FSA's Brands, the applicable period shall be 12 months after the Divestiture Date;
- C. Allow the Acquirer to terminate at any time, in whole or in part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty;
- D. At an Acquirer's request, file with the Commission a written request to extend the time period of any such Transition Assistance; and
- E. Not cease providing Transition Assistance due to a breach by the Acquirer of a Divestiture Agreement and not seek to limit any damages (such as indirect, special, and consequential damages) which the Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to the provision of Transition Assistance.

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

- A. Bradford A. Wise shall be appointed Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order.
- B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix 1 (Monitor Agreement) and Non-Public Appendix A (Monitor Compensation) to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the Consent of US Foods, which Consent shall not be unreasonably withheld. If US Foods has not opposed, in writing, including the reasons for opposing, the selection of a proposed substitute Monitor within ten

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(10) days after notice by the staff of the Commission to US Foods of the identity of any proposed substitute Monitor, US Foods shall be deemed to have Consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, US Foods shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. 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 terms of this Order and the Divestiture Agreements, 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, including, but not limited to:
 - a. Assuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by this Order, and the Divestiture Agreements;
 - b. Monitoring any Transition Assistance and transition services agreements; and
 - c. Assuring that Confidential Business Information is not received or used by Respondents or the Acquirers, except as allowed in this Order.
2. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order and the Divestiture Agreements.
4. 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 Respondents' compliance with their obligations under this Order and the Divestiture Agreements. Respondents shall cooperate with any reasonable request of the Monitor

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and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Divestiture Agreements.

5. 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.
 6. 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
 7. 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, including any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order and the Divestiture Agreements.
 8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning the performance by Respondents of their obligations under this Order, and the Divestiture Agreements.
 9. 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*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

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- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor pursuant to Paragraph VIII.C, above.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Divestiture Agreements.
- H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

IX. Divestiture Trustee**IT IS FURTHER ORDERED** that:

- A. If Respondents have not fully complied with the obligations imposed by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Broadline Distribution Assets, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall Consent to the appointment of a Divestiture Trustee in such action to divest the required assets. 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 Section 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, and stated in writing their 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.
 - 1. 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 effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

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2. 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:
 - a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.
 - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described in Paragraph IX.B to effectuate the required divestitures, 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 to divest, or believes the divestitures 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.
 - c. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. 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 caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
 - d. 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 minimum price. Each 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

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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.

- e. 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 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 all of the relevant assets that are required to be divested by this Order.
- f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.
- g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
- h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
- i. 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

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agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

- j. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.
- C. If the Commission determines that the 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 IX.
- D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

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

- A. Respondent US Foods shall not, without providing advance written notification to the Commission in the manner described in this Paragraph:
 - 1. Acquire any Third Party broadband distribution center in the Relevant Notice Area servicing broadband distribution customers; or
 - 2. Enter into any Contract to participate in the management, operation, or control of any Third Party broadband distribution center in the Relevant Notice Area serving broadband distribution customers.
- B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent US Foods and not of any other party to the transaction. Respondent US Foods shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the

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Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent US Foods shall not consummate the transaction until thirty (30) days after certifying substantial compliance with the request for additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph X for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

- A. Respondents shall:
 - 1. notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date, and
 - 2. submit each of the complete Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after each Divestiture Date.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
 - 1. An interim compliance report 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Paragraph II of this Order; and
 - 2. Additional compliance reports as the Commission or its staff may request.
- C. Respondent US Foods shall submit an annual compliance report one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date.
- D. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented, are implementing, or plan to implement to ensure that they have complied, are complying, or will comply with each paragraph of

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the Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.

- E. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondents

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

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

XIII. Access

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

- A. Access, during business hours of such 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 such Respondent 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 such Respondent; and

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- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of the divestiture is to ensure the continuation of the Broadline Distribution Businesses as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on November 15, 2029.

By the Commission.

NON-PUBLIC APPENDIX 1**Cash-Wa Divestiture Agreement****NON-PUBLIC APPENDIX 2****Harbor Divestiture Agreement****NON-PUBLIC APPENDIX 3****Shamrock Divestiture Agreement**

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NON-PUBLIC APPENDIX 4

Relevant Notice Area

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APPENDIX 1

[EXECUTION VERSION]

MONITOR AGREEMENT

This MONITOR AGREEMENT (this “**Agreement**”) entered into this 6th day of August 2019 by and between Brad Wise (the “**Monitor**”), and US Foods Holding Corp. (“**US Foods**” or “**Respondent**”) provides as follows:

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the “**Commission**”) is considering for public comment an Agreement Containing Consent Order with Respondent, which provides for, among other things, Respondent to divest certain assets and to engage a monitor to monitor Respondent’s compliance with its obligations under (a) the Decision and Order; (b) the Order to Maintain Assets; and (c) the Divestiture Agreement(s) (collectively, the “**Orders**”);

WHEREAS, the Commission is expected to issue the Agreement Containing Consent Order and appoint the Monitor pursuant to the Orders to monitor Respondent’s compliance with the terms of the Orders, and the Monitor has consented to such appointment;

WHEREAS, the Orders further provide that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights and powers necessary to permit the Monitor to carry out his duties and responsibilities pursuant to the Orders;

WHEREAS, this Agreement, although executed by the Monitor and Respondent, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or the Monitor under the Orders, until the Order to Maintain Assets has been issued and this Agreement has been approved by the Commission; and

WHEREAS, the parties to this Agreement intend to be legally bound by this Agreement, subject only to the Commission’s issuance of the Orders and approval of this Agreement.

DEFINITIONS

1. “**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.
2. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Orders.

ARTICLE I

1.1 Powers of Monitor. Subject to the terms of this Agreement, the Monitor shall have the rights, duties, powers and authority conferred upon the Monitor by the Orders that are necessary for the Monitor to monitor Respondent’s compliance with the Orders. As of

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one (1) day after the date the Acquisition is consummated, Respondent hereby transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities pursuant to the Orders and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify the Monitor's powers and authority or Respondent's obligations under the Orders.

1.2 **Exercise of Monitor's Power.** The Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture 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.

1.3 **Monitor's Duties.** The Monitor shall serve as an independent third party and not as an employee or agent of the Respondent or the Commission. The Monitor shall monitor Respondent's compliance with the Orders, including, but not limited to, assuring that Respondent timely complies with all of the obligations, and performs all of the responsibilities, of Respondent as required by the Orders in this matter.

1.4 **Duration of Monitor's Authority.** The Monitor shall have all powers, duties and responsibilities described above and consistent with the Orders for the term set forth in the Orders.

1.5 **Confidential and Proprietary Information.** This Agreement shall not affect the Confidentiality Agreement, dated as of July 29, 2019 (the "**Confidentiality Agreement**"), by and among the Monitor, Respondent and Services Group of America, Inc., which shall continue in full force and effect in accordance with the terms thereof. All information provided by Respondent, all business information of the Broadline Divestiture Assets, and all aspects of the performance of his duties under this Agreement shall be considered "Confidential Information" under the terms of the Confidentiality Agreement and shall be kept confidential by the Monitor in accordance with the terms thereof. Nothing in the Confidentiality Agreement restricts the Monitor from providing information to the Commission.

1.6 **Confidentiality of Commission Materials.** The Commission may 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.

1.7 **Restrictions.** The Monitor shall not be involved in any way in the management, distribution, production, supply and trading, logistics, sales, marketing, human resources and financial and other operations of Respondent that competes with the assets to be divested pursuant to [the Orders] except to the extent permitted by the Orders.

1.8 **Reports.** Respondent shall report to the Monitor in accordance with the requirements of the Orders. The Monitor shall evaluate the reports submitted by Respondent with

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respect to the performance of Respondent's obligations under the Order to Maintain Assets and the Decision and Order. Within thirty (30) days from the date the Monitor receives the first such report, and every thirty (30) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders and as otherwise requested by the Commission staff.

1.9 Access to Records, Documents and Facilities. Subject to any claim of legal privilege, the Monitor and any of the Persons permitted to be used or employed under Section 2.1 shall have full and complete access during normal business hours to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with the obligations of Respondent under the Orders. Respondent 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 Respondent's compliance with the Orders. The Monitor shall contact the persons listed in Exhibit B for any additional information.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. The Monitor shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities under this Agreement.

2.2 Compensation. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set in accordance with this Section 2.2. The Monitor shall be compensated by Respondent for its services under this Agreement, pursuant to the fee schedule attached hereto as Exhibit A and to the Decision and Order as Non-Public Appendix VIII-1 for time spent in connection with the discharge of his duties under this Agreement and the Orders. In addition, Respondent will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of his duties under the Orders in accordance with the terms hereof; and (b) fees reasonably incurred by the Monitor payable to any Person permitted to be used or employed by the Monitor pursuant to Section 2.1 in accordance with the fee schedule attached hereto as Exhibit A and out-of-pocket expenses reasonably incurred by such Persons in the performance of their duties in accordance with the terms hereof. At its own expense, Respondent may retain an independent auditor to verify such invoices. the Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitor submits an invoice to Respondent. Respondent shall pay such invoices within thirty (30) days of receipt. The Monitor shall retain fee and expense records for two years after the completion or termination of the Monitor's duties hereunder and shall make such records available to Respondent during normal business hours upon reasonable advance written notice. The Monitor shall cooperate in any verification audit of such records that Respondent may undertake; provided, however, that: (i) no such audit may occur more than once in any twelve (12) month period; and (ii) the Monitor shall have the right to approve any third party independent auditor used for any such audit, with such approval not to be unreasonably

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withheld. The Monitor and Respondent shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 Access to Temporary Workspace. To the extent available and needed, Respondent will provide the Monitor with temporary workspace at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. The Monitor agrees to comply with all of Respondent's safety and security regulations, instructions, and procedures while at Respondent's sites.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent shall indemnify the Monitor and any other Persons used or employed under Section 2.1 (collectively, "**Monitor Indemnified Persons**") and hold Monitor Indemnified Persons 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 preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, fraud, breach of confidentiality obligations, or bad faith by the Monitor Indemnified Persons. The Monitor's maximum liability to Respondent relating to services rendered in accordance with this Agreement (regardless of form of action, whether in contract, statutory law, or tort including without limitation negligence) shall be limited to an amount equal to the total sum of the fees paid to the Monitor by Respondent, except to the extent that such liability results from gross negligence, willful or wanton acts, fraud, breach of confidentiality obligations, or bad faith by the Monitor Indemnified Persons. In the performance of his duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person the performance of the duties under this Agreement. No party hereunder shall be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order, or requirement of any governmental agency or authority. The Monitor warrants that he will perform his obligations hereunder in good faith. Each party hereto disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the parties.

3.2 Disagreements or Disputes. In the event of a disagreement or dispute between Respondent and the Monitor, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Assistant Director of the Commission's Compliance Division to assist in resolving the issue. In the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. For the avoidance of doubt, each party shall have the right to appoint one arbitrator, and the two arbitrators so chosen shall select a third. Binding arbitration shall not be available, however, to resolve any

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disagreement or dispute concerning Respondent's obligations pursuant to any consent agreement entered by the Commission.

3.3 **Monitor's Removal.** If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in consultation with Respondent.

3.4 **Approval by the Commission.** This Agreement shall have no force or effect until approved by the Commission.

3.5 **Termination.** This Agreement shall terminate as of the earliest of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent's receipt of written notice from the Commission that the Commission has determined that the Monitor has ceased to act or failed to act diligently or is unwilling or unable to continue to serve as the Monitor; (c) with at least thirty (30) days' advance notice provided by the Monitor to Respondent and to the Commission, upon resignation of the Monitor; and (d) when Respondent's obligations under the Orders and the Divestiture Agreements that pertain to the Monitor's service have been fully performed; provided, however, that the Commission may require that Respondent extend this Agreement or enter into an additional agreement with the Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force.

3.6 **Conflicts of Interest.** If the Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of his duties under this Agreement, the Monitor shall promptly inform Respondent and the Commission of any such conflict.

3.7 **Governing Law.** This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of the State of New York (without giving effect to its conflicts of laws principles).

Analysis to Aid Public Comment

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

US FOODS HOLDING CORP.By: Name: Kristin ColemanTitle: EVP, General Counsel**BRAD WISE**By: Name: Brad Wise

Title: _____

NON-PUBLIC APPENDIX A**Monitor Compensation****ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from US Foods Holding Corp. ("USF"), and Services Group of America, Inc. ("SGA") (collectively, "Respondents"). The purpose of the Consent Agreement is to remedy the anticompetitive effects that otherwise would result from USF's acquisition of SGA's Food Group of Companies (the "Proposed Acquisition") in and around Boise, Idaho (hereafter

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"Eastern Idaho"), in and around Bismarck, North Dakota, (hereafter "Western North Dakota"), in and around Fargo, North Dakota (hereafter "Eastern North Dakota"), in and around Kent, Washington (hereafter the "Seattle Area"), and nationwide for multi-regional and national customers.

Among other things, the proposed Consent Agreement requires USF to divest certain of SGA's distribution centers and broadline distribution assets, including employees and tangible assets that are necessary to the operation of the businesses in Eastern Idaho, Western and Eastern North Dakota, and the Seattle Area to Shamrock Foods Co. ("Shamrock"), Cash-Wa Distributing ("Cash-Wa"), and Harbor Wholesale Foods ("Harbor"), respectively.

The Commission and the Respondents have also agreed to an Order to Maintain Assets. This order requires USF and SGA to maintain the assets that the Consent Agreement requires divestiture of, pending their divestiture. 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 market for broadline foodservice distribution in Eastern Idaho, Western North Dakota, Eastern North Dakota, the Seattle Area, and nationwide for multi-regional and national broadline distribution customers.

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

II. The Respondents and the Transaction

USF, headquartered in Rosemont, Illinois, is the second-largest distributor of food and food-related products in the United States. USF operates 61 distribution facilities throughout the United States, all of which provide broadline distribution, and some of which serve national chain customers (providing more of a systems-type service). In fiscal year 2017, USF generated approximately \$24 billion in sales to over 200,000 customers nationwide. Nearly \$6 billion of those sales were to independent (i.e., non-chain) restaurants.

Headquartered in Scottsdale, Arizona, Services Group of America, Inc. is a holding company made up of six operating companies. SGA is comprised of Food Services of America ("FSA"), a broadline foodservice distributor (notably, FSA is the only SGA business unit that generates competitive concern); Systems Services of America ("SSA"), a systems distributor; Amerifresh, a specialty produce distributor; Ameristar Meats, a specialty meat processor; and GAMPAC, a supply chain and logistics company. In fiscal year 2017, SGA generated approximately \$3.2 billion in sales. SGA has nine broadline distribution centers, three systems distribution centers, and three specialty facilities. FSA and SSA are members of Distribution Market Advantage ("DMA"), a supply chain and marketing cooperative owned by eight

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independent regional foodservice distributors who are also its members. Through DMA, FSA is able to serve national accounts in coordination with other large regional distributors.

On July 28, 2018, USF entered into a Stock Purchase Agreement with SGA. Pursuant to the agreement, USF will purchase all of the outstanding common stock of SGA's Food Group of Companies in an all-cash acquisition valued at \$1.8 billion.

III. Broadline Foodservice Distribution in Eastern Idaho, Western North Dakota, Eastern North Dakota, the Seattle Area, and Nationwide

Broadline foodservice distribution and broadline foodservice distribution to national customers are the relevant product markets in which to assess the effects of the Proposed Acquisition. Broadline foodservice distribution involves the sale and distribution of a broad range of national-brand and private-label food and foodservice-related products (such as paper towels, disposable cups, etc.) to a range of customers who serve food-away-from-home to consumers, such as restaurants, hospital cafeterias, stadiums, and schools. Broadline distributors offer customers a distinct combination of products and services that are not replicated by other foodservice distribution channels, including a wide array of stock keeping units (SKUs) to provide customers with product breadth and depth, a broad selection of private-label (i.e., distributor-branded) food products, a frequent and flexible delivery schedule (including next-day delivery), and other value-added services, such as order tracking, menu planning, and nutritional information. Customers value the ability to purchase this bundle of products and services from a single broadline distributor.

There are four local relevant geographic markets in which to analyze the transaction's effects: (1) Eastern Idaho, (2) Western North Dakota, (3) Eastern North Dakota, and (4) the Seattle Area. Competition to serve broadline customers plays out locally. The business of broadline distribution involves regularly loading food (much of which is perishable) and related items onto trucks, driving to customer locations, unloading the merchandise, and returning to the distribution center in time to repeat this process for the next day's deliveries. Customers, therefore, select from among broadline distributors within a reasonable radius of their location. Likewise, broadline distributors are limited in their distribution radius by cost and service considerations. USF and FSA compete from proximate distribution centers to serve customers in Eastern Idaho, Western North Dakota, Eastern North Dakota, and the Seattle Area, and these are thus appropriate geographic markets. FSA serves both North Dakota markets out of its Fargo distribution center, but other distributors serving the Eastern North Dakota market do not serve

Western North Dakota, and thus the competitive conditions are different and it is appropriate to define two geographic markets within the state.

USF and FSA compete closely to serve local broadline customers in Eastern Idaho, Western North Dakota, Eastern North Dakota, and the Seattle Area. The transaction would eliminate a key broadline distributor in each of these markets, limiting customers' ability to switch between distributors and leverage them in order to obtain more competitive pricing and better service. The few remaining competitors in the relevant markets would be insufficient to

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alleviate competitive concerns. As a result, the Proposed Acquisition will likely lead to higher prices and diminished service for local broadline customers in the four local markets.

The effects of the Proposed Acquisition must also be evaluated in the national market. Through its membership in a consortium of regional distributors, DMA, FSA competes with USF for the provision of broadline distribution services to multi-regional and national accounts. If DMA were to lose all of FSA's distribution centers from its network, it would be rendered a significantly less attractive competitor than it is today to many multi-regional and national customers. As a result, the Proposed Acquisition will likely result in higher prices and reduced quality and service to national customers.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the acquisition in the Eastern Idaho, Western North Dakota, Eastern North Dakota, Seattle Area, and national markets. The broadline foodservice distribution industry is capital and labor intensive, rendering entry challenging and time consuming, with significant operational and financial risks. Prospective entrants or expanders face three main obstacles: (1) developing the requisite sales forces and customer base; (2) establishing a properly outfitted distribution center, truck fleet, and driver base for operations and delivery; and (3) building the volume of perishable and non-perishable SKUs necessary to serve broadline customers. To overcome these hurdles, a new entrant or an adjacent company trying to expand must commit a tremendous amount of capital and time to develop relationships with potential customers, build or expand an existing facility, and assemble the equipment required for distribution in that area. Thus, due to the considerable time and investment required to build a functional broadline distribution operation in a new market, entry and expansion are unlikely to be timely, or sufficient to deter or counteract the Proposed Acquisition's anticompetitive effects.

IV. The Proposed Consent Agreement

The proposed Consent Order remedies the likely anticompetitive effects in each of the relevant markets by requiring divestitures to Shamrock, Cash-Wa, and Harbor within 30 days of the Proposed Acquisition's closing. Until the completion of each divestiture, the Respondents are required to abide by the Order to Maintain Assets, which requires them to maintain the viability, marketability, and competitiveness of the divestiture assets until the divestitures are completed. The proposed Consent Order appoints a Monitor to ensure the Respondents' compliance with the Order to Maintain Assets, Consent Order, and Divestiture Agreements in anticipation of and following the divestiture.

Additionally, the proposed Consent Order requires the Respondents to provide transitional services to the approved acquirer for at least 24 months after the divestiture, as needed, to assist the acquirer with the transfer and operation of the divested assets. Finally, the proposed Consent Order contains standard terms regarding the acquirer's access to employees, protection of Material Confidential Information, and compliance reporting requirements, among other things.

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A. Eastern Idaho

The proposed Consent Order remedies the likely anticompetitive effects in Eastern Idaho by requiring the divestiture of FSA's distribution center in Boise to Shamrock. The divestiture assets and rights include the distribution center and selected broadline distribution assets, including employees and tangible assets necessary to operate the business.

B. Western and Eastern North Dakota

The proposed Consent Order remedies the likely anticompetitive effects in both Western and Eastern North Dakota by requiring the divestiture of FSA's distribution center in Fargo to Cash-Wa. The divestiture assets and rights include the distribution center and selected broadline distribution assets, including employees and tangible assets necessary to operate the business.

C. The Seattle Area

The proposed Consent Order remedies the likely anticompetitive effects in the Seattle Area by requiring the divestiture of FSA's distribution center in Kent to Harbor. The divestiture assets and rights include the distribution center and selected broadline distribution assets, including employees and tangible assets necessary to operate the local broadline distribution business. Although the proposed Consent Order only requires USF to divest one of FSA's two Seattle-area broadline distribution centers, this remedy will prevent any increase in market concentration levels and preserve the status quo in the Seattle Area broadline distribution market because three major broadline distributors will remain.

D. National

The proposed Consent Order remedies the likely anticompetitive effects in the national market by replacing the loss of FSA from DMA's network with divestiture of the Kent, Boise, and Fargo distribution centers to three purchasers that are existing members of the DMA consortium. The divestiture assets and rights that Shamrock, Cash-Wa, and Harbor will acquire will enable each buyer to operate the local broadline distribution businesses in their respective local markets, but also to provide effective coverage to the DMA network in these regions so that DMA can continue to be an attractive option to, and effective competitor for, multi-regional and national customers.

The proposed Decision and Order will have a term of ten (10) years.

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The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

**DTE ENERGY COMPANY,
ENBRIDGE INC.,
III. AND
NEXUS GAS TRANSMISSION LLC**

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-4691; File No. 191 0068
Complaint, November 21, 2019 – Decision, November 21, 2019*

This consent order addresses the \$160 million acquisition by NEXUS Gas Transmission, LLC (“NGT”) of certain assets of Generation Pipeline LLC. The complaint alleges that the Transaction violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual and potential competition between NCGT and any other pipeline competitor in a market no broader than the pipeline transportation of natural gas to Lucas, Ottawa, and Wood counties in Ohio. The consent order requires Respondents to strike the Non-Compete from the purchase agreement and are prohibited from entering similarly anticompetitive agreements with their pipeline competitors in this market.

Participants

For the *Commission*: *Michael E. Blaisdell and Ashley Masters.*

For the *Respondents*: *Mike Cowie, Dechert, LLP; Joe Matelis, Sullivan Cromwell LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondent NEXUS Gas Transmission LLC, a joint venture between Respondents DTE Energy Company and Enbridge Inc., entered into a transaction to acquire Generation Pipeline LLC, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and which, if the acquisition is consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. RESPONDENTS

1. Respondent DTE Energy Company (“DTE”) is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Michigan with its executive offices and principal place of business located at One Energy Plaza, Detroit, Michigan, 48226.