

## Complaint

## IN THE MATTER OF

**ONE ROCK CAPITAL PARTNERS II, LP,  
FXI HOLDINGS, INC.,  
BAIN CAPITAL FUND XI, LP,  
AND  
INNOCOR, 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-4708; File No. 191 0087  
Complaint, February 21, 2020 – Decision, April 20, 2020*

This consent order addresses the \$850 million acquisition by FXI Holdings, Inc. of certain assets of Innocor Inc. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in several regional markets for low-density conventional polyurethane foam for home furnishing uses in the United States. The consent order requires the parties to divest foam-pouring plants located in Kent, Washington; Elkhart, Indiana; and Tupelo, Mississippi to Future Foam.

*Participants*

For the *Commission*: Cem Akleman, Llewellyn Davis, Josh Goodman, Joonsuk Lee, and Blake Risenmay.

For the *Respondents*: Amanda P. Reeves, Latham & Watkins LLP; Jonathan Klarfeld, Ropes & Gray.

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent FXI Holdings, Inc. (FXI), an indirect subsidiary of Respondent One Rock Capital Partners II, LP (One Rock) and Respondent Innocor, Inc. (Innocor), an indirect subsidiary of Respondent Bain Capital Fund XI, LP (Bain) (each a “Respondent” or collectively “Respondents”), have agreed to an acquisition, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENTS**

1. Respondent One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54th Floor, New York, NY 10112.

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2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.

3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.

4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.

## II. JURISDICTION

5. Respondents FXI and Innocor, 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.

## III. THE PROPOSED MERGER

6. Pursuant to an Agreement and Plan of Merger (the “Merger Agreement”) dated March 4, 2019, FXI and Innocor have agreed to a merger (the “Merger”) in which One Rock and Bain will own 74% and 26% of the combined firm, respectively.

## IV. THE RELEVANT PRODUCT MARKET

7. The relevant line of commerce in which to analyze the effects of the Merger is the sale of Low-Density Conventional Polyurethane Foam used in Home Furnishings (“Low-Density Foam”). Low-Density Foam, commonly referred to as “light and white” foam, is used as padding or cushioning in a variety of home furnishing products including mattresses, mattress toppers, pet beds, pillows, chairs, and couches. Customers do not have viable substitutes for Low-Density Foam.

## V. THE RELEVANT GEOGRAPHIC MARKETS

8. Regional geographic markets are appropriate here. Low-Density Foam is bulky to ship because it contains a significant amount of air, and freight costs can be expensive relative to the value of the product. Three relevant geographic markets—the Pacific Northwest, Midwest States, and Mississippi—are appropriate to analyze the probable effects of the Merger. The Pacific Northwest geographic market includes the states of Oregon and Washington and the Midwest States geographic market includes the states of Indiana, Michigan, and Ohio.

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**VI. MARKET STRUCTURE**

9. FXI and Innocor are two of only five major suppliers of Low-Density Foam in the United States.

10. In the Pacific Northwest, FXI and Innocor are the only suppliers of Low-Density Foam.

11. In the Midwest States, FXI and Innocor are two of the three major suppliers of Low-Density Foam.

12. In Mississippi, FXI and Innocor are two of the four major suppliers of Low-Density Foam.

13. In each of the relevant markets, the Merger would result in highly concentrated markets and a significant increase in concentration under the standards set forth in the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and the relevant case law, and, therefore, the Merger is presumptively unlawful.

**VII. ENTRY CONDITIONS**

14. Entry into the relevant markets described in Paragraphs 7 and 8 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Merger.

**VIII. EFFECTS OF THE MERGER**

15. The effects of the Merger, if consummated, may be to substantially lessen competition in the relevant lines of commerce, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways:

- a. by increasing the likelihood of coordination and parallel accommodating conduct among the remaining competitors in the relevant market; and
- b. by eliminating direct and substantial competition between FXI and Innocor.

**IX. VIOLATIONS CHARGED**

16. The allegations contained in Paragraphs 1 through 15 above are hereby incorporated by reference as though fully set forth here.

17. The Merger described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## Order to Maintain Assets

18. The Merger described in Paragraph 6, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Merger Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED**, the Federal Trade Commission on this twenty-first day of February, 2020, 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 FXI Holdings, Inc., an indirect subsidiary of Respondent One Rock Capital Partners II, LP, of Respondent Innocor, Inc., an indirect subsidiary of Respondent Bain Capital Fund XI, LP (each a “Respondent,” and 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 Containing Consent Order (“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) 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 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 One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54<sup>th</sup> Floor, New York, NY 10112.

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2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.
3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.
4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.
5. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

**ORDER****I. Definitions**

**IT IS HEREBY 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, shall apply:

- A. “Asset Maintenance Period” means the period commencing on the date the Commission issues this Order to Maintain Assets and ending on the last Divestiture Date.
- B. “Assets To Be Maintained” means the Polyurethane Foam Assets and the Polyurethane Foam Business.
- C. “Decision and Order” means:
  1. The proposed Decision and Order contained in the Consent Agreement in this matter, until issuance of a final Decision and Order by the Commission; and
  2. The final Decision and Order, once it is issued by the Commission in this matter.

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**II. Asset Maintenance**

**IT IS FURTHER ORDERED** that during the Asset Maintenance Period, Respondents shall operate the Assets To Be Maintained in the ordinary course of business consistent with past practices, and shall:

- A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, to minimize any risk of loss of competitive potential of the Assets To Be Maintained, to operate the Assets To Be Maintained in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Maintained (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Assets To Be Maintained (other than in the manner prescribed in the Decision and Order and this Order to Maintain Assets), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Assets To Be Maintained; and
- B. Conduct or cause to be conducted the Assets To Be Maintained in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Assets To Be Maintained, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Assets To Be Maintained. Included in the above obligations, Respondents shall:
  - 1. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;
  - 2. Provide the Assets To Be Maintained with sufficient financial and other resources to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, and commercial activities;
  - 3. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;
  - 4. Provide support services at levels customarily provided by Respondents;

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5. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;
6. Maintain the Business Information of the Assets To Be Maintained;
7. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:
  - a. Continuing to provide each of the Polyurethane Foam Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;
  - b. Providing reasonable financial incentives to encourage Polyurethane Foam Employees to continue in his or her position until the Divestiture Date, and as may be necessary to facilitate the employment of such Polyurethane Foam Employees by the proposed Acquirer following the Divestiture Date;
  - c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and
  - d. Not transferring any of the Polyurethane Foam Employees to any of Respondents' assets or businesses that Respondents will not be divesting; and
8. Not reduce, change, or modify in any material respect, the levels of production, quality, pricing, service, or customer support typically associated with the Assets To Be Maintained, other than changes in the ordinary course of business.

*Provided, however,* that Respondents shall not be in violation of this Paragraph II if Respondents take actions (i) that are explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Assets To Be Maintained and consistent with the purposes of the Decision and Order.

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**III. Additional Obligations**

**IT IS FURTHER ORDERED** that:

- A. Respondents, in consultation with the proposed Acquirer, for the purposes of ensuring an orderly transition, shall:
1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Polyurethane Foam Business by the Acquirer is not delayed or impaired by the Respondents;
  2. Designate employees of Respondents knowledgeable about the operation of the Polyurethane Foam Assets and Polyurethane Foam Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Polyurethane Foam Assets and Polyurethane Foam Business;
  3. Allow the Acquirer reasonable access to all Business Information related to the Polyurethane Foam Assets and Polyurethane Foam Business and to employees who possess or are able to locate such information; and
  4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.
- B. Respondents shall:
1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;
  2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;
  3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and
  4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in polyurethane foam production or sales activities in any of the Relevant Areas, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of III.B.1 and III.B.2 above;

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*Provided, however,* that nothing in this Paragraph III shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to the Decision and Order (including Shared Intellectual Property), provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order to Maintain Assets and the Decision and Order.

- C. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.
- D. No later than 10 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.
- E. Notwithstanding this Paragraph III of this Order to Maintain Assets, and subject to the Decision and Order, Respondent may use Confidential Business Information:
  - 1. For the purpose of performing Respondents' obligations under this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement; and
  - 2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensuring compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.
- F. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Polyurethane Foam Assets, including Contracts and Governmental Authorizations. Respondents may satisfy this requirement for a required Consent by certifying that the Acquirer has equivalent arrangements or has otherwise directly obtained the necessary Consent.

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*Provided, however,* it is not a violation of this provision for Respondents not to transfer a Contract or Governmental Authorization that Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents) so long as (i) prior to signing the Consent Order, Respondents inform Commission staff and the Acquirer that they cannot transfer the relevant Contract or Governmental Authorization, and (ii) Respondents assist the Acquirer in obtaining an equivalent Contract or Governmental Authorization.

- G. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Polyurethane Foam Assets) with a due diligence investigation of the Polyurethane Foam Assets and the Polyurethane Foam Business, including by providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.
- H. Respondents shall cooperate with and assist any proposed Acquirer of the Polyurethane Foam Assets to evaluate independently and offer employment to the Polyurethane Foam Employees relating to each of the Polyurethane Foam Facilities, with such cooperation to include at least the following:
  - 1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:
    - a. Provide to the proposed Acquirer a list of all Polyurethane Foam Employees and provide Employee Information for each; and
    - b. Allow the proposed Acquirer a reasonable opportunity to interview any Polyurethane Foam Employees;
  - 2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:
    - a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Polyurethane Foam Employees; and
    - b. Make offers of employment to any of the Polyurethane Foam Employees;
  - 3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Polyurethane Foam Employees, not offer any incentive to Polyurethane Foam Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Polyurethane Foam Employees by a proposed Acquirer;

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- I. Respondents shall remove any impediments within the control of Respondents that may deter any Polyurethane Foam Employees from accepting employment with a proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by a proposed Acquirer, and shall not make any counteroffer to any Polyurethane Foam Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

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

- A. Edward J. Buthusiem shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix IV (“Monitor Agreement”) and Non-Public Appendix IV-1 (“Monitor Compensation”) to the Decision and Order. The Monitor is appointed to monitor Respondents’ compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.
- B. No later than 1 day after the date this Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents’ compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  1. The Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement, 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.
  2. The Monitor shall 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 the Respondents or of the Commission.

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3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of the Decision and Order, or until such other time as may be determined by the Commission or its staff.
- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.
  - E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement.
  - F. 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 the 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.
  - G. 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 gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph IV.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph IV.F of this Order to Maintain Assets.
  - H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and the Decision and Order, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order to Maintain Assets and the Decision and Order. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders. The Monitor shall submit a final report to the Commission within 30 days following the satisfaction by Respondents of all its obligations under Paragraphs II and IV of the Decision and Order, unless otherwise directed by the Commission or its staff.

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- I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may require, among other things, 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.
- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
  - 1. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
  - 2. Not later than 10 days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.
- L. 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 to Maintain Assets, the Decision and Order, and the Divestiture Agreement.
- M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**V. Compliance Reports**

**IT IS FURTHER ORDERED** that Respondents FXI and One Rock Capital shall file verified written reports ("compliance reports") in accordance with the following:

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- A. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondents FXI and One Rock Capital shall submit to the Commission verified written reports (“compliance reports”) setting forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets and the Decision and Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets and the Decision and Order. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets and the Decision and Order are insufficient. Respondents FXI and One Rock Capital 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 or plan to implement to ensure that they have complied or will comply with each paragraph of this Order to Maintain Assets and the Decision and Order, and such supporting materials shall be retained and produced later if needed.
- B. 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 FXI and One Rock Capital 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](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents FXI and One Rock Capital shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

*Provided, however,* that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondents FXI and One Rock Capital pursuant to the Decision and Order.

**VI. Change in Respondent**

**IT IS FURTHER ORDERED** that Respondents FXI and One Rock Capital shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of FXI Holdings, Inc. or One Rock Capital Partners II, LP;
- B. Any proposed acquisition, merger or consolidation of FXI Holdings, Inc. or One Rock Capital Partners II, LP; or

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- C. Any other change in Respondents FXI and One Rock Capital, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

**VII. Access**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order to Maintain Assets, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

**VIII. Purpose**

**IT IS FURTHER ORDERED** that the purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Assets To Be Maintained as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the divestitures and other relief required by the Decision and Order; and (3) remedy the harm to competition the Commission alleged in its Complaint and ensure an Acquirer can operate the Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents operated the Polyurethane Foam Business prior to the Acquisition.

**IX. Term**

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate at the earlier of:

- A. 3 business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

## Decision and Order

- B. The day after Respondents' (or a Divestiture Trustee's) completion of the divestitures required by Paragraph II of the Decision and Order;

*Provided, however,* that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three business days after the Decision and Order becomes final;

*Provided, further, however,* that if the Commission, pursuant to Paragraph II.C of the Decision and Order, requires the Respondents to rescind the divestitures to Future Foam, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the assets required by the Decision and Order.

By the Commission.

**DECISION**

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent FXI Holdings, Inc., an indirect subsidiary of Respondent One Rock Capital Partners II, LP, of Respondent Innocor, Inc., an indirect subsidiary of Respondent Bain Capital Fund XI, LP (each a "Respondent," and 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 Containing Consent Order ("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) 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

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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:

1. Respondent One Rock Capital Partners II, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 30 Rockefeller Plaza, 54<sup>th</sup> Floor, New York, NY 10112.
2. Respondent FXI Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 100 Matsonford Road, 5 Radnor Corporate Center, Suite 300, Radnor, PA 19087-4560.
3. Respondent Bain Capital Fund XI, LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its executive offices and principal place of business located at 200 Clarendon Street, Boston, MA 02116.
4. Respondent Innocor, Inc. is a corporation, existing, organized, and doing business under and by virtue of the laws of New Jersey, with its executive offices and principal place of business located at 200 Schulz Drive, Red Bank, NJ 07701.
5. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

**ORDER****I. Definitions**

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

- A. “FXI” means FXI Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by FXI Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “One Rock Capital” means One Rock Capital Partners II, LP, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by One Rock Capital Partners II, LP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. “Innocor” means Innocor, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Innocor, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Bain” means Bain Capital Fund XI, LP, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Bain Capital Fund XI, LP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. “Future Foam” means Future Foam, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Nebraska, with its offices and principal place of business located at 1610 Avenue N. Council Bluffs, Iowa, 51501.
- F. “Commission” means the Federal Trade Commission.
- G. “Acquirer” means:
  - 1. Future Foam; or
  - 2. Any other person that the Commission approves to acquire the Polyurethane Foam Assets pursuant to this Decision and Order.
- H. “Acquisition” means the proposed acquisition by FXI of Innocor pursuant to the terms set forth in the transaction agreement by and among Respondents dated as of March 4, 2019.
- I. “Acquisition Date” means the date Respondents consummate the Acquisition.
- J. “Business Information” means all books, records, data, and information, wherever located and however stored, relating to the Polyurethane Foam Assets or used in the Polyurethane Foam Business, including documents, written information, graphic materials, and data and information in electronic format, along with the unwritten knowledge of employees, contractors and representatives. Business Information includes records and information relating to research and development, manufacturing, process technology, engineering, product formulations, production, sales, marketing, logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Polyurethane Foam Business or Polyurethane Foam Assets. For clarity, Business Information includes Respondents’ right and control over information and material provided to any other person.

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K. “Confidential Business Information” means any non-public Business Information relating to the Polyurethane Foam Assets and Polyurethane Foam Business:

1. Obtained by Respondents prior to the Divestiture Date; or
2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents’ obligations under this Order or any Divestiture Agreement (including any Transition Assistance agreement);

*Provided, however,* that Confidential Business Information shall not include:

1. Information that is in the public domain when received by Respondents;
2. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;
3. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and
4. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

L. “Consent” means any approval, consent, ratification, waiver, or other authorization.

M. “Contract” means a contract, lease, sub-lease and other agreement or obligation.

N. “Direct Cost” means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of the Respondents’ employees shall not exceed then-current average hourly wage rate for such employee.

O. “Divestiture Agreement” means:

1. Future Foam Divestiture Agreement; or
2. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer to purchase the Polyurethane Foam Assets, and all amendments, exhibits, attachments, ancillary agreements (including any Shared Intellectual Property License or agreements to provide Transition Assistance), and schedules thereto.

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- P. “Divestiture Date” means the date on which Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) close on each of the divestitures required by Paragraph II of this Order.
- Q. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IX of this Order.
- R. “Elkhart Polyurethane Foam Facility” means Respondent Innocor’s polyurethane foam production facilities located at 1900 West Lusher Road in Elkhart, Indiana, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.
- S. “Employee Information” means, for each Polyurethane Foam Employee, the following information summarizing the employment history of each employee that includes, as requested by the proposed Acquirer and to the extent permitted by applicable law:
1. Name, job title or position, date of hire, and effective service date;
  2. Specific description of the employee’s responsibilities;
  3. The base salary or current wages;
  4. Most recent bonus paid, aggregate annual compensation for Respondents’ last fiscal year, and current target or guaranteed bonus, if any;
  5. Written performance reviews for the past three years, if any;
  6. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);
  7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
  8. At the proposed Acquirer’s option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.
- T. “Excluded Assets” means those assets and Contracts listed at Non-Public Appendix III to this Order.
- U. “Future Foam Divestiture Agreement” means the agreements by and among the applicable Respondents and Future Foam, dated as of January 27, 2020, and all amendments, exhibits, attachments, ancillary agreements (including any agreements for Transition Assistance) related thereto and attached to this Order as Non-Public Appendix I.

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- V. “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.
- W. “Intellectual Property” means intellectual property of any kind, including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, process technology, engineering technology, product technology, product rights, trade secrets, and proprietary information.
- X. “Kent Polyurethane Foam Facility” means Respondent FXI’s polyurethane foam production facilities located at 19635 78<sup>th</sup> Avenue and 7620 S. 196 Street in Kent, Washington, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.
- Y. “Key Employees” means the employees listed at Appendix II to this Order.
- Z. “Monitor” means the person approved by the Commission to serve as a Monitor pursuant to this Order or the Order to Maintain Assets.
- AA. “Polyurethane Foam Assets” means all of Respondent’s legal or equitable rights, title, and interests in and to all tangible and intangible assets, wherever located, relating to the Polyurethane Foam Business (including any such assets removed and not replaced after the announcement of the Acquisition, other than in the ordinary course of business), including:
1. The Polyurethane Foam Facilities;
  2. Real property interests owned, leased or otherwise held, including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto;
  3. Intangible rights and property, including Intellectual Property, owned, used, or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone listings, internet sites and social media accounts;
  4. Tangible personal property, whether owned or leased, including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, together with all express or implied warranties by manufacturers, sellers or lessors and all maintenance records and operating manuals;
  5. Inventories;

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6. Business Information;
7. Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto; and
8. Governmental Authorizations and all pending applications therefor or renewals thereof;
9. *Provided, however*, that Polyurethane Foam Assets need not include:
  - a. Corporate headquarters of Respondents;
  - b. Corporate, business, or other names of Respondents or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof;
  - c. Cash, cash equivalents and accounts receivable;
  - d. Software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);
  - e. Enterprise software that Respondents also use in their businesses other than the Polyurethane Foam Business;
  - f. The portion of Business Information that contains information about any business other than the business divested to an Acquirer;
  - g. Any original document that Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however*, that Respondents shall provide copies of the record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes; and
  - h. The following assets, unless the Commission, in its sole discretion and within 12 months of the date this Order is issued, determines in consultation with the Acquirer and the Monitor, that any such assets are necessary for the Acquirer to operate the Polyurethane Foam Assets or Polyurethane Foam Business in a manner that achieves the purposes of this Order:
    - i. Excluded Assets; and
    - ii. Shared Intellectual Property, but only if the Shared Intellectual Property License is granted pursuant to Paragraph II of this Order.

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- BB. “Polyurethane Foam Business” means the applicable Respondent’s business of manufacturing, fabricating, and selling polyurethane foam and related products at the Polyurethane Foam Facilities.
- CC. “Polyurethane Foam Employees” means: (1) with respect to each of the Polyurethane Foam Facilities, each of Respondents employees who were employed or under contract by the Polyurethane Foam Business at any time between June 1, 2019, and the Divestiture Date; and (2) the Key Employees.
- DD. “Polyurethane Foam Facilities” means the Elkhart Polyurethane Foam Facility, the Kent Polyurethane Foam Facility, and the Tupelo Polyurethane Foam Facility.
- EE. “Relevant Area” means the states of Indiana, Michigan, Mississippi, Ohio, Oregon, and Washington.
- FF. “Shared Intellectual Property” means Intellectual Property that, at any time prior to the Divestiture Date, was used by both the Polyurethane Foam Business and Respondents’ retained businesses.
- GG. “Shared Intellectual Property License” means a perpetual, non-exclusive, fully paid-up, irrevocable, transferable, and royalty-free license(s), granted by Respondents to an Acquirer, to use Shared Intellectual Property (other than trademarks, domain names, and similar names and marks) in the operation of the Polyurethane Foam Business.
- HH. “Tupelo Polyurethane Foam Facility” means Respondent Innocor’s polyurethane foam production facilities located at 1665 South Veterans Boulevard in Tupelo, Mississippi, including associated production plants, warehouses, storage facilities, equipment, offices, fabricating operations, and transportation assets.
- II. “Transition Assistance” means services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Polyurethane Foam Business, including, but not limited to, accounting and finance, human resources (employee benefits, payroll, etc.) information technology and systems, logistics (purchasing, distribution, warehousing, supply chain management, etc.), manufacturing (technology, technology transfer, operating permits and licenses, regulatory compliance, quality control, manufacturing processes and troubleshooting, etc.), research and development, sales and marketing (including customer service), and allowing an Acquirer to use Respondents’ brands and marks for transitional purposes.

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

- A. Within 10 days of the Acquisition Date, Respondents shall divest, absolutely and in good faith, the Polyurethane Foam Assets as an ongoing business to Future Foam pursuant to the Future Foam Divestiture Agreement.
- B. No later than the Divestiture Date, Respondents shall grant the Shared Intellectual Property License to Future Foam to use Shared Intellectual Property to operate the Polyurethane Foam Business, including by extending or improving existing products, processes, and services; developing new products, processes and services; and expanding, constructing, or operating additional on-site facilities or production lines.
- C. If Respondents have divested the Polyurethane Foam Assets to Future Foam before the Commission issues this Order, and the Commission subsequently notifies Respondents that:
  - 1. Future Foam is not an acceptable Acquirer of the Polyurethane Foam Assets, then Respondents shall:
    - a. Within 5 days of notification by the Commission, rescind the Future Foam Divestiture Agreement,
    - b. Within 120 days of notification by the Commission, divest the Polyurethane Foam Assets as an ongoing business, absolutely and in good faith, at no minimum price, and grant the Shared Intellectual Property License, to an Acquirer and in a manner that receives the prior approval of the Commission, and
    - c. Set forth the manner in which they will divest the Polyurethane Foam Assets, and comply with the other provisions of this Order, in a proposed Divestiture Agreement that is submitted to the Commission for the prior approval required by this Order.
  - 2. The manner of the divestiture is not acceptable, then the Commission will direct the Respondents (or appoint a Divestiture Trustee) to modify the divestiture in the manner the Commission determines is necessary to satisfy the requirements of this Order, which may include entering into additional agreements or arrangements, or modifying a Divestiture Agreement.
- D. Respondents shall deliver the Business Information to the Acquirer as soon as practicable in a manner that ensures their completeness, accuracy and usefulness and meets the reasonable requirements of the Acquirer.

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- E. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Polyurethane Foam Assets, including Contracts and Governmental Authorizations. Respondents may satisfy this requirement for a required Consent by certifying that the Acquirer has equivalent arrangements or has otherwise directly obtained the necessary Consent.

*Provided, however,* it is not a violation of this provision for Respondents not to transfer a Contract or Governmental Authorization that Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents) so long as (i) prior to signing the Consent Order, Respondents inform Commission staff and the Acquirer that they cannot transfer the relevant Contract or Governmental Authorization, and (ii) Respondents assist the Acquirer in obtaining an equivalent Contract or Governmental Authorization.

- F. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Polyurethane Foam Assets) with a due diligence investigation of the Polyurethane Foam Assets and the Polyurethane Foam Business, including by providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.

### III. Divestiture Agreement

**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 a Divestiture Agreement shall constitute a violation of this Order; *provided, however,* that 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.
- B. Respondents shall not modify, replace, or extend the terms of a 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. Transition Assistance

**IT IS FURTHER ORDERED** that:

- A. Until Respondents have transferred all Business Information included in the Polyurethane Foam Assets, Respondents shall provide the Acquirer with access to records and information (wherever located and however stored) included in the

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Business Information that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

- B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (i) efficiently transfer the Polyurethane Foam Assets to the Acquirer and (ii) assist the Acquirer in operating the Polyurethane Foam Assets and Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition, and shall 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 the option of the Acquirer, for up to 12 months after the Divestiture Date.
- C. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit the damages (including indirect, special, and consequential damages) that an Acquirer is entitled to receive in the event of Respondents' breach of an agreement to provide Transition Assistance.
- D. The Acquirer may terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

**V. Employees**

**IT IS FURTHER ORDERED** that:

- A. Respondents shall cooperate with and assist any proposed Acquirer of the Polyurethane Foam Assets to evaluate independently and offer employment to the Polyurethane Foam Employees relating to each of the Polyurethane Foam Facilities, with such cooperation to include at least the following:
1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:
    - a. Provide to the proposed Acquirer a list of all Polyurethane Foam Employees and provide Employee Information for each; and

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- b. Allow the proposed Acquirer a reasonable opportunity to interview any Polyurethane Foam Employees;
  2. Not later than 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:
    - a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Polyurethane Foam Employees; and
    - b. Make offers of employment to any of the Polyurethane Foam Employees;
  3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Polyurethane Foam Employees, not offer any incentive to Polyurethane Foam Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Polyurethane Foam Employees by a proposed Acquirer;
  4. Respondents shall remove any impediments within the control of Respondents that may deter any Polyurethane Foam Employees from accepting employment with a proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by a proposed Acquirer, and shall not make any counteroffer to any Polyurethane Foam Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
  5. Respondents shall provide Polyurethane Foam Employees with reasonable financial incentives to continue in their positions, and as may be necessary to facilitate the employment of such Polyurethane Foam Employees by the proposed Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional reasonable incentives as may be necessary.
- B. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and the Monitor, determines in its sole discretion that the Acquirer should have the ability to interview, make offers of employment to, or hire any of Respondent Innocor or Respondent FXI's employees that are not otherwise included as Polyurethane Foam Employees, then the Commission may

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notify Respondents that such employees are to be designated as Polyurethane Foam Employees, and the provisions of this Paragraph V shall apply to such employees as of that notification date.

C. Respondents shall:

1. For a period of 1 year from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Polyurethane Foam Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.
2. For a period of 2 years from the Divestiture Date, not directly or indirectly solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

*Provided, however,* a violation of this Paragraph V.C will not occur if:

1. The employee's employment has been terminated by the Acquirer;
2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or
3. Respondents hire an employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

## VI. Asset Maintenance

**IT IS FURTHER ORDERED** that, pending divestiture of the Polyurethane Foam Assets, Respondents shall operate the Polyurethane Foam Assets in the ordinary course of business consistent with past practices, and shall:

- A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Polyurethane Foam Assets, to minimize any risk of loss of competitive potential of the Polyurethane Foam Assets, to operate the Polyurethane Foam Assets in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Polyurethane Foam Assets (including regular repair and maintenance efforts), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Polyurethane Foam Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Polyurethane Foam Assets; and

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- B. Conduct or cause to be conducted the Polyurethane Foam Business in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Polyurethane Foam Business, and shall use best efforts to preserve the relationships and goodwill with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Polyurethane Foam Business;

*Provided, however,* that Respondents shall not be in violation of this Paragraph VI if Respondents take actions (i) as explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Polyurethane Foam Assets and consistent with the purposes of the Order.

**VII. Additional Obligations**

**IT IS FURTHER ORDERED** that:

- A. Respondents, in consultation with the proposed Acquirer, for the purposes of ensuring an orderly transition, shall:
1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Polyurethane Foam Business by the Acquirer is not delayed or impaired by the Respondents;
  2. Designate employees of Respondents knowledgeable about the operation of the Polyurethane Foam Assets and Polyurethane Foam Business, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Polyurethane Foam Assets and Polyurethane Foam Business;
  3. Allow the Acquirer reasonable access to all Business Information related to the Polyurethane Foam Assets and Polyurethane Foam Business and to employees who possess or are able to locate such information; and
  4. Establish projected timelines for accomplishing all tasks necessary to effectuate the transition to the Acquirer in an efficient and timely manner.

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## B. Respondents shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;
2. Not use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order, the Order to Maintain Assets, or a Divestiture Agreement;
3. To the extent practicable, maintain Confidential Business Information separate and apart from other data or information of the Respondents; and
4. Following the Acquisition Date, ensure that Confidential Business Information is not shared with Respondents' employees engaged in polyurethane foam production or sales activities in any of the Relevant Areas, other than employees who had access to the information prior to the Acquisition Date in the normal course of business and subject to the provisions of VII.B.1 and VII.B.2 above.

*Provided, however,* that nothing in this Paragraph VII shall prevent Respondents from retaining and using any tangible or intangible property that Respondents retain the right to use pursuant to this Order (including Shared Intellectual Property), provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order.

- C. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order, the Order to Maintain Assets, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.
- D. No later than 10 days after the Divestiture Date, and no less than annually for 3 years after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

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- E. Notwithstanding this Paragraph VII of this Order, and subject to the Order to Maintain Assets, Respondent may use Confidential Business Information:
1. For the purpose of performing Respondents' obligations under this Order, the Order to Maintain Assets, or the Divestiture Agreements; and
  2. For purposes of complying with financial reporting requirements, obtaining legal advice, ensuring compliance with legal and regulatory requirements, prosecuting or defending legal claims, conducting investigations, or as otherwise required by law.

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

- A. Edward J. Buthusiem shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement.
- B. No later than 1 day after the Order to Maintain Assets is issued, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement, in a manner consistent with the purposes of the orders.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, the Order to Maintain Assets, and the Divestiture Agreement, 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.
  2. The Monitor shall 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 the Respondents or of the Commission.
  3. The Monitor shall serve until 30 days after Respondents have satisfied all obligations under Paragraph II and IV of this Order, or until such other time as may be determined by the Commission or its staff.

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- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreement.
- E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreement.
- F. 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 the 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.
- G. 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 gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VIII.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.F of this Order.
- H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.
- I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may require, among other things, the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and

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assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after the notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
  2. Not later than 10 days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement in a manner consistent with the purposes of the orders and in consultation with the Commission.
- L. 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.
- M. The Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not fully complied with the obligations of Paragraph II of this Order, the Commission may appoint one or more Divestiture Trustees to divest any or all of the Polyurethane Foam Assets, enter agreements for Transition Assistance, grant the Shared Intellectual Property License, 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 IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including

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one or more court-appointed Divestiture Trustees, 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 may select one or more Divestiture Trustees, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Commission may appoint one Divestiture Trustee or separate Divestiture Trustees to divest one or more of the Polyurethane Foam Assets, enter agreements for Transition Assistance, grant the Shared Intellectual Property License, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. Any 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 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 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures required by this Order 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. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.
  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 (including obligations to provide Transition Assistance and grant the Shared Intellectual Property License) imposed by, this Order.
    - b. The Divestiture Trustee shall have 1 year after the date the Commission approves each trust agreement described herein to accomplish the divestitures required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the 1 year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a

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court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period only 2 times.

- c. Subject to any demonstrated legally recognized privilege, any 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 any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph IX for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
- d. Any 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. The divestitures shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however*, if any Divestiture Trustee receives bona fide offers for any asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within 5 days after receiving notification of the Commission's approval.
- e. Any 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. Any 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. Any Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture

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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 any 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 any 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. Any Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
  - h. Any Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestitures.
  - i. Respondents may require any Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- C. If the Commission determines that any 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 any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

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

- A. For a period of 10 years from the date this Order is issued, Respondents FXI and One Rock Capital shall not, without providing advance written notification to the Commission in the manner described in this Paragraph X, acquire any assets of, or any financial, ownership, or leasehold interest in, any facility that has operated as a polyurethane foam production facility within 12 months prior to the date of such proposed acquisition, in any Relevant Area.
- 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 Respondents FXI and One Rock Capital and not of any other party to the transaction. Respondents FXI and One Rock Capital shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents FXI and One Rock Capital shall not consummate the transaction until 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph X may be requested and, where appropriate, granted by letter from staff of 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. Respondent FXI shall:
  - 1. Notify Commission staff via email at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) of:
    - a. The Acquisition Date, no later than 5 days after the Acquisition Date; and
    - b. The Divestiture Date, no later than 5 days after the Divestiture Date;

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2. Submit the complete Divestiture Agreement to the Commission at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) no later than 30 days after the Divestiture Date.
- B. Respondents FXI and One Rock Capital shall file verified written reports (“compliance reports”) in accordance with the following:
1. Respondents FXI and One Rock Capital shall submit an interim compliance report 30 days after the Order is issued, and additional interim reports every 30 days thereafter until Respondents have fully complied with the provisions of Paragraph II and IV of this Order; annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;
  2. 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 FXI and One Rock Capital 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 or plan to implement to ensure that they have complied or will comply with each paragraph of the Order, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted, and such supporting materials shall be retained and produced later if needed.
  3. Respondents FXI and One Rock Capital shall verify each compliance report 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](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov). In addition, Respondents FXI and One Rock Capital shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

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**XII. Change in Respondent**

**IT IS FURTHER ORDERED** that Respondents FXI and One Rock Capital shall notify the Commission at least 30 days prior to:

- A. Any proposed dissolution of FXI Holdings, Inc. or One Rock Capital Partners II, LP;
- B. Any proposed acquisition, merger or consolidation of FXI Holdings, Inc. or One Rock Capital Partners II, LP; or
- C. Any other change in Respondents FXI and One Rock Capital, including assignment and the creation, sale, 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, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

**XIV. Purpose**

**IT IS FURTHER ORDERED** that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure an Acquirer can operate the Polyurethane Foam Business in a manner equivalent in all material respects to the manner in which Respondents operated the Polyurethane Foam Business prior to the Acquisition.

**XV. Term**

**IT IS FURTHER ORDERED** that this Order shall terminate on April 20, 2030.

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**APPENDIX I**

**Future Foam Divestiture Agreement**

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

**APPENDIX II**

**Key Employees**

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

**APPENDIX III**

**Excluded Assets**

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

## Decision and Order

**APPENDIX IV****MONITOR AGREEMENT**

This Monitor Agreement (this “Agreement”), entered into this 29th day of January, 2020, by and among Berkeley Research Group, LLC, a Delaware limited liability company (“BRG”), which has consented to the appointment of Edward J. Buthusiem, director of BRG’s Healthcare Analytics Practice, to serve as the Monitor under this agreement (collectively, “Monitor”), One Rock Capital Partners II, LP, a Delaware limited partnership, and FXI Holdings, Inc., a Delaware corporation (“Respondents”) (Monitor and Respondents together, the “Parties”) provides as follows:

WHEREAS the Federal Trade Commission (the “Commission”), in the Matter of One Rock Capital Partners II, LP, FXI Holdings, Inc., Bain Capital Fund XI, LP, and Innocor, Inc., FTC File No. 191-0087, has accepted or will shortly accept for public comment an Agreement Containing Consent Orders incorporating a Decision and Order and an Order to Maintain Assets (collectively, the “Orders”), which, among other things, requires Respondents to divest certain polyurethane foam production facilities, as defined in the Orders, and contemplates the appointment of a Monitor to monitor Respondents’ compliance with its obligations under the Orders;

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

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

WHEREAS, this Agreement, although executed by Monitor and Respondents, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondents or Monitor under the Orders, except for those obligations under the confidentiality provisions herein, until it has been approved by the Commission; and

WHEREAS, the Parties to this Agreement intend to be legally bound, subject only to the Commission’s approval of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

All capitalized terms used in this Agreement and not specifically defined herein shall have the respective definitions given to them in the Orders.

**ARTICLE I**

1.1 **Powers of the Monitor.** Monitor shall have all of the powers and responsibilities conferred upon Monitor by the Orders, including but not limited to monitoring Respondents’ compliance with the divestiture, asset maintenance obligations, and other related requirements of the Orders. The Monitor shall serve as an independent third party and not as an employee or agent of Respondents or the Commission.

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1.2 Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as Monitor may reasonably request, related to Respondents' compliance with the obligations of Respondents under the Orders in this matter. Documents, records and other relevant information are to be provided in an electronic format if they exist in that form. Respondents shall cooperate with any reasonable request of Monitor. Monitor shall give Respondents reasonable notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of its responsibilities under the Orders.

1.3 Compliance Reports. Respondents shall provide Monitor with copies of all compliance reports filed with the Commission in a timely manner, but in any event, no later than five (5) business days after the date on which Respondents file such report with the Commission.

1.4 Confidentiality. Monitor shall:

(a) maintain the confidentiality of all confidential information provided to the Monitor by Respondents, the acquirer of the assets to be divested, any supplier or customer of Respondents, or the Commission ("Confidential Information"), and shall use such information only for the purpose of discharging its obligations as Monitor and not for any other purpose, including, without limitation, any other business, scientific, technological, or personal purpose. Monitor may disclose Confidential Information only to (i) persons employed by or working with Monitor pursuant to the Orders or (ii) persons employed at the Commission;

(b) require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by Monitor to assist in carrying out the duties and responsibilities of Monitor to execute a confidentiality agreement, which Respondents will provide if requested, that requires such third parties to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement;

(c) maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom Confidential Information has been disclosed;

(d) for a period of ten (10) years after the termination of this Agreement, maintain the confidentiality of all other aspects of the performance of its duties under this Agreement and not disclose any Confidential Information relating thereto; and

(e) upon the termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and

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electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with Respondents' request.

(f) For the purpose of this Agreement, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondents, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondents, when such source was not known to recipient after due inquiry to be restricted from making such disclosure to such recipient.

**ARTICLE II**

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to employ, at the cost and expense of the Respondents, such attorneys, consultants, accountants, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities pursuant to the Orders. Prior to engaging any such parties and prior to commissioning additional work to be performed by a party who has already been so engaged, Monitor shall notify Respondents of its intention to do so, and provide an estimate of the anticipated costs.

2.2 Monitor Compensation. Respondents shall pay Monitor in accordance with the fee schedule and procedure attached as Confidential Appendix A for all reasonable time spent in the performance of the Monitor's duties, including all monitoring activities related to the efforts of the acquirer of the assets to be divested, all work in connection with the negotiation and preparation of this Agreement, and all reasonable and necessary travel time.

(a) In addition, Respondents shall pay: (i) all out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the Orders; and (ii) all reasonable fees of, and disbursements reasonably incurred by, any advisor appointed by Monitor pursuant to the first paragraph in Article II.

(b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

2.3 Monitor's Indemnification. Respondents shall indemnify and hold harmless Monitor and its employees and agents against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of Monitor'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

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losses, claims, damages, liabilities, or expenses result from Monitor's gross negligence or willful misconduct.

2.4 Disputes. In the event of a disagreement or dispute between Respondents and Monitor concerning Respondents' obligations under the Orders, and, in the event that such disagreement or dispute cannot be resolved by the Parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division.

2.5 Conflicts of Interest. In the event that, during the term of this Agreement, Monitor becomes aware it has or may have a conflict of interest that may affect, or could have the appearance of affecting, performance by Monitor or persons employed by, or working with, Monitor, of any of its duties under this Agreement, Monitor shall promptly inform Respondents and the Commission of any such conflict or potential conflict.

### ARTICLE III

3.1 Termination. This Agreement shall terminate the earlier of: (a) the expiration or termination of the Orders; (b) Respondents' receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor; (c) with at least thirty (30) days advance notice to be provided by Monitor to Respondents and to the Commission, upon resignation of the Monitor; or (d) when the Monitor completes its Final Report pursuant to the Decision and Order; provided, however, that the Commission may require that Respondents extend this Agreement 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, as will the provisions of Articles 2.2 and 2.3 of this Agreement.

3.2 Monitor's Removal. If the Commission determines that Monitor ceases to act or fails to act diligently and consistent with the purpose of the Orders, Respondents shall, upon written request of the Commission, terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

3.3 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall in all respects be governed by the substantive laws of New York, including all matters of construction, validity and performance. The Orders shall govern this Agreement and any provisions herein which conflict or are inconsistent with the Orders may be declared null and void by the Commission and any provision not in conflict shall survive and remain a part of this Agreement.

3.4 Disclosure of Information. Nothing in this Agreement shall require Respondents to disclose any material or information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law or an agreement with a third party.

3.5 Assignment. This Agreement may not be assigned or otherwise transferred by Respondents or Monitor without the consent of Respondents and Monitor and the approval of the Commission. Any such assignment or transfer shall be consistent with the terms of the Orders.

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3.6 Modification. No amendment, modification, termination, or waiver of any provision of this Agreement shall be effective unless made in writing, signed by all Parties, and approved by the Commission. Any such amendment, modification, termination, or waiver shall be consistent with the terms of the Orders.

3.7 Approval by the Commission. This Agreement shall have no force or effect until approved by the Commission, other than the Parties' obligations under the confidentiality provisions herein.

3.8 Entire Agreement. This Agreement, and those portions of the Orders incorporated herein by reference, constitute the entire agreement of the Parties and supersede any and all prior agreements and understandings between the Parties, written or oral, with respect to the subject matter hereof.

3.9 Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

3.10 Section Headings. Any heading of the sections is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

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

**Monitor**

Edward J. Buthusiem



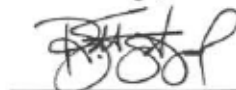
Edward J. Buthusiem  
Managing Director  
Berkeley Research Group, LLC

**Respondents**

FXI Holdings, Inc.



Harold Earley  
President and Chief Executive Officer  
FXI Holdings, Inc.



R. Scott Spielvogel  
Managing Partner, One Rock Capital Partners, GP, LLC,  
the general partner of One Rock Capital Partners II, LP

Analysis to Aid Public Comment

## **APPENDIX IV-1**

### **Monitor Compensation**

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

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

### **INTRODUCTION**

The Federal Trade Commission (“Commission”) has accepted from FXI Holdings, Inc. (“FXI”), One Rock Capital Partners II, LP (“One Rock Capital”), Innocor Inc. (“Innocor”) and Bain Capital Fund XI, LP (“Bain”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects that would likely result from FXI’s proposed acquisition of Innocor. The proposed Decision and Order (“Order”) contained in the Consent Agreement requires FXI and Innocor to divest three polyurethane foam pouring plants to Future Foam, Inc. (“Future Foam”).

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

On March 4, 2019, FXI and Innocor signed an Agreement and Plan of Merger by which FXI’s parent company, One Rock Capital, would acquire 100% of the voting securities of Innocor for approximately \$850 million (the “Acquisition”). The proposed Acquisition would combine two leading producers of polyurethane foam in the United States. 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 FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in several regional markets across the United States for low-density conventional polyurethane foam (“Low-Density Foam”). The proposed Consent Agreement would remedy the alleged violations by preserving the competition that otherwise would be lost in this market as a result of the proposed Acquisition.

### **THE PARTIES**

Headquartered in Media, Pennsylvania, FXI is a polyurethane foam producer, providing a full range of polyurethane foam products including conventional, visco, and high resiliency foam. Polyurethane foam is used in a variety of end-uses, including home furnishing, packaging, and automotive applications. FXI operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

## Analysis to Aid Public Comment

Innocor, headquartered in Red Bank, New Jersey, also produces a full range of polyurethane foam products including conventional, visco, and high resiliency foam for home furnishing, packaging, and other end uses. Like FXI, Innocor operates foam-pouring facilities across the United States, including in the Pacific Northwest, the Midwest States, and Mississippi.

**THE RELEVANT PRODUCT AND MARKET STRUCTURE**

The relevant product market in which to assess the competitive effects of the proposed acquisition is Low-Density Foam for home furnishing uses. Polyurethane foam consists of various grades and densities with different properties and end uses. Both FXI and Innocor sell Low-Density Foam, commonly referred to as “light and white,” to furniture manufacturers either directly or through third party fabricators. When used in home furnishing products, such as mattresses, mattress toppers, pet beds, pillows, chairs, and couches, Low-Density Foam serves as padding or cushioning. There are no reasonably interchangeable substitutes for Low-Density Foam in home furnishing applications.

Regional geographic markets are appropriate to assess the competitive effects of the proposed Acquisition because of the importance of proximity to producers. Low-Density Foam is bulky, and involves shipping a large volume of air, so the cost of shipping is high relative to the value of the product. These high shipping costs limit the ability of distant producers to compete against local suppliers and result in regional competition. Foam producers like FXI and Innocor operate regional pouring facilities that service customers in the surrounding areas. In this matter, there are three relevant geographic markets for Low-Density Foam: the Pacific Northwest, the Midwest States, and Mississippi. The Pacific Northwest includes Oregon, Washington. The Midwest States include Indiana, Michigan, and Ohio.

The combination of FXI and Innocor would create the largest supplier of Low-Density Foam in the United States. The combined firm would have a market share above 50% in each of the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor face varying levels of competition in these regional markets. FXI and Innocor are the only firms that pour foam in the Pacific Northwest. In the Midwest States, FXI, Innocor, and Carpenter each have foam-pouring facilities, while in Mississippi FXI, Innocor, Carpenter and Elite each operate foam-pouring facilities. Future Foam does not currently pour foam in any of these markets.

The proposed FXI/Innocor combination would result in highly concentrated markets for Low-Density Foam to become even more concentrated, increasing the Herfindahl-Hirschman Index (“HHI”) by more than 1500 in three regional markets – the Pacific Northwest, the Midwest States, and Mississippi. This increase in concentration far exceeds the thresholds set out in the Horizontal Merger Guidelines for raising a presumption that the Acquisition would create or enhance market power.

**EFFECTS OF THE ACQUISITION**

Absent a divestiture, the proposed acquisition is likely to harm customers of Low-Density Foam in the Pacific Northwest, Midwest States, and Mississippi markets. FXI and Innocor compete directly against each other for Low-Density Foam sales in each of the relevant markets,

### Analysis to Aid Public Comment

and customers have benefited from that competition. By eliminating head-to-head competition between FXI and Innocor, the proposed Acquisition likely would lead to unilateral effects in the form of higher prices and reduced innovation.

The proposed acquisition is also likely to increase the likelihood of coordination and parallel accommodating conduct among the remaining competitors in the relevant markets. There is a history of alleged anticompetitive conduct within the polyurethane foam industry, raising heightened concerns about further consolidation. The industry also shows an existing vulnerability to coordination, including significant awareness of interdependence among the suppliers, actions taken in recognition of that interdependence, and sufficient transparency among the producers to support coordination. Further consolidation is likely to increase the incentives and ability of the remaining firms to coordinate.

### ENTRY

Entry into the Low-Density Foam markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the proposed Acquisition. A new entrant with a single pouring plant would face significant barriers to entry, such as higher procurement costs for critical inputs, including the various chemicals, which make up a substantial portion of the cost of polyurethane foam. No new polyurethane foam pouring plants have opened in the Pacific Northwest, the Midwest States or Mississippi for many years. In fact, the number of plants in these regions has steadily decreased as industry participants have consolidated and closed numerous overlapping plants.

### THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by the proposed Acquisition by requiring the merging parties to divest foam-pouring plants located in Kent, Washington; Elkhart, Indiana; and Tupelo, Mississippi to Future Foam, a privately held competitor based in Council Bluffs, Iowa. Future Foam is a leading producer of low-density conventional foam but currently has a limited presence in the Pacific Northwest, Mississippi, and the Midwest States. The divestiture package consists of the following assets and rights: FXI's Kent, Washington polyurethane foam plant, Innocor's Elkhart, Indiana plant, and Innocor's Tupelo, Mississippi plant, including each plant's production facilities, warehouses, storage facilities, equipment, offices, fabricating operations, transportation assets, and all other related businesses, operations and assets; formulas, technologies and other intangible rights and property relating to the facilities; and licenses to shared intellectual property. Additionally, the Order requires that, at the request of Future Foam, FXI must provide transitional assistance for up to twelve months following the divestiture date. These services include logistical and administrative support. The Order also includes other standard terms designed to ensure the viability of the divested business. The provisions of the proposed Consent Agreement positions Future Foam to become an effective competitor in the markets for Low-Density Foam in the Pacific Northwest, the Midwest States, and Mississippi in order to maintain the competition that currently exists.

Under the Order, FXI is required to divest the three plants no later than 10 days from the close of its acquisition of Innocor. If the Commission determines that Future Foam is not an

## Analysis to Aid Public Comment

acceptable acquirer, or that the manner of the divestitures is not acceptable, the Order requires FXI to either unwind the sale of rights and assets to Future Foam and then divest the assets to a Commission-approved acquirer within 120 days of the date the Order becomes final, or modify the divestiture to Future Foam in the manner the Commission determines is necessary to satisfy the requirements of the Order.

The Order also requires a monitor to oversee FXI's compliance with the obligations set forth in the Order. If FXI does not fully comply with the divestiture and other requirements of the Order, the Commission may appoint a Divestiture Trustee to divest the three facilities and perform FXI's other obligations consistent with the Order. The Order also requires that FXI and One Rock Capital shall not, without providing advance written notification to the Commission, acquire any polyurethane foam production plant in the states of Indiana, Michigan, Mississippi, Ohio, Oregon, and Washington for a period of ten years from the date the Order is issued.

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

## Complaint

## IN THE MATTER OF

**RAG-STIFTUNG,  
EVONIK INDUSTRIES AG,  
EVONIK CORPORATION,  
EVONIK INTERNATIONAL HOLDING B.V.,  
ONE EQUITY PARTNERS SECONDARY FUND L.P.,  
ONE EQUITY PARTNERS V, L.P.,  
LEXINGTON CAPITAL PARTNERS VII (AIV I), L.P.,  
PEROXYCHEM HOLDING COMPANY LLC,  
PEROXYCHEM HOLDINGS, L.P.,  
PEROXYCHEM HOLDINGS LLC,  
PEROXYCHEM LLC,  
AND  
PEROXYCHEM COOPERATIEF U.A.**

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. 9384; File No. 191 0029*

*Complaint, August 2, 2019 – Decision, April 29, 2020*

This case addresses the \$625 million acquisition by RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V. of certain assets of PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A. The complaint alleges that the 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 hydrogen peroxide in North America. On February 7, 2020, Respondents RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V.; and Respondents One Equity Partners Secondary Fund, L.P. and One Equity Partners V, L.P., Lexington Capital Partners VI (AIV I), L.P., and PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A., moved to withdraw the matter from adjudication pursuant to Rule 3.26(c). The Commission dismissed the Complaint.

*Participants*

For the *Commission*: Michael Blevins, Steven Dahm, Amy Dobrzynski, Josh Goodman, Frances Anne Johnson, Michael Lovinger, Lily Rudy, Stephen Santulli, and Cecelia Waldeck.

For the *Respondents*: Jan Rybnicek and Paul Yde, Freshfields Bruckhaus Deringer US LLP; Mike Cowie, Dechert LLP.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“Commission”),

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having reason to believe that Respondents RAG-Stiftung, Evonik Industries AG, Evonik Corporation, and Evonik International Holding B.V., (collectively, “Evonik”), One Equity Partners Secondary Fund, L.P. and One Equity Partners V, L.P., (collectively, “One Equity Partners”), Lexington Capital Partners VII (AIV I), L.P., and PeroxyChem Holding Company LLC, PeroxyChem Holdings, L.P., PeroxyChem Holdings LLC, PeroxyChem LLC, and PeroxyChem Cooperatief U.A., (collectively, “PeroxyChem”) have executed an acquisition agreement (the “Acquisition”) in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, 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, 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. NATURE OF THE CASE**

1. Respondents Evonik and PeroxyChem are two of only five hydrogen peroxide producers in North America. Hydrogen peroxide is a commodity chemical used for oxidation, sterilization, and bleaching, and for most end uses there are no effective substitutes. Hydrogen peroxide producers sell to customers in various industries, including pulp and paper, food packaging, agriculture, chemical synthesis, mining and gas, and personal care. The pulp and paper industry uses most of the hydrogen peroxide produced in North America, primarily for bleaching pulp and deinking recycled paper. This case does not concern electronics-grade hydrogen peroxide, which requires additional manufacturing steps and is not a substitute for other forms hydrogen peroxide.

2. Respondents compete vigorously for customers, especially in regional markets in the Pacific Northwest and the Southern and Central United States. In the Pacific Northwest, the Acquisition would combine two of only three significant hydrogen peroxide producers in the region. In the Southern and Central United States, the Acquisition would combine the two largest hydrogen peroxide producers by nameplate production capacity, and two of the three largest hydrogen peroxide suppliers by sales. The Acquisition would create a firm with a dominant share and significantly increase market concentration in each regional market.

3. Post-Acquisition, Evonik would control more than half of the market, based on capacity and sales, for the production and sale of hydrogen peroxide in the Pacific Northwest, where Solvay would be the only other hydrogen peroxide producer with a meaningful presence. In the Southern and Central United States, post-Acquisition, Evonik would control nearly half of the market, based on capacity and sales, for the production and sale of hydrogen peroxide, with only Solvay, Arkema, and Nouryon remaining.

4. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”), a post-acquisition market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index (“HHI”), and an increase in market concentration of more than 200 points renders an acquisition presumptively unlawful. Based on both capacity and sales, in both the Pacific Northwest and the Southern and Central United States, the Acquisition would significantly increase concentration in already

## Complaint

concentrated markets, well beyond the thresholds set forth in the Merger Guidelines. Thus, under the Merger Guidelines, the Acquisition is presumptively unlawful in both the Pacific Northwest and the Southern and Central United States.

5. The Acquisition would substantially lessen competition for the production and sale of hydrogen peroxide in at least two ways. First, the Acquisition will increase the likelihood of coordination in a market already vulnerable to coordination, functioning as an oligopoly, and with a long history of price-fixing, including guilty pleas, litigation, and substantial fines and settlements. The hydrogen peroxide industry is already characterized by significant market transparency, strong interdependence among a few major competitors, low demand elasticity, and high entry barriers. Several hydrogen peroxide suppliers previously admitted to illegally fixing prices at a time when there were six major suppliers in North America. After the Acquisition, there will be only two suppliers remaining in the Pacific Northwest and four suppliers remaining in the Southern and Central United States. In each of the two relevant geographic markets, the Acquisition removes one of only a few competitors, thereby strengthening and reinforcing the existing oligopolistic market dynamics and making coordination amongst the few remaining suppliers easier. The Acquisition will thus increase the likelihood of coordinated effects in both the Pacific Northwest and the Southern and Central United States.

6. Second, the Acquisition would eliminate significant head-to-head competition between Evonik and PeroxyChem in the Pacific Northwest and the Southern and Central United States. In both regional markets, customers benefit from head-to-head competition amongst a small handful of hydrogen peroxide suppliers, including the merging parties. The Acquisition would substantially reduce that competition. Direct competition between Evonik and PeroxyChem has repeatedly resulted in lower prices for customers. If consummated, the Acquisition threatens significant harm to hydrogen peroxide customers in both the Pacific Northwest and the Southern and Central United States by eliminating this direct competition.

7. New entry or expansion by existing hydrogen peroxide producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry for potential producers of hydrogen peroxide. These include the need for substantial capital investment and the likelihood that it would take multiple years to build a new hydrogen peroxide production plant. These barriers make entry or expansion difficult, and incapable of constraining the merged entity. Expansion or repositioning by the remaining firms sufficient to offset the Acquisition's anticompetitive effects is also unlikely. Nor are increases in hydrogen peroxide imports or repositioning by other chemical producers likely to offset the anticompetitive effects of the Acquisition.

8. Respondents cannot show cognizable, merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Acquisition.

## Complaint

**II. JURISDICTION**

9. Respondents are, and at all relevant times have been, engaged in commerce or in activities affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

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

**III. RESPONDENTS**

11. Respondent RAG-Stiftung owns Respondent Evonik Industries AG, a large chemicals manufacturer, headquartered in Essen, North Rhine-Westphalia, Germany. Respondent Evonik Corporation is a wholly owned subsidiary of Evonik Industries AG, and is based in New Jersey. Respondent Evonik International Holding B.V. is a wholly owned subsidiary of Evonik Industries AG, and is based in the Netherlands. In 2006, RAG-Stiftung acquired Degussa, a long-time hydrogen peroxide producer, and ultimately renamed the company Evonik. Evonik had worldwide revenue of €14.4 billion in 2017. Evonik has three North American hydrogen peroxide production plants located in Mobile, Alabama; Gibbons, Alberta; and Maitland, Ontario.

12. Respondent One Equity Partners Secondary Fund, L.P. holds all of the limited partnership interests of Respondent One Equity Partners V, L.P. Respondent Lexington Capital Partners VIII (AIV I), L.P. indirectly holds a majority of the limited partnership interests in One Equity Partners Secondary Fund, L.P. One Equity Partners is the private investment arm of J.P. Morgan Chase & Co., which owns Respondent PeroxyChem Holding Company LLC, a leading global manufacturer of several chemicals, including hydrogen peroxide, based in Philadelphia, Pennsylvania. PeroxyChem Holding Company LLC owns Respondent PeroxyChem Holdings LLC, Respondent PeroxyChem Holdings, L.P., Respondent PeroxyChem LLC, and Respondent PeroxyChem Cooperatief. One Equity Partners acquired FMC Global Peroxygens, a long-time hydrogen peroxide producer, in 2014, renaming the business PeroxyChem. PeroxyChem has two hydrogen peroxide production plants in North America, in Bayport, Texas and Prince George, British Columbia. PeroxyChem also recently opened a plant in Saratoga Springs, New York. That plant purifies hydrogen peroxide produced at PeroxyChem’s Bayport facility to create electronics-grade hydrogen peroxide.

**IV. THE ACQUISITION**

13. Pursuant to an Agreement and Plan of Merger dated November 7, 2018, Evonik proposes to acquire 100% of the voting securities of PeroxyChem for approximately \$625 million in cash.

**V. RELEVANT MARKETS**

14. The production and sale of hydrogen peroxide to customers in (1) the Pacific Northwest and (2) the Southern and Central United States constitute relevant antitrust markets.

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**A. Relevant Product Market**

15. The relevant product market in which to assess the effects of the Acquisition is hydrogen peroxide. Hydrogen peroxide is an oxidizing agent with diverse uses such as bleaching pulp, chemical synthesis, and sterilizing food packaging. The primary use of hydrogen peroxide produced in North America is for bleaching in the pulp and paper industry.

16. The relevant product market at issue in this case does not include electronics-grade hydrogen peroxide. Electronics-grade hydrogen peroxide is used by semiconductor manufacturers as a cleaning and etching agent to remove contaminants from semiconductor wafers that go into cell phones, computers, and other advanced electronic devices. Electronics-grade hydrogen peroxide requires additional purification capabilities that vary by hydrogen peroxide producer, and not all hydrogen peroxide producers are capable of producing electronics-grade hydrogen peroxide. Hydrogen peroxide is not a substitute for electronics-grade hydrogen peroxide.

17. Hydrogen peroxide is a commodity chemical. The primary raw materials in manufacturing hydrogen peroxide are natural gas and hydrogen. The hydrogen peroxide production process in North America is comprised of three steps: 1) hydrogenation, 2) oxidation, and 3) extraction. This process results in crude hydrogen peroxide, which is then diluted, filtered, and stabilized depending on customer end-use.

18. There are no reasonably interchangeable substitutes for hydrogen peroxide, and customers could not realistically switch to other chemicals in the face of a small but significant non-transitory increase in price. For pulp and paper customers, who purchase the majority of hydrogen peroxide in North America, mills are set up to use specific chemicals in the bleaching process. These customers could not switch to a different bleaching chemical without purchasing new equipment and re-formulating the bleaching process, which would be costly and could take several years to implement. Similarly, there are no effective substitutes for hydrogen peroxide for other end-use applications.

**B. Relevant Geographic Markets**

19. Respondents compete in regional markets for the production and sale of hydrogen peroxide to customers. Accordingly, it is appropriate to analyze the competitive effects of the Acquisition in certain regional markets in which Respondents compete. There is also likely to be harm to customers that are outside of these geographic markets.

20. The relevant regional geographic markets in which to assess the Acquisition's effects are: (1) the Pacific Northwest and (2) the Southern and Central United States.

21. Hydrogen peroxide is delivered to customers predominantly by rail or truck. There are high transportation costs associated with delivering hydrogen peroxide, particularly relative to the value of the product itself. As a result, hydrogen peroxide producers deliver from plants that are relatively nearer to customers because – when all else is equal – it is more cost-effective to deliver at shorter distances. While hydrogen peroxide producers use terminals to deliver further distances, this usage increases the cost of delivery.

## Complaint

22. Respondents, like the other major North American hydrogen peroxide producers, analyze the industry by geographic regions, routinely treating the Pacific Northwest and the Southern and Central United States as separate regions.

23. Evonik and PeroxyChem individually negotiate prices with customers and price differently based on customers' locations. When hydrogen peroxide producers negotiate with a multiregional customer, the customer's prices typically vary by region.

24. Customers within one of the relevant regional geographic markets are unlikely to purchase hydrogen peroxide outside of that market and transport it themselves, given the cost of delivery and the importance of proximity. Further, customers could not defeat a price increase by purchasing indirectly from or through other customers (*i.e.*, arbitrage).

25. Competitive conditions for the production and sale of hydrogen peroxide differ by region. Evonik and PeroxyChem each compete to serve customers in the Pacific Northwest and the Southern and Central United States, where clusters of hydrogen peroxide customers are located. Additionally, Evonik and PeroxyChem each have plants in the Pacific Northwest and the Southern and Central United States.

26. The Pacific Northwest consists of approximately Washington, Oregon, Montana, Idaho, and Wyoming in the United States, along with British Columbia, Alberta, Manitoba, and Saskatchewan in Canada.

27. The Southern and Central United States consists of approximately Alabama, Arkansas, Arizona, California, Colorado, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and West Virginia.

## **VI. MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY**

28. Post-Acquisition, the combined entity would have a dominant share of sales to customers in both the Pacific Northwest and the Southern and Central United States, and the Acquisition would greatly increase concentration in these already concentrated markets.

29. Other than Evonik and PeroxyChem, only one other hydrogen peroxide producer has significant sales in the Pacific Northwest: Solvay. Following the Acquisition, the merged entity will be the largest hydrogen peroxide producer in the Pacific Northwest, with more than half of the production capacity and sales in the region.

30. In the Southern and Central United States, Evonik and PeroxyChem compete with Solvay, Arkema, and Nouryon. By nameplate production capacity, Evonik and PeroxyChem are the two largest hydrogen peroxide producers, and are two of the top three suppliers of hydrogen peroxide by sales. Following the Acquisition, the merged entity will be the largest hydrogen peroxide producer in the area, with nearly half of the production capacity and sales in the region.

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31. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market pre- and post-Acquisition. Under the Merger Guidelines, an acquisition is presumed likely to create or enhance market power – and is presumptively illegal – when the post-acquisition HHI exceeds 2,500 and the acquisition increases the HHI by more than 200 points.

32. The market for hydrogen peroxide in each relevant regional market is already concentrated. Post-Acquisition, each regional market would be substantially more concentrated than it is today.

33. In the Pacific Northwest, post-Acquisition Evonik would control more than half of the production capacity and sales in the relevant market. Post-Acquisition, the HHI in the relevant market far exceeds the 2,500 points that demonstrate that a market is highly concentrated. Moreover, the Acquisition would increase HHIs in an already highly concentrated market by significantly more points than required for a presumption that the Acquisition is likely to enhance market power.

34. In the Southern and Central United States, post-Acquisition Evonik would control nearly half of the production capacity and sales in the market. Post-Acquisition, the HHI in the relevant market would exceed the 2,500 points that demonstrate that a market is highly concentrated. Moreover, the Acquisition would increase HHIs in an already concentrated market by significantly more points than required for a presumption that the Acquisition is likely to enhance market power.

35. Thus, in both relevant markets, the Acquisition would result in concentration well above the amount necessary to establish a presumption of competitive harm.

36. Therefore, the Acquisition is presumptively unlawful.

## VII. ANTICOMPETITIVE EFFECTS

### A. The Acquisition Would Increase the Likelihood of Anticompetitive Coordination

37. The markets for the production and sale of hydrogen peroxide to customers already demonstrate numerous characteristics that make them vulnerable to coordinated conduct. These characteristics include a commodity product; a highly concentrated market structure with a limited number of competitors; significant transparency regarding the competitive and strategic decisions of rival firms; customers with long-term, stable supplier relationships allowing for easy detection of deviations from past practices; low elasticity of demand; and a history of strong interdependent behavior.

## Complaint

38. Given these characteristics, it is not surprising that the industry has a history of price fixing, including guilty pleas, private litigation, and substantial fines and settlements. Evonik's predecessor, Degussa, entered into an antitrust leniency agreement with the U.S. Department of Justice for its cooperation with a criminal antitrust investigation into illegal price fixing involving hydrogen peroxide. As part of the same criminal price-fixing case, Solvay and AkzoNobel (now Nouryon) entered plea agreements which summarized the facts underlying the anticompetitive behavior among the hydrogen peroxide producers:

[Solvay] . . . participated in a conspiracy among major hydrogen peroxide producers, the primary purpose of which was to suppress and eliminate competition by fixing the price of hydrogen peroxide sold in the United States and elsewhere. In furtherance of the conspiracy, the defendant, through certain of its former officers, directors, and employees, engaged in discussions and attended meetings with representatives of other major hydrogen peroxide producers. During these discussions and meetings, agreements were reached to fix the price of hydrogen peroxide sold in the United States and elsewhere.

39. The major North American hydrogen peroxide producers have considerable visibility into their competitors' business. Competitors track a wealth of information about each other—including plant-by-plant production capacities, production and inventory levels, costs, and customer locations served—by monitoring public statements and gathering competitive information from customers, distributors and others throughout the industry.

40. North American hydrogen peroxide producers also have significant awareness of their competitors' pricing. The major costs to produce hydrogen peroxide are natural gas and electricity, which allows hydrogen peroxide producers to estimate production costs at competitor plants. Further, when responding to competitive bids, hydrogen peroxide producers factor in transportation costs from their competitors' hydrogen peroxide production plants. Hydrogen peroxide producers also learn about competitor pricing during the competitive bid process for customers, whether formal or informal.

41. Having competed against each other in an oligopolistic market environment for many years, the major North American hydrogen peroxide producers recognize their mutual interdependence and aligned incentives. For years, hydrogen peroxide producers have engaged in parallel pricing behavior and other types of parallel accommodating conduct, including refraining from competing aggressively to win new business for fear of provoking a competitive response from a rival. By eliminating a key competitor, the Acquisition may exacerbate the anticompetitive effects of this interdependence.

42. Allowing Evonik to acquire PeroxyChem will increase the likelihood of anticompetitive coordination by eliminating a large, independent competitor. In the Pacific Northwest, the Acquisition creates a duopoly, leaving Evonik and Solvay as the only hydrogen peroxide producers remaining in the region. In the Southern and Central United States, the Acquisition establishes a firm controlling nearly half of the production capacity and sales in the region. Previous industry conduct demonstrates that hydrogen peroxide producers were successfully able to fix prices with six firms competing in North America. The Acquisition would

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reduce the number of remaining firms to two in the Pacific Northwest and four in the Southern and Central United States, making coordination among the remaining firms both easier and more likely to increase.

#### **B. The Acquisition Would Eliminate Vital Head-to-Head Competition Between Evonik and PeroxyChem**

43. The Acquisition would eliminate significant direct, head-to-head competition between Respondents. Customers benefit substantially from the competition between Evonik and PeroxyChem in the form of lower prices. The Acquisition would substantially reduce that competition.

44. Evonik and PeroxyChem compete for customers in both the Pacific Northwest and the Southern and Central United States, to the direct benefit of customers. Evonik and PeroxyChem track rival firms' price movements and respond to competition by offering better prices. This competition enables customers to pit hydrogen peroxide producers against each other in negotiations to obtain lower prices and increased discounts. Customers benefit from having more hydrogen peroxide producers in the region from which to obtain competitive pricing.

45. Post-Acquisition, Evonik would face less meaningful competition in both regional markets than it does today. Evonik would not need to compete as aggressively on price to win or retain the business of many customers. Other hydrogen peroxide producers will be unable to make up for the competition lost as a result of the Acquisition.

46. The only remaining hydrogen peroxide producer with a significant presence in the Pacific Northwest is Solvay. Customers in the Pacific Northwest are often unwilling to use hydrogen peroxide producers with plants outside the Pacific Northwest—Arkema and Nouryon—due to their distance from customer locations, which results in higher delivered prices and an increased risk of supply issues. Further, Arkema and Nouryon generally do not bid on customers' business in the Pacific Northwest.

47. The only remaining hydrogen peroxide producers in the Southern and Central United States are Solvay, Arkema, and Nouryon. However, post-Acquisition, Evonik would control nearly half of the production capacity and sales in the region. Solvay, Arkema, and Nouryon do not have sufficient capacity to mitigate the anticompetitive effects of the Acquisition in the Southern and Central United States. Further, for certain customers, some of these suppliers are not viable options due to smaller production capacities.

### **VIII. LACK OF COUNTERVAILING FACTORS**

#### **A. Barriers to Entry and Expansion**

48. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Acquisition.

## Complaint

49. The hydrogen peroxide market is characterized by substantial barriers to entry. Building a new hydrogen peroxide plant would take multiple years and a large capital investment. Thus, sufficiently timely entry is unlikely to occur in response to the Acquisition's anticompetitive effects in the Pacific Northwest or the Southern and Central United States to prevent significant anticompetitive harm.

50. Expansion or repositioning by the remaining firms that would defeat anticompetitive effects in the hydrogen peroxide markets in the Pacific Northwest or the Southern and Central United States is also unlikely. While Solvay expanded production of hydrogen peroxide at its Longview, Washington plant in 2016, there has been no other substantial increase in hydrogen peroxide capacity in the last decade. Further, any expansion would require a large capital investment. Thus, expansion would not be timely, likely, or sufficient in the Pacific Northwest or the Southern and Central United States to counteract the anticompetitive effects of the Acquisition.

51. Other industrial chemical producers are unlikely to reposition. The same barriers to entry and expansion by existing hydrogen peroxide producers hold true for industrial chemical manufacturers.

52. There are no significant imports of hydrogen peroxide into North America, and North American hydrogen peroxide producers do not view imports as a competitive threat. Further, customers do not view imports as a viable option for hydrogen peroxide due to supply chain challenges and transportation costs.

**B. Efficiencies**

53. Respondents cannot demonstrate cognizable merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Acquisition's likely significant anticompetitive effects in the relevant markets.

**IX. VIOLATION****Count I – Illegal Agreement**

54. The allegations of Paragraphs 1 through 53 above are incorporated by reference as though fully set forth herein.

55. The Acquisition Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**Count II—Illegal Acquisition**

56. The allegations of Paragraphs 1 through 53 above are incorporated by reference as though fully set forth herein.

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

### NOTICE

Notice is hereby given to the Respondents that the 22nd day of January, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

## Complaint

**NOTICE OF CONTEMPLATED RELIEF**

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Evonik and PeroxyChem were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between Evonik and PeroxyChem that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, Evonik and PeroxyChem provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore PeroxyChem as a viable, independent competitor in the relevant market.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this second day of August, 2019.

By the Commission, Chairman Simons recused.

## Final Order

**ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING  
COMPLAINT**

On February 11, 2020, this matter was withdrawn from adjudication pursuant to Rule 3.26(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.26(c). The Commission has now determined to return this matter to adjudication for the sole purpose of dismissing the Complaint. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, returned to adjudication; and

**IT IS FURTHER ORDERED** that the Complaint in this matter be, and it hereby is, dismissed.

By the Commission, Commissioners Chopra and Slaughter dissenting.

## Complaint

## IN THE MATTER OF

**AARON'S INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL  
TRADE COMMISSION ACT

*Docket No. C-4714; File No. 191 0074*  
*Complaint, May 11, 2020 – Decision, May 11, 2020*

This consent order addresses Aaron's Inc.'s violation of Section 5 of the Federal Trade Commission Act by negotiating and executing reciprocal purchase and non-compete agreements that had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers. The complaint alleges that Respondent entered into a small number of reciprocal purchase agreements from June 2015 to May 2018 that explicitly required the selling party to exit and remain out of the market for a specified period. The reciprocal purchase and non-compete agreements unreasonably restrained brick-and-mortar rent-to-own retail industry in the geographic markets. The consent order requires Respondent to not enter into a reciprocal purchase agreement nor any non-competition agreement that was part of a reciprocal purchase agreement. Future franchise agreements must specifically prohibit Respondent from entering into a reciprocal purchase agreement with a competitor.

*Participants*

For the *Commission*: Eric Edmondson, Stuart Hirschfeld, Joe Lipinsky, and Connor Shively.

For the *Respondents*: Norman Armstrong, Jr., King & Spalding.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Aaron's Inc. ("Aaron's"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

**Nature of the Case**

1. This action concerns purchase agreements of consumer rental contracts between Aaron's and other rent-to-own ("RTO") companies that were executed between 2015 and 2018.

2. In the traditional brick and mortar retail RTO industry, each RTO company operates stores that compete in small geographic markets. Each store derives income through rental contracts executed with its customers. When an RTO company chooses to close a store, it must decide what to do with the store's active consumer rental contracts. If the RTO company has a store nearby, it will transfer the closed store's consumer rental contracts to its nearby store. However, when the RTO company does not have a store nearby, it will attempt to sell the closed