

Complaint

IN THE MATTER OF

THERMO FISHER SCIENTIFIC 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-4431; File No. 131 0134*
Complaint, January 30, 2014 – Decision, April 1, 2014

This consent order addresses the \$13.6 billion acquisition by Thermo Fisher Scientific Inc. of certain assets of Life Technologies Corporation. 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 lessening competition in the markets for: (1) short/small interfering ribonucleic acid (“siRNA”) reagents; (2) cell culture media; and (3) cell culture sera. The consent order requires Thermo Fisher to divest its gene modulation business (which includes siRNA reagents) and its cell culture media and sera business to GE Healthcare.

Participants

For the *Commission*: *Emily J. Kozumbo, Jasmine Y. Rosner,*
and *James R. Weiss.*

For the *Respondent*: *Mark D. Alexander, Morris A. Bloom,*
John D. Harkrider, and *Michael L. Keeley, Axinn Veltrop &*
Harkrider LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Thermo Fisher Scientific Inc. (“Thermo Fisher”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Life Technologies Corp. (“Life”), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that

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

I. THE RESPONDENT

1. Respondent Thermo Fisher is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business at 81 Wyman Street, Waltham, Massachusetts 02454.

2. Respondent is engaged in, among other things, the production and sale of cell culture media, cell culture sera, and siRNA reagents, or small/short interfering RNA reagents.

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

II. THE ACQUIRED COMPANY

4. Life is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business at 5781 Van Allen Way, Carlsbad, California 92008.

5. Life is engaged in, among other things, the production and sale of cell culture media, cell culture sera, and siRNA reagents.

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

III. THE PROPOSED ACQUISITION

7. Under the terms of an Agreement and Plan of Merger (the “Agreement”) dated April 14, 2013, Respondent Thermo Fisher

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proposes to acquire all of the voting securities of Life for \$13.6 billion (the “Acquisition”).

IV. THE RELEVANT PRODUCT MARKETS

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the production and sale of (a) cell culture media, (b) cell culture sera, and (c) siRNA reagents.

- a. Cell culture media are mixtures of salts, sugars, amino acids, vitamins, ions, and trace elements that are used to support the growth of cells. Cell culture media are provided in liquid or powder form, and include, but are not limited to, process liquids, standard basal media, customized media, proprietary media, and chemically-defined media.
- b. Cell culture serum is an animal blood derivative that is used to propagate mammalian cell lines. Cell culture sera complement media by providing growth factors and other nutrients necessary for mammalian cells. Cell culture sera include, but are not limited to, fetal bovine sera, adult bovine sera, newborn calf sera, calf sera, equine sera, and porcine sera.
- c. siRNA reagents are used to study gene function by silencing gene expression and protein synthesis. Individual siRNA reagents are uniquely suited towards specific genes. Collections of siRNA reagents, or siRNA libraries, are used to target a gene family or for full genome screening in, among other things, drug development and disease treatment. The relevant product market includes siRNA libraries as well as individual siRNA reagents.

9. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce is no narrower than the United States and may be as broad as the entire world.

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V. THE STRUCTURE OF THE MARKETS

10. The cell culture media market is highly concentrated currently, with only three main suppliers: Life, Thermo Fisher, and Sigma-Aldrich Corp. (“Sigma-Aldrich”). Combined, Thermo Fisher and Life would have more than a 50% share in the cell culture media market. Sigma-Aldrich, the next closest competitor, trails with a market share of approximately 25%. The balance of the cell culture media market is split among several smaller, less significant competitors. The Acquisition substantially increases concentration in the cell culture media market and reduces the number of major suppliers of cell culture media from three to two.

11. Thermo Fisher and Life are two of only three substantial competitors in the market for cell culture sera. Life has a market share in excess of 40%. Thermo Fisher’s market share is approximately 20%. Sigma-Aldrich, the next largest competitor, has a market share of approximately 15%. Although other firms participate in this market, their market shares are considerably smaller. As a result, the Acquisition would substantially increase concentration in the cell culture sera market by combining the two most significant competitors and reducing the number of major suppliers from three to two.

12. Thermo Fisher and Life are two of only four significant competitors in the market for siRNA reagents. This is in large part because only these four firms have licenses for critical intellectual property necessary to compete effectively in this market. Thermo Fisher and Life offer the most advanced lines of siRNA reagents and are the only suppliers to offer a portfolio of siRNA reagents for the full human genome. The other license holders, Sigma-Aldrich and Qiagen N.V., do not offer as advanced or as many siRNA reagents as Thermo Fisher and Life. Combined, Thermo Fisher and Life would have a market share of more than 50% for individual siRNA reagents and greater than 90% for siRNA libraries. As a result, the Acquisition would substantially increase concentration in the market for siRNA reagents.

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VI. ENTRY CONDITIONS

13. Sufficient and timely entry into the relevant product markets described in Paragraph 8 is unlikely to deter or counteract the anticompetitive effects of the Acquisition. Entry into each of these relevant product markets requires a significant amount of time and resources. In each relevant product market, a firm must develop products with high levels of performance and reliability to establish the brand recognition necessary to compete effectively. A potential entrant must also develop around or obtain licenses for existing intellectual property. Moreover, entry into the cell culture media and sera markets requires substantial upfront investment to build sufficient capacity to supply the needs of large industrial customers, while in the case of cell culture sera, a potential entrant must competitively bid against established market participants for access to limited supplies of raw sera. Finally, a potential entrant must establish a U.S. sales force, offering high-quality technical support.

VII. THE EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, would likely be to substantially lessen competition and to tend to create a monopoly in each relevant market 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, among others:

- a. by eliminating actual, direct, and substantial competition between Respondent Thermo Fisher and Life and reducing the number of competitors for the sale of each relevant product;
- b. by increasing the likelihood that Respondent Thermo Fisher would unilaterally exercise market power for each relevant product;
- c. by increasing the likelihood and degree of coordinated interaction between or among suppliers for each relevant product;

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- d. by increasing the likelihood that consumers would experience lower levels of quality and service for each relevant product; and
- e. by increasing the likelihood that customers would be forced to pay higher prices for each relevant product.

VIII. VIOLATIONS CHARGED

15. The Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of January, 2014, issues its Complaint against said Respondent.

By the Commission.

**ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Life Technologies Corporation (“Life”), by Thermo Fisher Scientific Inc. (“Respondent Thermo Fisher”), and Respondent Thermo Fisher having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Thermo Fisher with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C.

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§ 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and factual findings and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Thermo Fisher is a corporation organized, existing and doing business under the laws of the State of Delaware with its office and principal headquarters located at 81 Wyman Street, Waltham, Massachusetts 02451.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent Thermo Fisher and the proceeding is in the public interest.

I.

IT IS HEREBY ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

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- A. “Divestiture Businesses Employee(s)” means any and all employees working, in any capacity and for any amount of time, for the Dharmacon Gene Modulation Business, or the HyClone Cell Culture Business, including all employees who share time between the Divestiture Businesses and businesses that Respondent Thermo Fisher may retain after the divestiture pursuant to the Decision and Order. For purposes of this Hold Separate Order, the Persons not included as Divestiture Businesses Employees are (1) the employees whose time is exclusively dedicated to SUTs; or (2) employees who have no work time devoted to or related to Gene Modulation Products.
- B. “Hold Separate Manager(s)” means the Person or Persons appointed pursuant to Paragraph IV of this Hold Separate Order to be the manager(s) of the Divestiture Businesses.
- C. “Hold Separate Monitor” means the Person appointed pursuant to Paragraph III of this Hold Separate Order to oversee the Hold Separate Manager(s) and the Divestiture Businesses.
- D. “Hold Separate Period” means the period during which the Divestiture Businesses shall be held separate from Respondent Thermo Fisher’s other businesses under this Hold Separate Order, which shall begin on the Acquisition Date and terminate on the Closing Date.
- E. “Hold Separate Services” means those services provided by the Divestiture Businesses and certain Divestiture Businesses Employees (1) in the ordinary course of each such employee’s job, and (2) that are reasonable and necessary to ensure that Respondent Thermo Fisher’s businesses -- not a part of the Divestiture Businesses -- are able to continue to operate in the normal course of business, independently of the Divestiture Businesses during the Hold Separate Period, including but not limited to the transition services described in Paragraph VI.B.3 of this Order and in the Schedules to Exhibit C to the

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Remedial Agreements. Hold Separate Services shall be subject to review and approval of the Hold Separate Monitor.

- F. “Orders” means the Decision and Order and the Hold Separate Order.

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

- A. With respect to the Divestiture Businesses, and subject to consultation with the Hold Separate Monitor regarding the Hold Separate Services, during the Hold Separate Period, Respondent Thermo Fisher shall:
1. Hold the Divestiture Businesses separate, apart, and independent of Respondent Thermo Fisher’s other businesses and assets as required by this Hold Separate Order and shall vest the Divestiture Businesses with all rights, powers, and authority necessary to conduct business in a manner consistent with the Orders;
 2. Not exercise direction or control over, or influence directly or indirectly, the Divestiture Businesses or any of their operations, the Hold Separate Monitor, or the Hold Separate Manager, except to the extent that Respondent Thermo Fisher must exercise direction and control over the Divestiture Businesses as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws and regulations, including, in consultation with the Hold Separate Monitor, continued oversight of compliance of the Divestiture Businesses with policies and standards concerning safety, health, and environmental aspects of its operations and the integrity of its financial controls. Respondent Thermo Fisher shall have the right in consultation with the Hold Separate Monitor to defend any legal claims,

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investigations, or enforcement actions threatened or brought against the Divestiture Businesses;

3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Divestiture Businesses (including, but not limited to, taking such actions as the Hold Separate Monitor, in consultation with Commission staff, might request or direct that are reasonably necessary to maintain and assure the continued viability, marketability, and competitiveness of the Divestiture Businesses), and prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Businesses, except for ordinary wear and tear;
 4. Not sell, transfer, encumber, or otherwise impair the Divestiture Businesses (except as directed by the Hold Separate Monitor or required by the Orders); and
 5. Provide the Divestiture Businesses with sufficient funding and financial resources necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Businesses, including, but not limited to, all funding and financing necessary to: (i) operate the Divestiture Businesses in a manner consistent with how it has been operated, and is currently operated, in the normal course of business, and consistent with existing business, capital and strategic plans and operating budgets; (ii) carry out any planned or existing capital projects and physical improvements; (iii) perform maintenance, replacement, or remodeling of assets in the ordinary course of business; and (iv) provide capital, working capital, and reimbursement for any operating expenses, losses, capital losses, or other losses;
- B. The purpose of this Hold Separate Order is to: (1) maintain and preserve the Divestiture Businesses as

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viable, marketable, competitive, and ongoing businesses independent of Respondent Thermo Fisher until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondent Thermo Fisher and the Divestiture Businesses, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

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

- A. KPMG LLP (Charles A. Riepenhoff, Jr., Managing Director) shall serve as Hold Separate Monitor to monitor and supervise the management of the Divestiture Businesses and ensure that Respondent Thermo Fisher comply with its obligations under the Orders.
- B. Respondent Thermo Fisher shall enter into the Hold Separate Monitor Agreement with the Hold Separate Monitor that is attached as Appendix A, with the Hold Separate Monitor compensation attached at Non-Public Appendix A-1. The Hold Separate Monitor Agreement shall become effective on the Acquisition Date. The Hold Separate Monitor Agreement shall transfer to and confer upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of the Orders and in consultation with Commission staff, and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission. Further, the Hold Separate Monitor Agreement shall provide that:
 - 1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of

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the Divestiture Businesses; supervising the management of the Divestiture Businesses by the Hold Separate Manager; overseeing the on-going Hold Separate Services coming from the Divestiture Businesses and Divestiture Business Employees to Respondent Thermo Fisher; maintaining the independence of the Divestiture Businesses; ensuring continued and adequate funding of the Divestiture Businesses; and monitoring Respondent Thermo Fisher's compliance with its obligations pursuant to this Hold Separate Order and the Decision and Order.

2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Hold Separate Monitor shall have full and complete access to all of Respondent Thermo Fisher's facilities, personnel, and books and records relating to the Divestiture Businesses as may be necessary for or relate to the performance of the Hold Separate Monitor's duties under the Orders and the Hold Separate Monitor Agreement. The Books and Records to which the Hold Separate Monitor shall have access include, but are not limited to, any and all:
 - a. Data and databases, including, but not limited to, databases with financial information relating to the Divestiture Businesses;
 - b. Regularly-prepared reports relating to the Divestiture Businesses, including, but not limited to, financial, revenue, customer or operating statements or reports prepared daily, weekly, monthly, or on some other regular interval;
 - c. Regularly-prepared or periodic reports prepared and filed with any Government Entity;

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- d. Reports or summaries of marketing and promotional activities by Respondent Thermo Fisher that relate to the Divestiture Businesses;
 - e. Reports, summaries, records, or documents from the past operations of the Divestiture Businesses sufficient to allow the Hold Separate Monitor to evaluate the performance of the Divestiture Businesses during the Hold Separate Period in comparison to the past performance of the Divestiture Businesses;
 - f. Other relevant reports, summaries, records documents, or information relating to the Divestiture Businesses as the Hold Separate Monitor may request; and
 - g. Financial summaries or reports, or other information, reports, or summaries relating to the Divestiture Businesses as the Hold Separate Monitor may request Respondent Thermo Fisher to locate, collect, organize, and develop for the Hold Separate Monitor.
4. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondent Thermo Fisher, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.
 5. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondent Thermo Fisher, on reasonable and customary terms commensurate with the person's experience and responsibilities. Respondent Thermo Fisher shall provide compensation to the Hold Separate Monitor, and pay the Hold Separate Monitor's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys, and other representatives

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and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Thermo Fisher shall indemnify the Hold Separate Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate 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 losses, claims, damages, liabilities, or expenses result from the Hold Separate Monitor's gross negligence, willful or wanton acts, or bad faith.
7. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.
8. Respondent Thermo Fisher may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.
9. Thirty (30) calendar days after the Hold Separate Order becomes final, and every thirty (30) calendar days thereafter until the Hold Separate Order terminates, and as requested by the Commission or Commission staff, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold

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Separate Order. Each report shall include, but not be limited to, the Hold Separate Monitor's assessment of the extent to which each of the Divestiture Businesses is meeting (or exceeding) its projected goals as reflected in business planning documents, budgets, projections, or any other regularly prepared financial statements.

10. Respondent Thermo Fisher shall comply with all terms of the Hold Separate Monitor Agreement, and any breach by Respondent Thermo Fisher of any term of the Hold Separate Monitor Agreement shall constitute a violation of this Hold Separate Order. Notwithstanding any paragraph, section, or other provision of the Hold Separate Monitor Agreement, any modification of the Hold Separate Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Hold Separate Order and the Decision and Order.
- C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistently with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondent Thermo Fisher, which consent shall not be unreasonably withheld, as follows:
1. If Respondent Thermo Fisher has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the Commission staff to Respondent Thermo Fisher of the identity of the proposed substitute Hold Separate Monitor, then Respondent Thermo Fisher shall be deemed to have consented to the selection of the proposed substitute Monitor.
 2. Respondent Thermo Fisher shall, no later than five (5) business days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate

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Monitor that, subject to the prior approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in Paragraph III of this Hold Separate Order.

- D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. The Hold Separate Monitor shall not make any material changes in the ongoing operations or development of the Divestiture Businesses, and shall continue the management and operation of the Divestiture Businesses in a manner intended to ensure continued compliance with the indentures and credit agreements governing Respondent Thermo Fisher's indebtedness (and all notes and agreements related thereto), except with prior approval of the Commission staff, and after providing written notice to, and an opportunity for consultation with, Respondent Thermo Fisher.
- F. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of this Hold Separate Order.

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

- A. Respondent Thermo Fisher's employees shall not receive, have access to, use or continue to use, or disclose any Confidential Business Information

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pertaining to the Divestiture Businesses except in the course of:

1. Performing their obligations as permitted under this Hold Separate Order;
2. Performing their obligations under any Remedial Agreement; or
3. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Businesses, or as required by law.

For purposes of this Paragraph IV.A., Respondent Thermo Fisher's employees who provide support services under the Hold Separate Order or staff the Divestiture Businesses shall be deemed to be performing obligations under the Order to Hold Separate.

- B. If the receipt, access to, use, or disclosure of Confidential Business Information pertaining to the Divestiture Businesses is permitted to Respondent Thermo Fisher's employees under Paragraph IV.A. of this Order, Respondent Thermo Fisher shall limit such information (1) only to those Persons who require such information for the purposes permitted under Paragraph IV.A., (2) only to the extent such Confidential Business Information is required, and (3) only after such Persons have signed an appropriate agreement in writing to maintain the confidentiality of such information.

Respondent Thermo Fisher shall enforce the terms of this Paragraph IV as to any Person other than the Acquirer of the Divestiture Businesses and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph IV, including training of Respondent Thermo Fisher's employees and all other actions that Respondent Thermo Fisher

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would take to protect its own trade secrets and proprietary information.

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

- A. Effective on the Acquisition Date, Respondent Thermo Fisher shall appoint Mike Deines as the Hold Separate Manager to manage and maintain the operations of the Dharmacon Gene Modulation Business and David Radspinner as the Hold Separate Manager to manage and maintain the operations of the HyClone Cell Culture Business in the regular and ordinary course of business and in accordance with past practice.
- B. Respondent Thermo Fisher shall enter into the manager agreement with the Hold Separate Managers attached as Appendix B and Appendix C to this Hold Separate Order. Each manager agreement shall become effective on the Acquisition Date. The manager agreement shall transfer all rights, powers, and authority necessary to permit the Hold Separate Manager to perform his or her duties and responsibilities pursuant to this Hold Separate Order to manage the Divestiture Businesses. Further, the manager agreement shall provide that:
 - 1. Each Hold Separate Manager shall be responsible for managing the operations of the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business, respectively, through the Hold Separate Period, and shall report directly and exclusively to the Hold Separate Monitor and, subject to the Hold Separate Services, shall manage each business independently of the management of Respondent Thermo Fisher and its other businesses.
 - 2. Each Hold Separate Manager shall make no material changes in the ongoing operations or development of the business, and shall continue the

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management and operation of each business in a manner intended to ensure continued compliance with the indentures and credit agreements governing the Respondent Thermo Fisher's indebtedness (and all notes and agreements related thereto), except with the approval of the Hold Separate Monitor, in consultation with Commission staff, and after providing written notice to and an opportunity for consultation with Respondent Thermo Fisher, or as otherwise allowed by the Orders.

3. Each Hold Separate Manager, with the approval of the Hold Separate Monitor, shall have the authority to employ such Persons as are reasonably necessary to assist the Hold Separate Manager in managing each business, including, without limitation, consultants, accountants, attorneys, and other representatives, assistants, and employees.
4. Respondent Thermo Fisher shall provide each Hold Separate Manager with reasonable financial incentives to undertake these positions. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Divestiture Businesses, and as may otherwise be necessary to secure the Hold Separate Manager's agreement to achieve the purposes of this Hold Separate Order.
5. Each Hold Separate Manager shall serve, without bond or other security, at the cost and expense of Respondent Thermo Fisher, on reasonable and customary terms commensurate with the person's experience and responsibilities, and with any financial incentives that may be reasonable or necessary as described in this Paragraph V.

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Respondent Thermo Fisher shall pay each Hold Separate Manager's costs and expenses (including, but not limited to, those related to consultants, accountants, attorneys, and other representatives and assistants) on a monthly or other reasonable periodic basis.

6. Respondent Thermo Fisher shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager'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 the Manager's gross negligence, willful or wanton acts, or bad faith.
7. Nothing contained herein shall preclude each Hold Separate Manager from contacting or communicating directly with the Commission staff, either at the request of the Commission staff or the Hold Separate Monitor, or in the discretion of the Hold Separate Manager.
8. Each Hold Separate Manager shall have the authority, in consultation with the Hold Separate Monitor, to staff the Divestiture Businesses with sufficient employees to maintain the viability and competitiveness of the businesses, including:
 - a. Replacing any departing or departed employee with a person who has similar experience and expertise or determine not to replace such departing or departed employee;
 - b. Removing any employee who ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, and

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replacing or not replacing such employee with another person of similar experience or skills;

- c. Ensuring that no employee shall be involved in any way in the operations of Respondent Thermo Fisher's other businesses, unless allowed or required by the Hold Separate Services or otherwise under the Orders;
 - d. Providing each Divestiture Businesses Employee, with reasonable financial incentives, including continuation of all salaries, employee benefits, and regularly scheduled raises and bonuses, to continue in his or her position during the Hold Separate Period; and
 - e. Providing each Divestiture Businesses Employee with additional financial incentives, to continue in his or her position throughout the Hold Separate Period.
- C. Each Hold Separate Manager may be removed for cause by the Hold Separate Monitor, in consultation with the Commission staff. If a Hold Separate Manager is removed, resigns, or otherwise ceases to act as Hold Separate Manager, the Hold Separate Monitor shall, within three (3) business days of such action, subject to the prior approval of Commission staff, appoint a substitute Hold Separate Manager, and Respondent Thermo Fisher shall enter into an agreement with the substitute Hold Separate Manager on the same terms and conditions as provided in this Hold Separate Order.

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

- A. Respondent Thermo Fisher shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor; (ii) the Hold

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Separate Managers; or (iii) any Divestiture Businesses Employee, to perform his or her duties and responsibilities consistent with the terms of the Orders.

- B. Respondent Thermo Fisher shall continue to offer and provide any support services and goods (directly or through third-party contracts) to the Divestiture Businesses.
1. For support services and goods that Respondent Thermo Fisher provides to the Divestiture Businesses, Respondent Thermo Fisher may charge no more than the same price, if any, charged by Respondent Thermo Fisher for such support services and goods as of the Acquisition Date.
 2. Respondent Thermo Fisher employees who provide support to the Divestiture Businesses shall retain and maintain all Confidential Business Information of the Divestiture Businesses on a confidential basis and, except as is permitted by the Orders, shall not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any Person whose employment involves any of Respondent Thermo Fisher's other businesses, other than the Divestiture Businesses. Respondent Thermo Fisher employees who provide support to the Divestiture Businesses shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Divestiture Businesses.
 3. The services and goods that Respondent Thermo Fisher shall offer the Divestiture Businesses shall include, but not be limited to, the following:
 - a. Human resources and administrative support services, including, but not limited to, payroll processing and employee benefits, including health benefits and administration;

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- b. Preparation of tax returns;
- c. Environmental health and safety services, which are used to insure compliance with federal and state regulations and corporate policies;
- d. Financial accounting and reporting services;
- e. Legal, licensing, and audit services;
- f. Federal and state regulatory compliance;
- g. Maintenance and oversight of all information technology systems and databases, including, but not limited to, all hardware, software, electronic mail, word processing, document retention, enterprise management systems, financial management systems and databases, customer databases, gaming systems, security systems, and reporting systems;
- h. Processing of accounts payable and accounts receivable;
- i. Distribution thru Fisher Scientific of products of the Divestiture Businesses on terms and with the level of support at least equivalent to the terms and support before the Acquisition;
- j. Procurement of supplies, goods, and services utilized in the ordinary course of business by the Divestiture Businesses;
- k. Public relations and public affairs support services;
- l. Construction and development services;
- m. Procurement and renewal of insurance and related services; and

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- n. Security and safety services.
4. Notwithstanding the above, the Divestiture Businesses shall have, at the option of the Hold Separate Managers and with the approval of the Hold Separate Monitor following consultation with Commission staff, the right to acquire support services from third parties unaffiliated with Respondent Thermo Fisher.
- C. Respondent Thermo Fisher shall not permit:
- 1. Any of its employees, officers, agents, or directors, other than: (i) the Hold Separate Monitor; (ii) the Hold Separate Managers; and (iii) any Divestiture Businesses employee, to be involved in the operations of the Divestiture Businesses, except to the extent otherwise provided in this Hold Separate Order or required for the provision of Hold Separate Services.
 - 2. The Hold Separate Managers or any of the Divestiture Business Employees to be involved, in any way, in the operations of Respondent Thermo Fisher's businesses other than the Divestiture Businesses, except to the extent required for the provision of Hold Separate Services.
- D. Respondent Thermo Fisher shall provide the Divestiture Businesses with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Monitor, consistent with his obligations and responsibilities in this Hold Separate Order, to:
- 1. Operate the Divestiture Businesses at least as they are currently operated (including efforts to generate new business and complete development and construction projects) consistent with the practices of the Divestiture Businesses, and Respondent Thermo Fisher's business, capital, and strategic plans, in place as of the Acquisition;

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2. Provide each Divestiture Businesses employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Businesses pending divestiture. Such incentives shall include a continuation of all salaries, employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Divestiture Businesses during the Hold Separate Period, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order;
3. Respondent Thermo Fisher will provide sufficient financial resources to allow the Hold Separate Monitor to provide certain important management or sales personnel of the Divestiture Businesses, at his discretion, with additional financial incentives to continue in his or her position until the termination of the Hold Separate Period;
4. Perform all maintenance to, and replacements or remodeling of, the assets of the Divestiture Businesses in the ordinary course of business, in accordance with past practice, and Respondent Thermo Fisher's business, capital, and strategic plans in place prior to the Acquisition Date;
5. Carry on such capital projects, physical plant improvements, and business plans as are already under way or planned, including, but not limited to, existing or planned renovation, remodeling, and expansion projects, all in accordance with Respondent Thermo Fisher's business, capital, and strategic plans in place prior to the Acquisition Date; and

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6. Maintain the viability, competitiveness, and marketability of the Divestiture Businesses.

Such financial resources to be provided to the Divestiture Businesses shall include, but shall not be limited to: (i) general funds; (ii) capital; (iii) working capital; and (iv) reimbursement for any operating expenses, losses, capital losses, or other losses, *provided, however* that, consistent with the purposes of the Orders, the Hold Separate Monitor may, and in consultation with Commission staff, substitute any capital or development project for another of like cost.

- E. No later than five (5) business days after the Acquisition Date, Respondent Thermo Fisher shall establish and implement written procedures, subject to the approval of the Hold Separate Monitor and in consultation with Commission staff, regarding the operational independence of the Divestiture Businesses and the independent management by the Hold Separate Monitor and each Hold Separate Manager, consistent with the provisions of this Hold Separate Order, the Decision and Order, the Hold Separate Monitor Agreement (attached as Appendix A to this Hold Separate Order), and the Hold Separate Manager agreements (attached as Appendices B and C to this Hold Separate Order).
- F. No later than five (5) business days after the Acquisition Date, Respondent Thermo Fisher shall circulate to Divestiture Businesses employees, and to Respondent Thermo Fisher's employees who have responsibilities associated with businesses that compete with the Divestiture Businesses, the Decision and Order, and to Persons who are employed in Respondent Thermo Fisher's businesses that compete with the Divestiture Businesses, a notice of the Orders, in a form approved by the Hold Separate Monitor in consultation with Commission staff. This notice shall include, but not be limited to, information and directions about the independent operation of the Divestiture Businesses, and the limitations on

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Respondent Thermo Fisher's rights to use or have access to Confidential Business Information.

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

A. During the Hold Separate Period, Respondent Thermo Fisher shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any Person except as required or permitted by the Orders; and
2. Not use any Confidential Business Information for any reason or purpose other than as required or permitted by the Orders.

Provided, however, that nothing in this Paragraph VII shall prevent Respondent Thermo Fisher from using any tangible or intangible property that Respondent Thermo Fisher retains the right to use pursuant to the Orders, *provided, further, however,* that to the extent that the use of such property involves disclosure of Confidential Business Information to another Person, Respondent Thermo Fisher shall require such Person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondent Thermo Fisher's obligations under the Orders.

B. Notwithstanding Paragraph VII.A. of this Hold Separate Order and subject to the Decision and Order, Respondent Thermo Fisher is permitted to retain a copy of any information used by, necessary for, or relating to Respondent Thermo Fishers businesses other than a Divestiture Businesses and may use Confidential Business Information:

1. For the purpose of performing Respondent Thermo Fisher's obligations under this Hold Separate

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Order, the Decision and Order, or the Divestiture Agreement; and

2. As otherwise allowed in the Decision and Order.
- C. If access to or disclosure of Confidential Business Information of the Divestiture Businesses to Respondent Thermo Fisher's employees and agents is necessary and permitted under Paragraph VII.B. of this Hold Separate Order, Respondent Thermo Fisher shall:
1. Implement and maintain processes and procedures, as approved by the Hold Separate Monitor and in consultation with Commission staff, pursuant to which Confidential Business Information of the Divestiture Businesses may be disclosed or used by Respondent Thermo Fisher's employees and agents;
 2. Limit disclosure or use by its employees or agents to those who require access to such Confidential Business Information for uses permitted by the Orders;
 3. Maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff records of Respondent Thermo Fisher's employees or agents who have accessed or used Confidential Business Information, a reasonable description of the Confidential Business Information to which they had access or used, and the dates upon which they accessed or used such information;
 4. Require its employees and agents to sign, and maintain and make available for inspection and copying by the Hold Separate Monitor and Commission staff, appropriate written agreements to maintain the confidentiality of such information and to use such information only as permitted by the Orders; and

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5. Enforce the terms of this Paragraph VII as to any of Respondent Thermo Fisher's employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph VII. including:
 - a. Training of Respondent Thermo Fisher's employees and agents in permitted access to and use of Confidential Business Information;
 - b. Appropriate discipline of Respondent Thermo Fisher's employees and agents who fail to comply with processes and procedures established by Respondent Thermo Fisher pursuant to this Paragraph VI. Or any confidentiality agreement; and
 - c. All other actions that Respondent Thermo Fisher would take to protect their own trade secrets, proprietary, and other non-public information.
- D. Respondent Thermo Fisher shall implement and maintain in operation a system, approved by the Hold Separate Monitor and in consultation with Commission staff, of written procedures covering access and data controls to prevent unauthorized access to, or dissemination or use of, Confidential Business Information of the Divestiture Businesses, including, but not limited to, the opportunity by the Hold Separate Monitor to audit Respondent Thermo Fisher's networks and systems to verify compliance with Respondent Thermo Fisher's systems with the Orders.
- E. Neither the Hold Separate Managers nor any Divestiture Businesses' employees shall receive or have access to, or use or continue to use, any Confidential Business Information relating to Respondent Thermo Fisher's businesses (not subject to the Hold Separate Order), except such information as

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is necessary to maintain and operate the Divestiture Businesses and provide Hold Separate Services.

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

- A. Respondent Thermo Fisher shall cooperate with and assist any proposed Acquirer of each of the Divestiture Businesses to evaluate independently and retain any of the Divestiture Businesses employees, such cooperation to include at least to implement the provisions of the Decision and Order relating to employee interviewing and hiring.
- B. During the Hold Separate Period, Respondent Thermo Fisher shall waive any corporate policy, rules, and regulations, and waive any written or oral agreement or understanding, that might prevent or limit any Hold Separate Monitor, Hold Separate Manager, or Divestiture Businesses Employee from performing any services, engaging in any activities, or other conduct reasonably related to achieving the purposes of the Orders.

IX.

IT IS FURTHER ORDERED that, within seven (7) calendar days after this Hold Separate Order becomes final, and every seven (7) calendar days thereafter until this Hold Separate Order terminates, Respondent Thermo Fisher shall submit to the Commission, with a copy to the Hold Separate Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondent Thermo Fisher shall include in their reports, among other things that are required from time to time:

- A. A description in reasonable detail of any claim (whether Respondent Thermo Fisher agrees or disagrees with the claim) by any Person (including, but not limited to, any of Respondent Thermo Fisher's

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employees or agents) that Respondent Thermo Fisher has failed to comply fully with the Orders, and the name, address, phone number, and email address of such Person; and

- B. A description in reasonable detail of any information in Respondent Thermo Fisher's possession, custody, or control (including, but not limited to, information obtained from Respondent Thermo Fisher's monitoring of the compliance of its employees and agents with processes, procedures, and agreements intended to secure Respondent Thermo Fisher's compliance with their obligations under the Orders) relevant to any failure by Respondent Thermo Fisher, its employees, or agents to comply fully with Respondent Thermo Fisher's obligations under the Orders.

X.

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

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

XI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Thermo Fisher, with respect to any matter contained in this Order, Respondent Thermo Fisher

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shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent Thermo Fisher related to compliance with the Consent Agreement and the Orders, which copying services shall be provided by Respondent Thermo Fisher at the request of the authorized representative of the Commission and at the expense of Respondent Thermo Fisher;
- B. Upon five (5) days' notice to Respondent Thermo Fisher and without restraint or interference from them, to interview officers, directors, or employees of Respondent Thermo Fisher, who may have counsel present.

XII.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate when all of the obligations relating to the Divestiture Businesses have been performed, and the Divestiture Businesses have been divested pursuant to Paragraph II or Paragraph VII of the Decision and Order.

By the Commission.

APPENDIX A**HOLD SEPARATE MONITOR AGREEMENT**

Order to Hold Separate

NON-PUBLIC APPENDIX A-1

HOLD SEPARATE MONITOR COMPENSATION

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

APPENDIX B

**AGREEMENT OF THE HOLD SEPARATE MANAGER
OF THE DHARMA CON GENE MODULATION BUSINESS**

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

APPENDIX C

**AGREEMENT OF THE HOLD SEPARATE MANAGER
OF HYCLONE CELL CULTURE BUSINESS**

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

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DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Life Technologies Corporation (“Life”), by Thermo Fisher Scientific Inc. (“Respondent Thermo Fisher”), and Respondent Thermo Fisher having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Thermo Fisher with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Thermo Fisher has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Thermo Fisher is a corporation organized, existing and doing business under the laws of the State

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of Delaware with its office and principal headquarters located at 81 Wyman Street, Waltham, Massachusetts 02451.

2. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Thermo Fisher” or “Respondent” means Thermo Fisher Scientific Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Thermo Fisher Scientific Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Life” means Life Technologies Corporation, a corporation organized, existing and doing business under the laws of the State of Delaware with its headquarters located at 5791 Van Allen Way, Carlsbad, California 92008.
- C. “Commission” means the Federal Trade Commission.
- D. “GE Healthcare” means GE Healthcare, a division of General Electric Company, a corporation organized, existing and doing business under the laws of the State of New York with its headquarters located at 3135 Easton Turnpike, Fairfield, Connecticut 06828. GE Healthcare’s United States headquarters is located at 9900 W. Innovation Drive, Wauwatosa, Wisconsin 55226.

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- E. “Aalst, Belgium Facility” means:
1. the warehouse site leased by Respondent Thermo Fisher located at 27 Industrielaan, 9320 Erembodegen-Aalst, Belgium, and
 2. the office site leased by Respondent Thermo Fisher located at Clinton Park, 198 Ninovesteenweg, 9320 Erembodegen-Aalst, Belgium.
- F. “Acquisition” means the Respondent Thermo Fisher’s proposed acquisition of Life.
- G. “Acquirer” means the following:
1. a Person specified by name in this Order to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order; or
 2. a Person approved by the Commission to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- H. “Acquisition Date” means the date on which the Acquisition is consummated.
- I. “Beijing Facility” means the facility currently leased by Respondent Thermo Fisher located at Area B, Beijing Tianzhu Airport Economic Development Zone, China.
- J. “Cell Culture Media” means growth media products used for cell culture, designed to support the growth of cells, in any form, including process liquids, standard basal media, customized media, proprietary media, and chemically defined media; *provided, however*, that Cell Culture Media does not include microbiological culture media.

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- K. “Cell Culture Sera” means raw or processed animal blood sera used for cell culture, including, but not limited to, fetal bovine serum, adult bovine serum, newborn calf serum, calf serum, equine serum, and porcine serum.
- L. “Cell Line Development for Biologics” means the use of molecular biology to create or modify the genome of a biological producing cell line to enhance its production of the biologics, *e.g.*, antibody, EPO, or Factor VIII.
- M. “Confidential Business Information” means information owned by, or in the possession or control of, Respondent Thermo Fisher that is not in the public domain and that is directly related to the conduct of the Divestiture Businesses. The term “Confidential Business Information” *excludes* the following:
1. information relating to any of Respondent Thermo Fisher’s general business strategies or practices that does not discuss with particularity the Divestiture Businesses;
 2. information specifically excluded from the Divestiture Businesses conveyed to the Acquirer;
 3. information that is contained in documents, records, or books of Respondent Thermo Fisher that is provided to an Acquirer that is unrelated to the Divestiture Businesses acquired by that Acquirer or that is exclusively related to businesses or products retained by Respondent Thermo Fisher; and
 4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; and

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- F. information that Respondent Thermo Fisher demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
- a. Was or becomes generally available to the public other than as a result of disclosure by Respondent Thermo Fisher;
 - b. Is necessary to be included in Thermo Fisher's mandatory regulatory filings; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;
 - c. Was available, or becomes available, to Respondent Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Respondent Thermo Fisher, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 - d. Is information the disclosure of which is consented to by the Acquirer;
 - e. Is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement;
 - f. Is disclosed in complying with the Order;
 - g. Is information the disclosure of which is necessary to allow Respondent Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or
 - h. Is disclosed in obtaining legal advice.

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- N. “Closing Date” means the respective dates on which Respondent Thermo Fisher or a Divestiture Trustee divests the HyClone Cell Culture Business and the Dharmacon Gene Modulation Business.
- O. “Cramlington Facility” means the two sites located at unit 9, Nelson Park Industrial Estate, Cramlington, United Kingdom, and unit 12, Atley Way, Nelson Park Industrial Estate, Cramlington, United Kingdom, currently owned and leased, respectively, by Respondent Thermo Fisher.
- P. “Designated Employees” means all employees of Respondent Thermo Fisher who are working for the Divestiture Businesses, or have worked for the Divestiture Businesses in the last six (6) months including, but not limited to:
1. At the HyClone Cell Culture Leased Facilities;
 2. At the HyClone Cell Culture Owned Facilities;
 3. At the HyClone Cell Culture Excluded Facilities;
 4. At the Lafayette Facility; and
 5. Anywhere in the world in the marketing, selling, managing, researching, manufacturing, or otherwise working for the Divestiture Businesses.
- provided, however,* that if the Acquirer is GE Healthcare, the number of “Designated Employees” who can be hired shall be limited as described in Non-Public Appendix B-2 to this Order. *provided, further, however,* that if the Acquirer is GE Healthcare, the “Designated Employees” does not include the employees listed on Non-Public Appendix B-1.
- Q. “Dharmacon Divestiture Agreement” means the Remedial Agreement, between Respondent Thermo Fisher and GE Healthcare or an Acquirer for the divestiture of the Dharmacon Gene Modulation

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Business. The Dharmacon Divestiture Agreement between Respondent Thermo Fisher and GE Healthcare is attached as part of Non-Public Appendix A.

- R. “Dharmacon Gene Modulation Business” means all of Respondent Thermo Fisher’s assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing, or sale of Dharmacon Gene Modulation Products including, but not limited to:
1. Dharmacon Gene Modulation Intellectual Property;
 2. Dharmacon Gene Modulation Product Marketing Materials;
 3. Dharmacon Gene Modulation Products scientific and regulatory material;
 4. Dharmacon Gene Modulation Products manufacturing and other equipment located at any facility owned or leased by Respondent Thermo Fisher, or used by Respondent Thermo Fisher or its agents for the production of Dharmacon Gene Modulation Products;
 5. inventory; and
 6. Confidential Business Information and current and historical product, customer, and supplier information and data, relating to the Dharmacon Gene Modulation Business (to the extent there is shared information, Respondent Thermo Fisher shall provide redacted versions to the Acquirer and retain copies with information redacted relating to the Dharmacon Gene Modulation Business).
- S. “Dharmacon Gene Modulation Contracts” means Respondent Thermo Fisher’s current customer, licensing, sourcing, or distribution contracts for

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Dharmacon Gene Modulation Products to the extent that they pertain to the manufacture, supply, or distribution of Dharmacon Gene Modulation Products. *provided, however,* that if such customer, licensing, sourcing, or distribution contract also relates to products other than Dharmacon Gene Modulation Products, then only those portions of such contracts that relate to the sale, supply, or distribution of Dharmacon Gene Modulation Products shall be included for purposes of this Order. *provided, further, however,* that Dharmacon Gene Modulation Contracts do not include the contracts listed in Non-Public Appendix H to this Order.

- T. “Dharmacon Gene Modulation Intellectual Property” means all Intellectual Property relating to the design, manufacture, and sale of Dharmacon Gene Modulation Products designed, manufactured, or sold by, or on behalf of, Respondent Thermo Fisher, even where such Intellectual Property has not been reduced to practice or commercialized, including, but not limited to, web domain names relating to the Dharmacon Gene Modulation Business. *provided, however,* that unless otherwise provided for in this Order, the Dharmacon Gene Modulation Intellectual Property does not include (i) the Gene Sequence Patents, (ii) the Intellectual Property relating to TurboFECT transfection products, and (iii) the Thermo Fisher brand name, or the names of any other divisions, businesses, corporations, or companies owned by Respondent Thermo Fisher.
- U. “Dharmacon Gene Modulation Products” means products related to Gene Modulation and Gene Silencing, made by, or being researched and developed but not yet commercialized by, Respondent Thermo Fisher’s Dharmacon subsidiary, part of Respondent Thermo Fisher’s Molecular Biology Business Unit, and formerly marketed under the Dharmacon or Open Biosystems brand names at any time since January 1, 2012, including, but not limited to, the following product platforms: small/short interfering RNA

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(siRNA), Custom RNA, microRNA, RNAi Controls, Transfection, and short hairpin RNA (shRNA), which include, among other products, RNAi Control Reagents, libraries and standalone reagents for siRNA, cDNA, ORFs, DNA oligos, viral packaging vector products, transfection reagents, and RNAi ancillary reagents. *provided, however*, that “Dharmacon Gene Modulation Products” does not include TurboFECT transfection products.

- V. “Divestiture Businesses” means the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business.
- W. “Gene Modulation” means the use of RNA interference (RNAi), also called post-transcriptional gene silencing, as a biological process in which RNA molecules inhibit gene expression, typically by causing the destruction of specific mRNA molecules, or gene over-expression by inserting cDNA or ORF sequences into a genome causing the cell to express the inserted gene.
- X. “Gene Silencing” means the use of nucleic acid (including, but not limited to RNAi, siRNA, shRNA, microRNA, DNA, and ORFs) molecules to inhibit (either partially or totally) gene expression.
- Y. “Gene Sequence Patents” means the Patents claiming or disclosing the sequences of synthetic RNA duplexes and their use in RNA interference covered under patent families listed in Non-Public Appendix F.
- Z. “Government Entity” means any federal, state, local, or non-U.S. government entity, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- AA. “Green Bay Facility” means the facility currently leased by Respondent Thermo Fisher located at 1263 Waube Lane, Green Bay, Wisconsin 54304.

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- BB. “Hold Separate Monitor” means the person appointed to be the Hold Separate Monitor pursuant to Paragraph III of the Order to Hold Separate and Maintain Assets.
- CC. “HyClone Cell Culture Business” means all of Respondent Thermo Fisher’s assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing, or sale of HyClone Cell Culture Products including, without limitation, the following:
1. HyClone Cell Culture Owned Facilities;
 2. HyClone Cell Culture Intellectual Property;
 3. HyClone Cell Culture Product Marketing Materials;
 4. HyClone Cell Culture Products scientific and regulatory material;
 5. HyClone Cell Culture Products manufacturing equipment, owned by Respondent Thermo Fisher and at the Acquirer’s option, located at the HyClone Cell Culture Owned Facilities, HyClone Cell Culture Leased Facilities, and the Excluded Facilities, or at any other facility owned or leased by Respondent Thermo Fisher or used by Respondent Thermo Fisher or its agents for the production of HyClone Cell Culture Products;
 6. inventory; and
 7. Confidential Business Information and current and historical product, customer, and supplier information and data, relating to the HyClone Cell Culture Business (to the extent there is shared information, Respondent Thermo Fisher shall provide redacted versions to the Acquirer and retain copies with information redacted relating to the HyClone Cell Culture Business).

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provided, however, that, unless otherwise provided for in this Order, the HyClone Cell Culture Business does not include SUTs, HyClone Excluded Facilities, the Lanzhou Joint Venture, and the Thermo Fisher Microbiological Culture Media products or business.

- DD. “HyClone Cell Culture Contracts” means the current customer, supply, sourcing, or distribution contracts for HyClone Cell Culture Products to the extent that they pertain to the manufacture, supply, or distribution of HyClone Cell Culture Products. *provided, however*, that if such customer, sourcing, or distribution contract also relates to products other than HyClone Cell Culture Products, then only those portions of such contracts that relate to the sale, supply or distribution of HyClone Cell Culture Products shall be included for the purposes of this Order. *provided, further, however*, that HyClone Cell Culture Contracts do not include the contracts listed in Non-Public Appendix H to this Order.
- EE. “HyClone Cell Culture Divestiture Agreement” means the Remedial Agreement between Respondent Thermo Fisher and GE Healthcare or an Acquirer for the divestiture of the HyClone Cell Culture Business attached as part of Non-Public Appendix A.
- FF. “HyClone Cell Culture Intellectual Property” means all Intellectual Property relating to the design, manufacture, and sale of the HyClone Cell Culture Products designed, manufactured, or sold by, or on behalf of, Respondent Thermo Fisher, even where such Intellectual Property has not been reduced to practice or commercialized including, but not limited to, web domain names relating to the HyClone Cell Culture Business. *provided, however*, that unless otherwise provided for in this Order and the Remedial Agreement, HyClone Cell Culture Intellectual Property does not include (i) Intellectual Property exclusively related to SUTs or Thermo Fisher Microbiological Culture Media products or businesses, (ii) the use of HyClone and HyQ brand names for the

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sale or marketing of SUTs, and (iii) the Thermo Fisher brand name or the names of any other divisions, businesses, corporations, or companies owned by Respondent Thermo Fisher.

GG. “HyClone Cell Culture Leased Facilities” means the following facilities used for the manufacture, processing, and distribution of Cell Culture Media and Cell Culture Sera:

1. the Cell Culture facility leased by Respondent Thermo Fisher located at 917 W 600 North, Suite 114, Logan, Utah;
2. the Singapore Facility;
3. the Mordialloc Facility;
4. the Green Bay Facility; and
5. the Aalst, Belgium Facility.

HH. “HyClone Cell Culture Owned Facilities” means the following facilities including all physical assets and equipment for the manufacture, processing, and distribution of Cell Culture Media and Cell Culture Sera as well as operation of the facilities:

1. The General Administration Building currently owned by Respondent Thermo Fisher located at 925 West 1800 South, Logan, Utah;
2. The Sera and Liquid Media Facility currently owned by Respondent Thermo Fisher located at 1725 S Hyclone Road, Logan, Utah;
3. Powder Media and Component Facility currently owned by Respondent Thermo Fisher located at 1665 S Hyclone Road, Logan, Utah;

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4. Distribution Warehouse Facility owned by Respondent Thermo Fisher located at 925 West 1800 South, Logan, Utah;
 5. the Omaha Facility; and
 6. the Omokora Facility.
- II. “HyClone Cell Culture Products” means the entire HyClone product line produced, or other HyClone products or product lines being researched or developed but not yet commercialized, at any time since January 1, 2012, including, but not limited to, Australia- and New Zealand-origin fetal bovine serum, U.S.-origin fetal bovine serum, and USDA-approved fetal bovine serum, and all HyClone liquid and dry powder media product lines including, but not limited to, media, sera, and process buffers and reagents, in all packaging options including SUT packaging. For purposes of this Order, “HyClone Cell Culture Products” does not include the Thermo Fisher Microbiological Culture Media products or the SUTs products.
- JJ. “HyClone Excluded Facilities” means the following facilities owned or leased by Respondent Thermo Fisher:
1. SUTs Facility, Logan, Utah;
 2. the Beijing Facility;
 3. the Cramlington Facility; and
 4. the Tokyo Facility.
- KK. “Intellectual Property” means:
1. Patents;

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2. product manufacturing technology, including process technology and technology for equipment;
3. product and manufacturing copyrights;
4. all plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the non-exclusive right to use Patents, know-how, and other intellectual property relating to such plans);
5. product trademarks, trade dress, trade secrets, technology, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of the products, including, but not limited to, all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with any Government Entity approvals and compliance, and labeling and all other information related to the manufacturing process, and supplier lists;
6. licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Respondent Thermo Fisher;
7. recipes and a description of all ingredients, materials, or components used in the manufacture of products;

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8. rights to obtain and file for Patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violations of any of the foregoing; and
9. any other intellectual property used in the past by Respondent Thermo Fisher in the design, manufacture, and sale of products.

provided, however, that unless otherwise provided for in this Order, “Intellectual Property” does not include (i) the corporate names or corporate trade dress of Respondent Thermo Fisher, or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent Thermo Fisher, and (ii) Respondent Thermo Fisher’s licenses with third party vendors for Oracle and Salesforce.com software or databases, and (iii) the software and databases listed in Non-Public Appendix G.

- LL. “Lafayette Facility” means the Dharmacon Gene Modulation Product production and distribution facility currently leased by Respondent Thermo Fisher located at 2600 Campus Drive and 2650 Crescent Drive, Lafayette, Colorado 80026.
- MM. “Lanzhou Joint Venture” means the National HyClone Bio-engineering Co., Ltd., a joint venture between HyClone Laboratories, Inc. and China Northwest Minorities University in which Respondent Thermo Fisher has a 51% interest.
- NN. “Monitor” means any Person appointed pursuant to Paragraph IV of this Order.
- OO. “Mordialloc Facility” means the facility currently leased by Respondent Thermo Fisher located at 27A White Street, Melbourne, Victoria, Australia.

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- PP. “Omaha Facility” means the facility currently owned by Respondent Thermo Fisher located at 3566 South 32nd Avenue, Omaha, Nebraska 68105.
- QQ. “Omokora Facility” means the facility currently owned by Respondent Thermo Fisher located at Barrett Road, Whakamarama, Tauranga, New Zealand.
- RR. “Order Date” means the date on which this Decision and Order is issued by the Commission.
- SS. “Order to Hold Separate and Maintain Assets” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- TT. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.
- UU. “Patents” means all United States and foreign patents, and any applications for and registrations of such patents, and any renewal, derivation, divisions, reissues, continuation, continuations in-part, modifications, or extensions thereof or, if the patents have already been issued on the basis of said applications, the resulting patents.
- VV. “Product Marketing Materials” means all marketing materials used specifically in the marketing or sale of the products of the specified Divestiture Businesses as of the Acquisition Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either

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dollars and/or units for each month, quarter, or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to the products of the specified Divestiture Businesses.

WW. “Regulatory Approval” means approval required from any Government Entity in order to complete the divestiture of the Dharmacon Gene Modulation Business and/or the HyClone Cell Culture Business.

XX. “Remedial Agreement(s)” means the following:

1. any agreement between Respondent Thermo Fisher and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
2. any agreement between Respondent Thermo Fisher and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by Respondent Thermo Fisher to supply specified products or components thereof, and that have been approved

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by the Commission to accomplish the requirements of this Order. A Remedial Agreement for the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business under this subparagraph may include different or additional assets or provide broader employee access, interview, and hiring provisions related to the Dharmacon Gene Modulation Products and Business and the HyClone Cell Culture Business or Products, than the Dharmacon Divestiture Agreement and HyClone Divestiture Agreement attached as Non-Public Exhibit A to this Order.

- YY. “Singapore Facility” means the facility currently leased by Respondent Thermo Fisher located at 25 Tuas South Street 1, Singapore.
- ZZ. “SUTs” means Respondent Thermo Fisher’s business and products related to single-use technology including, but not limited to, Thermo Fisher’s bioprocess container products, such as HyQtainer, HyClone Labtainer, HyClone tankliners, Single Use Bioreactors (“SUBs”), SUB bags, bioprocess container (“BPC”) bags or assemblies, Single Use Mixers (“SUM”), SUM bags, HyQ, Harvestainer BPC bags, HyClone PowderTrainer BioProcess containers, and, unless otherwise required in this Order, brand names, licenses, permits, Intellectual Property, know-how, equipment, and facilities related to Respondent Thermo Fisher’s single-use technology.
- AAA. “SUTs Facilities, Logan, Utah” means the following facilities and buildings, leased or owned by Respondent Thermo Fisher, used for research and development, production, testing and distribution of SUTs, and located at:
1. 3050 North 300 West, Logan, Utah;
 2. 881 West 700 North, Suites 104-114, Logan, Utah (Building B);

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3. 650 North 870 West, Suites 101-113, Logan, Utah (Building C);
 4. 918 West 700 North, Suite 114, Logan, Utah (Building D); and
 5. 1726 S. HyClone Road, Logan, Utah (SUT Facility (BioCenter)).
- BBB. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- CCC. “Thermo Fisher Microbiological Culture Media” means Respondent Thermo Fisher’s culture media business and products sold and/or developed for microbiology applications including, but not limited to, dehydrated culture media, dehydrated culture media supplements, REMEL, OXOID, VersaTREK REDOX Media, and VersaTREK Myco Media and any licenses, permits, Intellectual Property, know-how, equipment, and facilities related to such products and business.
- DDD. “Third Party(ies)” means any non-governmental Person other than the Respondent Thermo Fisher or the Acquirer of particular assets or rights pursuant to this Order.
- EEE. “Tokyo Facility” means the facility managed by a third-party logistics provider located at 1-8-26 Horinouchi, Suginami ward, Tokyo 166-0013, Japan.
- FFF. “Tuschl Patents” means:
1. the Tuschl I patents (the family of patents and patent applications entitled “RNA Sequence-Specific Mediators of RNA Interference” (attached to this Order as Non-Public Appendix J)), co-owned by the Massachusetts Institute of Technology, The Whitehead Institute for Biomedical Research, the University of Massachusetts, and Max Planck Gesellschaft zur

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Förderung der Wissenschaften e.V., and covers the uses of 21-23 sequence specific mediators of double-stranded RNAi as a tool to study gene function and as a gene-specific therapeutic; and

2. the Tuschl II patents (the family of patents and patent applications entitled “RNA Interference Mediating Small RNA Molecules” (attached to this Order as Non-Public Appendix J)) owned by the Max Planck Institute and covers RNAi-mediating small RNA molecules.

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

- A. Within (i) forty-five (45) days after the Acquisition Date, or (ii) ten (10) days after all requisite Regulatory Approvals for completion of the divestiture of the Dharmacon Gene Modulation Business to GE Healthcare are obtained, whichever date is earlier, Respondent Thermo Fisher shall:
 1. Divest the Dharmacon Gene Modulation Business, absolutely and in good faith, to GE Healthcare pursuant to, and in accordance with, the Dharmacon Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of GE Healthcare or to reduce any obligations of Respondent Thermo Fisher under such agreement), and such agreement is incorporated by reference into this Order and made a part hereof.
 2. grant to GE Healthcare a royalty-free, fully-paid-up, irrevocable, perpetual, (with rights to sublicense):
 - a. exclusive license (even as to Respondent Thermo Fisher) to the Gene Sequence Patents, for use in the research, development, manufacture, and sale

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of Gene Silencing products for research applications; and

- b. a non-exclusive license to the Gene Sequence Patents for use in the field of gene modification and/or gene expression modulation for research purposes and Cell Line Development for Biologics.
3. assign, or otherwise transfer, to GE Healthcare the Dharmacon Gene Modulation Contracts, and with respect to the excluded contracts in Non-Public Appendix H, at the option of the Acquirer, Respondent Thermo Fisher shall use all reasonable commercial efforts to secure for the Acquirer a substantially similar contract on the same terms.
 4. assign, or otherwise transfer, to GE Healthcare the license to the Tuschl Patents; and
 5. assign, or otherwise transfer, to GE Healthcare the lease to the Lafayette Facility.

provided, however, that for any obligation of Respondent Thermo Fisher pursuant to this Paragraph that is at the option of the Acquirer, Respondent Thermo Fisher need not fulfill such obligation only if the following two conditions are satisfied: (1) the Acquirer exercises its option not to have Respondent Thermo Fisher fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation;

provided, further, however, that if Respondent Thermo Fisher has divested the Dharmacon Gene Modulation Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that GE Healthcare is not an acceptable purchaser of the Dharmacon Gene Modulation Business, then Respondent Thermo Fisher shall immediately rescind the transaction with GE Healthcare, in whole or in part, as directed by the

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Commission, and shall divest the Dharmacon Gene Modulation Business within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided, further, however, that if Respondent Thermo Fisher has divested the Dharmacon Gene Modulation Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Thermo Fisher, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Dharmacon Gene Modulation Business (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Within (i) forty-five (45) days after the Acquisition Date, or (ii) ten (10) days after all requisite Regulatory Approvals for completion of the divestiture of the HyClone Cell Culture Business to GE Healthcare are obtained, whichever date is earlier, Respondent Thermo Fisher shall:
1. divest the HyClone Cell Culture Business, absolutely and in good faith, to GE Healthcare pursuant to, and in accordance with, the HyClone Cell Culture Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of GE Healthcare or to reduce any obligations of Respondent Thermo Fisher under such agreement), and such agreement is incorporated by reference into this Order and made a part hereof;

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2. assign, or otherwise transfer, to GE Healthcare the HyClone Cell Culture Contracts, and with respect to the excluded contracts in Non-Public Appendix H, at the option of the Acquirer, Respondent Thermo Fisher shall use all reasonable commercial efforts to secure for the Acquirer a substantially similar contract on the same terms, and
3. at the Acquirer's option, assign, or otherwise transfer, to GE Healthcare the HyClone Cell Culture Leased Facilities.

provided, however, that for any obligation of Respondent Thermo Fisher pursuant to this Paragraph that is at the option of the Acquirer, Respondent Thermo Fisher need not fulfill such obligation only if the following two conditions are satisfied: (1) the Acquirer exercises its option not to have Respondent Thermo Fisher fulfill the obligation; and (2) the Commission approves the divestiture without the fulfillment of that obligation;

provided, further, however, that if Respondent Thermo Fisher has divested the HyClone Cell Culture Business to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that GE Healthcare is not an acceptable purchaser of the HyClone Cell Culture Business, then Respondent Thermo Fisher shall immediately rescind the transaction with GE Healthcare, in whole or in part, as directed by the Commission, and shall divest the HyClone Cell Culture Business within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided, further, however, that if Respondent Thermo Fisher has divested the HyClone Cell Culture Business

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to GE Healthcare prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Thermo Fisher that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Thermo Fisher, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the HyClone Cell Culture Business (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- C. Prior to the Closing Date for each of the Divestiture Businesses, Respondent Thermo Fisher shall secure all consents and waivers from all Third Parties that are required for the Acquirer to manufacture and sell products made by the Divestiture Businesses as of the Closing Date. Such consents shall include, but not be limited to:
1. securing requisite assignments to leases to manufacturing and other facilities, if such facilities are being leased to the Acquirer;
 2. securing requisite consents to assign customer and supplier contracts to the Acquirer pursuant to this Order;
 3. if necessary for transfer, securing a consent to assign the Tuschl Patents license that is part of the Dharmacon Gene Modulation Business to the Acquirer; and
 4. any Regulatory Approvals.

provided, however, that Respondent Thermo Fisher may satisfy this requirement by certifying that the relevant Acquirer for each of the Divestiture Businesses has, to the Acquirer's satisfaction, either (i) executed all such agreements directly with each of the relevant Third Parties, or (ii) secured a similar contract

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with similar terms from the customer or from a similar supplier supplying such product or service.

- D. Any Remedial Agreement that has been approved by the Commission between Respondent Thermo Fisher (or a Divestiture Trustee) and an Acquirer shall be deemed incorporated into this Order, and any failure by Respondent Thermo Fisher to comply with any term of such Remedial Agreement shall constitute a failure to comply with the Order.
- E. Respondent Thermo Fisher shall include in each Remedial Agreement related to each of the Divestiture Businesses a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each of Respondent Thermo Fisher's obligations to the Acquirer pursuant to this Order.
- F. Respondent Thermo Fisher shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- G. Respondent Thermo Fisher shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.
- H. Respondent Thermo Fisher shall include, as part of the Remedial Agreement(s), any transition services agreement or agreements under which Respondent

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Thermo Fisher shall provide services or assistance to the Acquirer, at the Acquirer's option. Such agreements shall include, but not be limited to:

1. A royalty-free, fully-paid-up, irrevocable, non-exclusive license for no more than two (2) years from Respondent Thermo Fisher to the Acquirer solely to use the "Thermo Scientific" brand name for the sale of HyClone Cell Culture Products inventory bearing that brand name, to the extent such inventory was transferred by Respondent Thermo Fisher as part of the Remedial Agreement.
2. A supply contract to provide up to two (2) years of HyClone Cell Culture media manufacturing at the Thermo Fisher media production facilities in Cramlington, UK, and Beijing, China. Such agreement shall include a provision for the orderly transfer of the media manufacturing equipment used in the production of HyClone Cell Culture Media to the Acquirer.
3. Transition services agreements to cover, among other things and if requested by the Acquirer, administrative assistance to assist the Acquirer in the divestiture and transfer of the Divestiture Businesses, the transfer or replication of information technology and computer systems, the distribution of products acquired by the Acquirer as part of the divestiture, and the transfer of data divested pursuant to this Order to the Acquirer.
4. A transition services agreement to cover:
 - a. The supply of laboratory services at Respondent Thermo Fisher's Logan, Utah, facilities, for up to two (2) years, related to Cell Culture Media and Cell Culture Sera; and
 - b. The purchase of new laboratory equipment, and the creation of a laboratory at a facility of Acquirer's choice in Logan, Utah, related to

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Cell Culture Media and Cell Culture Sera, and comparable in size and capabilities of the Respondent Thermo Fisher laboratory currently supplying laboratory services related to Cell Culture Media and Cell Culture Sera.

- I. Respondent Thermo Fisher shall not terminate any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without:
 1. Prior approval of the Commission;
 2. The written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or
 3. In the case of a proposed unilateral termination by Respondent Thermo Fisher due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *provided, however,* that such sixty (60) days notice shall be given only after the parties have:
 - a. Attempted to settle the dispute between themselves, and
 - b. Either engaged in arbitration and received an arbitrator's decision, or received a final court decision after all appeals.
- J. Until Respondent Thermo Fisher or the Divestiture Trustee complete the divestitures and other obligations to transfer the Divestiture Businesses as required by this Order:
 1. Respondent Thermo Fisher shall take actions as are necessary to:
 - a. maintain the full economic viability and marketability of the Divestiture Businesses;

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- b. minimize any risk of loss of competitive potential for each Divestiture Business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Divestiture Businesses; and
 2. Respondent Thermo Fisher shall not sell, transfer, encumber, or otherwise impair the Divestiture Businesses (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Businesses.
- K. The purpose of the divestiture of the Divestiture Businesses and other obligations to transfer the Divestiture Businesses to the Acquirer is:
 1. to ensure the continued operation of the Divestiture Businesses;
 2. to minimize the loss of competitive potential for the Divestiture Businesses;
 3. to minimize the risk of disclosure and unauthorized use of Confidential Business Information related to the Divestiture Businesses;
 4. to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Businesses, except for ordinary wear and tear;
 5. to create a viable and effective competitor that is independent of Respondent Thermo Fisher in the Divestiture Businesses; and
 6. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondent Thermo Fisher shall:
1. Deliver all Confidential Business Information related to the Divestiture Businesses being acquired by that Acquirer to that Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness.
 2. Pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer, the Hold Separate Monitor, and the Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the relevant Divestiture Businesses that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order
- B. Respondent Thermo Fisher shall not seek, receive, obtain, use, share, or otherwise have or grant access to, directly or indirectly, any Confidential Business Information from or with any Person, except the Acquirer of the particular Divestiture Business, the Hold Separate Monitor, the Monitor, the Divestiture Trustee (if appointed), or Commission staff or other Persons specifically authorized by that Acquirer, the Hold Separate Monitor, the Monitor, Divestiture Trustee, or Commission staff to receive such

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information. Among other things, Respondent Thermo Fisher shall not use such Confidential Business Information:

1. to assist or inform Respondent Thermo Fisher employees who research, develop, manufacture, solicit for sale, sell, or service Respondent Thermo Fisher products acquired in the Acquisition that compete with the products of the Divested Businesses, including Gene Modulation, Cell Culture Media, and Cell Culture Sera products acquired from Life;
2. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
3. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to this Order; or
4. to interfere in any way with the Acquirer pursuant to this Order or with the Divested Businesses.

C. Respondent Thermo Fisher shall:

1. institute procedures and requirements to ensure that:
 - a. Respondent Thermo Fisher employees with access to Confidential Business Information do not provide, disclose or otherwise make available Confidential Business Information as in contravention with this Order; and
 - b. Respondent Thermo Fisher employees associated with the products acquired in the Acquisition that compete with the products of the Divested Businesses, including Gene Modulation, Cell Culture Media, and Cell Culture Sera products acquired from Life, do not, for any purpose, solicit, access, or use any

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Confidential Business Information that this Order prohibits them from receiving.

- D. As part of the procedures and requirements, above, require all Designated Employees not hired by the Acquirer, and all other employees who managed or otherwise were engaged in the research, development, manufacture, marketing, or sale of products of the Divestiture Businesses, to sign a non-disclosure agreement within ten (10) days of the Closing Date agreeing to comply with the confidentiality requirements of this Order. A draft copy of that non-disclosure agreement is attached at Appendix I to this Order.
- E. The requirements in Paragraph III.A., III.B., III.C. do not apply to Confidential Business Information that Respondent Thermo Fisher demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent Thermo Fisher;
 2. necessary to be included in mandatory regulatory filings; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in the regulatory filings;
 3. was available, or becomes available, to Respondent Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Respondent Thermo Fisher, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
 4. is information the disclosure of which is consented to by the Acquirer;

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5. is necessary to be exchanged in the course of consummating the Acquisition or the transaction under the Remedial Agreement;
6. is disclosed in complying with the Order;
7. is information the disclosure of which is necessary to allow Respondent Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such disclosures;
8. is disclosed in defending legal claims, investigations, or enforcement actions threatened or brought against Respondent Thermo Fisher or the Divestiture Businesses; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such actions or claims; or
9. is disclosed in obtaining legal advice; *provided, however,* that Respondent Thermo Fisher shall make all reasonable efforts to maintain the confidentiality of such information, and to obtain a protective order for such information, in such advice.

provided, however, that pursuant to this Paragraph III, if Respondent Thermo Fisher needs access to original documents, it shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (2) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

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

- A. KPMG LLP (Charles A. Riepenhoff, Jr., Managing Director) shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Thermo Fisher and attached as Appendix C (“Monitor Agreement”) and Non-Public Appendix D (“Monitor Compensation”). The Monitor is appointed to assure that Respondent Thermo Fisher expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the Order to Hold Separate and Maintain Assets.
- B. No later than one (1) day after the Acquisition Date, the Monitor Agreement shall require that Respondent Thermo Fisher transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his/her duties and responsibilities, pursuant to this Order and the Order to Hold Separate and Maintain Assets and consistent with the purposes of this Order, and Respondent Thermo Fisher shall effectuate such transfer.
- C. Respondent Thermo Fisher 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 Respondent Thermo Fisher’s compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.
 - 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

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- D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Thermo Fisher's 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 Respondent Thermo Fisher's compliance with its obligations under the Order, including, but not limited to, its obligations related to the Divestiture Businesses.
- E. Respondent Thermo Fisher shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Thermo Fisher's compliance with the Order.
- F. The Monitor shall serve, without bond or other security, at the expense of Respondent Thermo Fisher, 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 Respondent Thermo Fisher, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- G. Respondent Thermo Fisher 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.
- H. Respondent Thermo Fisher shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in the agreement approved by

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the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Thermo Fisher and any reports submitted by the Acquirer with respect to the performance of Respondent Thermo Fisher's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondent Thermo Fisher of its obligations under the Order.

- I. Respondent Thermo Fisher 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, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- 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 Respondent Thermo Fisher, which consent shall not be unreasonably withheld. If Respondent Thermo Fisher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after the notice by the staff of the Commission to Respondent Thermo Fisher of the identity of any proposed Monitor, Respondent Thermo Fisher shall be deemed to

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have consented to the selection of the proposed Monitor.

2. Not later than ten (10) days after the appointment of the substitute Monitor, Respondent Thermo Fisher 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 Respondent Thermo Fisher's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- 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 the 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 or as the Hold Separate Monitor pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets.

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

- A. Beginning no later than the time Respondent Thermo Fisher signs the Consent Agreement in this matter until one-hundred-twenty (120) days after the Closing Date:
1. Respondent Thermo Fisher shall provide the applicable Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent Thermo Fisher until the Designated Employee has been hired by the Acquirer, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has

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declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to transition the Divestiture Businesses to the Acquirer.

2. Respondent Thermo Fisher shall not interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer as described in this Order, and shall remove any impediments within the control of Respondent Thermo Fisher that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer including, but not limited to, any non-compete provisions of employment or other contracts with Respondent Thermo Fisher that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondent Thermo Fisher shall not make any offer for a new or different employment or a counteroffer to a Designated Employee who receives a written offer of employment from the Acquirer, unless and until the Designated Employee has declined, in writing, the Acquirer's offer, or that the Acquirer has decided not to hire the Designated Employee and sent such notice to Respondent Thermo Fisher.
3. Respondent Thermo Fisher shall, in a manner consistent with local labor laws:
 - a. Facilitate employment interviews between each Designated Employee and the Acquirer including providing the names and contact information for such employees, and allowing such employees reasonable opportunity to interview with the Acquirer, and shall not discourage such employee from participating in such interviews;

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- b. Not interfere in employment negotiations between each Designated Employee and the Acquirer; and
- c. With respect to each Designated Employee who receives an offer of employment from the Acquirer:
 - (1) not prevent, prohibit or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer including, but not limited to, the Acquirer offering to hire the Designated Employee;
 - (2) cooperate with the Acquirer in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts an offer of employment from the Acquirer;
 - (3) eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information relating to the manufacture and sale of the products of the Divestiture Businesses; and
 - (4) unless alternative arrangements are agreed upon with the Acquirer, pay, and retain the obligation to pay, the benefits of any Designated Employee who accepts employment with the Acquirer including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits.

provided, however, that subject to the conditions of continued employment prescribed in this Order, this

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Paragraph shall not prohibit Respondent Thermo Fisher from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer to such employee.

- B. Respondent Thermo Fisher shall not, for a period of two (2) years following the Closing Date, directly or indirectly, solicit, induce, or attempt to solicit or induce any Person employed by the Acquirer and working in or for the Divestiture Businesses, to terminate his or her employment relationship with the Acquirer.

provided, however, that Respondent Thermo Fisher may place general advertisements for, or conduct general searches for, employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's employees.

provided, further, however, that Respondent Thermo Fisher may hire Designated Employees who apply for employment with Respondent Thermo Fisher as long as such employees were not solicited by Respondent Thermo Fisher in violation of this Paragraph IV.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the Order Date, Respondent Thermo Fisher shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VI, directly or indirectly, acquire:

- A. any stock share capital, equity, or other interest in any Person, corporate or non-corporate, that produces, designs, manufactures, or sells Cell Culture Media, Cell Culture Sera, or Gene Modulation products in or into the United States;

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- B. any business, whether by asset purchase or otherwise, that engages in or engaged in, at any time after the Acquisition, or during the six (6) month period prior to the Acquisition, the design, manufacture, production, or sale Cell Culture Media, Cell Culture Sera, or Gene Modulation products in or into the United States.

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”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondent Thermo Fisher and not of any other party to the transaction. Respondent Thermo Fisher shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Thermo Fisher shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

provided, further, however, that prior notification shall not be required by this Paragraph V for any acquisition

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after which Respondent Thermo Fisher would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VI.

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

- A. If Respondent Thermo Fisher has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Businesses required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets 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 § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Thermo Fisher shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Thermo Fisher to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Thermo Fisher, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Thermo Fisher has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture

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Trustee within ten (10) days after notice by the staff of the Commission to Respondent Thermo Fisher of the identity of any proposed Divestiture Trustee, Respondent Thermo Fisher shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission:
 - a. The Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
 - b. The Divestiture Trustee may divest the Divestiture Businesses in a manner different from the Dharmacon Divestiture Agreement or the HyClone Cell Culture Divestiture Agreement between Respondent Thermo Fisher and GE Healthcare, described and incorporated into this Order. For example, the Divestiture Trustee may, in his or her sole discretion, change the number of employees interviewed and hired, and the terms of the patents, licenses, transitions services, related to the Divestiture Businesses.

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2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, that the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Thermo Fisher shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Thermo Fisher shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Thermo Fisher shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Thermo Fisher's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, that if the

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Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent Thermo Fisher from among those approved by the Commission; *provided, further, however*, that Respondent Thermo Fisher shall select such Person within five (5) days after receiving notification of the Commission's approval.

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

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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, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Hold Separate and Maintain Assets in this matter.
8. The Divestiture Trustee shall report in writing to Respondent Thermo Fisher and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondent Thermo Fisher may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

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- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondent Thermo Fisher has fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., II.H., II.I., III.A., V.A., Respondent Thermo Fisher shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Thermo Fisher shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, if any Monitor has been appointed. Respondent Thermo Fisher shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and/or the agreement to supply relevant Products and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

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- B. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Thermo Fisher shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

IX.

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

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

X.

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

- A. access, during business office hours of Respondent Thermo Fisher and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all

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other records and documents in the possession or under the control of the Respondent Thermo Fisher related to compliance with this Order, which copying services shall be provided by Respondent Thermo Fisher at the request of the authorized representative(s) of the Commission and at the expense of Respondent Thermo Fisher; and

- B. to interview officers, directors, or employees of Respondent Thermo Fisher, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on April 1, 2024.

By the Commission.

NON-PUBLIC APPENDIX A**DHARMACON GENE MODULATION AND HYCLONE
CELL CULTURE****DIVESTITURE AGREEMENT****BETWEEN RESPONDENT THERMO FISHER AND GE
HEALTHCARE**

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

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NON-PUBLIC APPENDIX B-1

EXCLUDED EMPLOYEES

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

NON-PUBLIC APPENDIX B-2

SHARED EMPLOYEES

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

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APPENDIX C**APPENDIX C****MONITOR AGREEMENT**

MONITOR AGREEMENT (this "Agreement") entered into this 27th day of January 2014 by and between KPMG LLP (the "Monitor") and Thermo Fisher Scientific Inc., ("Respondent Thermo Fisher") provides as follows:

PRELIMINARY STATEMENT

WHEREAS the Federal Trade Commission (the "Commission") is considering for public comment an Agreement Containing Consent Orders with Respondent Thermo Fisher, which provides, among other things, that Respondent Thermo Fisher divest the HyClone Cell Culture Business and Dharmacon Gene Modulation Business, and engage a monitor to monitor Respondent Thermo Fisher's compliance with its obligations under (a) the Decision and Order and (b) and Order to Hold Separate and Maintain Assets (collectively, the "Orders");

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

WHEREAS, the Orders further provide that Respondent Thermo Fisher shall execute an agreement, subject to 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 Respondent Thermo Fisher, is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent Thermo Fisher or Monitor under the Orders, until the Order to Hold Separate and Maintain Assets has been issued and this Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound by this Agreement, subject only to the Commission's approval of this Agreement.

DEFINITIONS

1. "Thermo Fisher" or "Respondent" means Thermo Fisher Scientific Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Thermo Fisher Scientific Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
2. "Acquirer" means the following:
 - a. a Person specified by name in this Order to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order; or

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- b. a Person approved by the Commission to acquire particular assets or rights that Respondent Thermo Fisher is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
3. **"Remedial Agreement(s)"** means the following:
- a. any agreement between Respondent Thermo Fisher and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;
- b. any agreement between Respondent Thermo Fisher and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by Respondent Thermo Fisher to supply specified products or components thereof, and that have been approved by the Commission to accomplish the requirements of this Order. A Remedial Agreement for the Dharmacon Gene Modulation Business and the HyClone Cell Culture Business under this subparagraph may include different or additional assets or provide broader employee access, interview, and hiring provisions related to the Dharmacon Gene Modulation Products and Business and the HyClone Cell Culture Business or Products, than the Dharmacon Divestiture Agreement and HyClone Divestiture Agreement attached as Non-Public Exhibit A to the Decision and Order.
4. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to have the defined meanings assigned to them in the Orders.

ARTICLE I

1.1 **Powers of the Monitor.** Monitor shall have the rights, duties, powers and authority conferred upon Monitor by the Orders that are necessary for Monitor to monitor Respondent Thermo Fisher's compliance with the Orders. No later than the Acquisition Date, Thermo Fisher hereby transfers to Monitor all rights, powers, and authorities necessary to permit Monitor to perform its duties and responsibilities pursuant to the Decision and Order and Order to Hold Separate and Maintain Assets and consistent with the purposes of the Decision and Order. Any descriptions thereof contained in this Agreement in no way modify Monitor's powers and authority or Respondent Thermo Fisher's obligations under the Orders.

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1.2 Exercise of Monitor's Power. The Monitor shall have the power and authority to monitor Respondent Thermo Fisher's compliance with the divestiture and asset maintenance obligations and related requirements of the Decision and Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Decision and Order and in consultation with the Commission.

1.3 Monitor's Duties. The Monitor shall act in a fiduciary capacity for the benefit of the Commission, notwithstanding the fact that Respondent Thermo Fisher is the party to this Agreement and responsible for compensating the Monitor hereunder. The Monitor shall monitor Respondent Thermo Fisher's compliance with the Orders, including, but not limited to:

- a. Assuring that Respondent Thermo Fisher expeditiously complies with all of the obligations, and performs all of the responsibilities, of Respondent Thermo Fisher as required by the Orders in this matter;
- b. Monitoring Remedial Agreements; and
- c. Assuring that Confidential Business Information is not received or used by Respondent Thermo Fisher or the Acquirer, except as allowed in the Orders in this matter.

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

1.5 Confidential and Proprietary Information. The Monitor shall maintain the confidentiality of all information provided by Respondent Thermo Fisher, all Confidential Business Information of the Divestiture Businesses and all confidential aspects of the performance of its duties under this Agreement (collectively, "Confidential Materials"). Except as provided in this Agreement, such information may be disclosed only to (i) Persons employed by or working with the Monitor under this Monitor Agreement including persons working at Monitor or other members of the KPMG network of independent firms, (ii) Persons employed at Smith & Williamson LLP with regard to Regulatory Approvals by the European Commission or other Government Entities, (iii) any other Person to whom disclosure is reasonably necessary for the Monitor to fulfill its duties (provided that such Person shall execute a confidentiality agreement prior to receiving Confidential Materials), or (iv) persons employed at the Commission, the European Commission or any other Government Entity. When providing Confidential Materials to a third party pursuant to this Paragraph, the Monitor shall label such information "Confidential." The Monitor shall request confidential treatment by the Commission and staff of any Confidential Materials turned over to the Commission, including any information labeled "Confidential" by Respondent Thermo Fisher. The Monitor shall also request confidential treatment by the European Commission or any other Government Entity of any Confidential Materials turned over to the European Commission or any other Government Entity, respectively, including any information labeled "Confidential" by Respondent Thermo Fisher. The Monitor shall use the Confidential Materials provided by Respondent Thermo Fisher pursuant to this Agreement or learned in connection with performing its obligations under this Agreement only in performance of the duties set forth herein or in connection with any decision by a Government Entity. At no time shall the Monitor use such information for any other purpose or for the benefit of any other Person. For the avoidance of doubt, it shall not be a breach hereof for the Monitor, or any of the persons permitted to be used or

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employed under Section 2.1 below, to disclose Confidential Materials to the extent that it is otherwise required to be disclosed pursuant to a statutory or regulatory provision or court or administrative order, or, subject to appropriate conditions of confidentiality, to fulfill professional obligations and standards (including quality and peer review) or to submit and process an insurance claim. The confidentiality obligations of this Paragraph shall survive the termination of this Agreement.

1.6 Confidentiality Agreements. Respondent Thermo Fisher may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.

1.7 Confidentiality of Commission Materials. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

1.8 Restrictions. Monitor shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of any products of Respondent Thermo Fisher that compete with the products sold by the HyClone Cell Culture Business or Dharmacon Gene Modulation Business except to the extent permitted by the Orders.

1.9 Reports. Respondent Thermo Fisher shall report to the Monitor in accordance with the requirements of the Decision and Order. Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

1.10 Access to Records, Documents and Facilities. Subject to any demonstrated legally recognized privilege, Monitor and any of the persons permitted to be used or employed under Section 2.1 below shall have full and complete access to Respondent Thermo Fisher's personnel, to include those employees designated to be transferred to an acquirer, 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 Respondent Thermo Fisher's compliance with the obligations of Respondent Thermo Fisher 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. Respondent Thermo Fisher shall cooperate with any reasonable request of Monitor and shall take no action to interfere with or impede Monitor's ability to monitor Respondent Thermo Fisher's compliance with the Orders.

ARTICLE II

2.1 Retention and Payment of Counsel, Consultants, and other Assistants. Monitor shall have the authority to use or employ, at the cost and expense of the Respondent Thermo Fisher, such personnel of Monitor or other members of the KPMG network of independent firms, or such other attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities as allowed pursuant to the Orders.

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2.2 Compensation. The Monitor shall serve, without bond or other security, at the expense of Respondent Thermo Fisher. Where Monitor is reimbursed for expenses, it is its policy to bill clients the amount incurred at the time the good or service is purchased. If Monitor subsequently receives a volume rebate or other incentive payment from a vendor relating to such expenses, Monitor does not credit such payment to its client. Instead, Monitor applies such payments to reduce its overhead costs, which costs are taken into account in determining its standard billing rates and certain transaction charges that may be charged to clients. Monitor shall be compensated by Respondent Thermo Fisher for its services under this Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached hereto and to the Decision and Order as Non-Public Appendix D for time spent in connection with the discharge of its duties under this Agreement and the Orders. Compensation paid to Monitor by Respondent Thermo Fisher will include amounts for costs and expenses incurred by other members of the KPMG network of independent firms retained by Monitor in connection herewith, and those related to other persons engaged by the Monitor under Section 2.1 above. In addition, Respondent Thermo Fisher will pay: (a) out-of-pocket expenses reasonably incurred by Monitor in the performance of its duties under the orders; and (b) fees and disbursements reasonably incurred by any advisor appointed by the Monitor pursuant to the first paragraph in Article II. At its own expense, Respondent Thermo Fisher may retain an independent auditor to verify such invoices. Monitor shall provide Respondent Thermo Fisher with monthly invoices for time and expenses that include details and an explanation of all matters for which Monitor submits an invoice to Respondent Thermo Fisher. Respondent Thermo Fisher shall pay such invoices within thirty (30) days of receipt. Monitor shall retain fee and expense records for two years after the completion or termination of the Monitor's duties hereunder and shall make such records available to Thermo Fisher during normal business hours upon reasonable advance written notice. Monitor shall cooperate in any verification audit of such records that Thermo Fisher may undertake; provided, however, that: (i) no such audit may occur more than once in any twelve (12) month period; and (ii) Monitor shall have the right to approve any third party independent auditor used for any such audit, with such approval not to be unreasonably withheld. The Monitor and Respondent Thermo Fisher shall submit any disputes about invoices to the Commission for assistance in resolving such disputes.

2.3 To the extent available, Respondent Thermo Fisher will provide the Monitor with temporary workspace and access to office equipment owned or used by Respondent Thermo Fisher at sites the Monitor is required to visit in order to fulfill its obligations under this Agreement. Monitor agrees to comply with all of Respondent Thermo Fishers' safety and security regulations, instructions and procedures while at Respondent Thermo Fisher's sites.

ARTICLE III

3.1 Monitor's Liabilities and Indemnification. Respondent Thermo Fisher shall indemnify the Monitor and its partners or principals and any other persons used or employed under Section 2.1 above (collectively, "Monitor Indemnified Persons") and hold Monitor Indemnified Persons harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of 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 losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by Monitor. The Monitor's maximum liability to Respondent Thermo Fisher relating to services rendered in accordance with this Agreement (regardless

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of form of action, whether in contract, statutory law, or tort including without limitation negligence) shall be limited to an amount equal to the total sum of the fees paid to the Monitor by the Respondent Thermo Fisher. Any claim arising from this Agreement that Respondent Thermo Fisher may have against the Monitor must be brought no later than one (1) year following the termination or expiration of this Agreement. In the performance of its duties under this Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his own business affairs. The Monitor shall not be liable for any delays or other failures to perform resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or requirement of any governmental agency or authority. The Monitor warrants that it will perform its obligations hereunder in good faith. Monitor disclaims other warranties, expressed or implied, other than those expressly agreed to in writing between the Parties.

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

3.3 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, Respondent Thermo Fisher shall terminate this Agreement and appoint a substitute Monitor, subject to Commission approval and consistent with the Orders.

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

3.5 Termination. This Agreement shall terminate the earlier of: (a) thirty (30) days following the termination date set forth in the applicable Order; (b) Respondent Thermo Fisher's 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 Respondent Thermo Fisher and to the Commission, upon resignation of the Monitor; or (d) when Respondent Thermo Fisher's last obligation under the Orders and the Remedial Agreements that pertains to the Monitor's service has been fully performed; provided, however, that the Commission may require that Respondent Thermo Fisher extend this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders. If this Agreement is terminated for any reason, the confidentiality obligations set forth in this Agreement will remain in force. The foregoing shall not be construed to require Monitor or its subcontractors to return or destroy copies of Confidential Materials retained in work paper files or records in order to comply with applicable professional standards, or anything that may be stored in back up media

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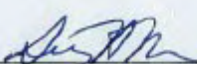
or other electronic data storage systems, latent data and metadata. Any Confidential Materials so retained shall remain subject to the confidentiality obligations hereof.

3.6 Conflicts of Interest. If Monitor becomes aware during the term of this Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Agreement, Monitor shall promptly inform Respondent Thermo Fisher and the Commission of any such conflict. Monitor and one or more members of the KPMG network of independent firms perform audit, tax and advisory services to GE Healthcare [defined in the Orders]. Respondent Thermo Fisher agrees that such relationships do not constitute a conflict of interest for the purposes of this matter.

3.7 Governing Law. This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of the State of New York.

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

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MONITOR	RESPONDENT THERMO FISHER
By: 	By: 
Charles A. Riepenhoff, Jr. Managing Director	Seth H. Hoogasian Senior Vice President, General Counsel & Secretary
KPMG LLP 303 Peachtree St., NE Suite 2000 Atlanta, GA 30308	Thermo Fisher Scientific Inc. 81 Wyman Street Waltham, Massachusetts 02455
Fax: E-mail: criepenhoffjr@kpmg.com	Fax: E-mail: seth.hoogasian@thermofisher.com

Decision and Order

NON-PUBLIC APPENDIX D

MONITOR COMPENSATION

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

APPENDIX E

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NON-PUBLIC APPENDIX F

GENE SEQUENCE PATENTS

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

Decision and Order

NON-PUBLIC APPENDIX G

EXCLUDED SOFTWARE AND DATABASES

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

NON-PUBLIC APPENDIX H

NON-ASSIGNED CONTRACTS

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

Decision and Order

APPENDIX I

APPENDIX I

NOTICE OF FTC ORDERS AND REQUIREMENT TO
MAINTAIN CONFIDENTIALITY

AND

DRAFT NON-DISCLOSURE AGREEMENT

Thermo Fisher Scientific Inc. ("Thermo Fisher"), sometimes referred to as "Respondent Thermo Fisher," has entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("Commission") providing for divestiture of certain businesses and other relief in connection with Thermo Fisher's acquisition of Life Technologies Corporation ("Life") (the "Acquisition"). The Consent Agreement includes two orders: the Decision and Order and the Order to Hold Separate and Maintain Assets ("Orders"). Both Orders are attached to this notice. The Commission has appointed Charles A. Riepenhoff, Jr., Managing Director, KPMG US (the "Monitor") to monitor Thermo Fisher's compliance with the Orders.

Complete definitions of all capitalized terms in this notice can be found in Section I of the attached Decision and Order or Section I of the Order to Hold Separate and Maintain Assets.

Pursuant to the requirements of the Decision and Order, and pursuant to a Purchase and Sale Agreement dated December 24, 2013 with General Electric Company ("GE"), Thermo Fisher has agreed to divest its cell culture and gene modulation businesses ("Divestiture Businesses") to GE. During the Hold Separate Period, which begins on the date Thermo Fisher acquires Life and ends after Thermo Fisher has completed the required divestitures, Thermo Fisher must hold the Divestiture Businesses separate, apart, and independent from Thermo Fisher's other businesses. Until the required divestitures occur, Thermo Fisher must take such actions as are necessary to maintain the economic viability, marketability, and competitiveness of each of the businesses and assets to be divested, and must prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of these businesses and assets except for ordinary wear and tear. Pending the divestitures to GE, the Commission has appointed Mr. Riepenhoff to also serve as Hold Separate Trustee with responsibilities including the supervision of the management of the Divestiture Businesses and the maintenance of the Divestiture Businesses' independence.

The Orders require Thermo Fisher to restrict its use of "Confidential Business Information," which is information owned by, or in the possession or control of Thermo Fisher that is not in the public domain and that is directly related to the conduct of the Divestiture Businesses during the Hold Separate Period and after the required divestitures to GE.

Decision and Order

You are receiving this notice because you are an employee who was identified as a Designated Employee under the Decision and Order and/or a Thermo Fisher employee who is or was directly engaged in the research, development, manufacture, marketing, or sale of products of the Divestiture Businesses and may have Confidential Business Information.

Confidential Business Information does not include: (i) information relating to any of Thermo Fisher's general business strategies or practices that does not discuss with particularity the Divestiture Businesses; (ii) information specifically excluded from the Divestiture Businesses conveyed to GE; (iii) information that is contained in documents, records or books of Thermo Fisher, that is provided to GE that is unrelated to the Divestiture Businesses acquired by GE or that is exclusively related to businesses or products retained by Thermo Fisher; and (iv) information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law. When documents or data contain information related to the Divestiture Businesses and other products and topics, only the portion of the document or data related to the Divestiture Businesses is Confidential Business Information. Public information about the Divestiture Businesses is not Confidential Business Information.

Confidential Business Information also does not include information (that Thermo Fisher demonstrates to the satisfaction of the Commission) that: (i) was or becomes generally available to the public other than as a result of disclosure by Thermo Fisher; (ii) is necessary to be included in Thermo Fisher's mandatory regulatory filings, provided that Thermo Fisher makes all reasonable efforts to maintain the confidentiality of such information in the regulatory filings; (iii) was available, or becomes available to Thermo Fisher on a non-confidential basis, but only if, to the knowledge of Thermo Fisher, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information; (iv) is information the disclosure of which is consented to by GE; (v) is necessary to be exchanged in the course of consummating the Acquisition or Thermo Fisher's divestiture agreements with GE; (vi) is disclosed in complying with the Decision and Order; (vii) is information the disclosure of which is necessary to allow Thermo Fisher to comply with the requirements and obligations of the laws of the United States and other countries, and to comply with decisions by Government Entities; or (viii) is disclosed in obtaining legal advice.

During the Hold Separate Period, all Confidential Business Information must be retained and maintained on a confidential basis by the persons who have been and continue to be involved in the operations or sale of the Divestiture Businesses. Except as provided in the Decision and Order or the Order to Hold Separate and Maintain Assets, all such persons are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person employed by Thermo Fisher or whose employment relates to any of Thermo Fisher's businesses other than the Divestiture Businesses. Similarly, persons involved in similar activities with respect to Thermo Fisher's businesses are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any similar

Decision and Order

Thermo Fisher information to or with any other person whose employment involves the Divestiture Businesses, except as otherwise provided in the Decision and Order or Order to Hold Separate and Maintain Assets.

Even after the Hold Separate Period, the Decision and Order requires Thermo Fisher to commit that, except in limited circumstances, no Confidential Business Information will be sought, received, obtained, disclosed, shared or otherwise used by any employee who works for Thermo Fisher after the Acquisition. In particular, this is to protect Confidential Business Information from being used in any way:

- to assist or inform Thermo Fisher employees who research, develop, manufacture, solicit for sale, sell, or service Thermo Fisher products acquired in the Acquisition that compete with the products of the Divestiture Businesses, including Gene Modulation, Cell Culture Media and Cell Culture Sera products acquired from Life;
- to interfere with any suppliers, distributors, resellers, or customers of GE;
- to interfere with any contracts divested, assigned, or extended to GE pursuant to the Orders; or
- to interfere in any way with GE pursuant to the Orders or with the Divestiture Businesses.

The Orders also require Thermo Fisher to provide GE and the Monitor/Hold Separate Trustee with access to all such Confidential Business Information along with current and historical product, customer and supplier information and data relating to the Divestiture Businesses. To the extent this includes information relating to the Divestiture Businesses and Thermo Fisher's retained businesses, the Decision and Order requires Thermo Fisher to redact information relating to the retained businesses it provides to GE and redact information relating to the Divestiture Businesses in copies it retains.

Thermo Fisher must also provide GE and the Monitor/Hold Separate Trustee with access to employees who possess or are able to locate such information for the purposes of identifying books, records, and files directly related to the relevant Divestiture Businesses that contain such information and facilitate the delivery in a manner consistent with the Orders.

The Decision and Order further requires that Thermo Fisher make commercially reasonable efforts to assure that in any instance wherein its own counsel (including its own in-house counsel) under appropriate confidentiality agreements retains Confidential Business Information related to the Divestiture Businesses provided to GE or accesses original documents containing Confidential Business Information related to the Divestiture Businesses (under circumstances where copies of documents are insufficient or otherwise unavailable), that Thermo Fisher's counsel does so only for the following purposes: (i) to assure Thermo Fisher's compliance with its divestiture agreements with GE, the Decision and Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules

Decision and Order

promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or (ii) to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Businesses or the assets or products associated with the Divestiture Businesses. The Decision and Order permits Thermo Fisher to disclose information necessary for the purposes of this paragraph pursuant to an appropriate confidentiality order, agreement or arrangement. If Thermo Fisher, however, needs, pursuant to this paragraph, such access to original documents, it must: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with GE, (however, Thermo Fisher will not be deemed to have violated this requirement if GE withholds such agreement unreasonably) and (ii) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

Except as permitted under the Orders, you must keep Confidential Business Information confidential and must not provide, discuss, exchange, circulate, or otherwise disclose any Confidential Business to or with any other person whose job responsibilities relate to the products Thermo Fisher acquired in the Acquisition that compete with the products of the Divestiture Businesses, including Gene Modulation, Cell Culture Media and Cell Culture Sera products acquired from Life. Finally, if you have documents that might contain Confidential Business Information and you have not received specific instructions as to how these documents should be delivered to GE, you should contact Jonathan Wilk, Vice President, General Counsel Analytical Instruments Group, Deputy General Counsel at Thermo Fisher.

Any violation of the Orders may subject Thermo Fisher to civil penalties and other relief as provided by law. If you have any questions regarding the contents of this notice, the confidentiality of information, or the Orders, you should contact Jonathan Wilk, Vice President, General Counsel Analytical Instruments Group, Deputy General Counsel at Thermo Fisher.

AGREEMENT

I, _____ (print name), hereby acknowledge that I have read the above notification, agree to abide by its provisions and to comply with the confidentiality requirements of the Orders.

EMPLOYEE

THERMO FISHER

By: _____
[Print Name]

By: _____
[Print Name]

Decision and Order

[Title]

[Title]

Thermo Fisher Scientific Inc.
81 Wyman Street
Waltham, Massachusetts 02455

Date: _____

Date: _____

Analysis to Aid Public Comment

NON-PUBLIC APPENDIX J

TUSCHL PATENTS

**[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 Thermo Fisher Scientific Inc. (“Thermo Fisher”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”), which is designed to remedy the anticompetitive effects likely to result from Thermo Fisher’s proposed acquisition of Life Technologies Corporation (“Life”). Pursuant to an agreement signed on April 14, 2013, Thermo Fisher plans to acquire Life for approximately \$13.6 billion. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the markets for: (1) short/small interfering ribonucleic acid (“siRNA”) reagents; (2) cell culture media; and (3) cell culture sera. Under the terms of the Consent Agreement, Thermo Fisher is required to divest its gene modulation business (which includes siRNA reagents) and its cell culture media and sera business to GE Healthcare.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review

Analysis to Aid Public Comment

the Consent Agreement and the comments received, and decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

THE PARTIES

Thermo Fisher, headquartered in Waltham, Massachusetts, is a leading global manufacturer and distributor of scientific products, laboratory equipment, and laboratory consumables. Thermo Fisher supplies siRNA reagents under its Dharmacon brand, and cell culture media and sera under its HyClone brand.

Headquartered in Carlsbad, California, Life manufactures and supplies a wide range of laboratory equipment and consumables to customers worldwide. Life sells siRNA reagents under its Ambion brand, and cell culture media and sera under its Gibco brand.

THE RELEVANT PRODUCTS AND MARKET STRUCTURES**siRNA Reagents**

siRNA reagents are used to study gene function by selectively turning off or “silencing” gene expression and inhibiting protein synthesis. Scientists use siRNA reagents in connection with a number of important applications, including the study of the cause of disease, genetic research, and agricultural research and crop production. Customers, which consist of biopharmaceutical companies, universities, and other research institutions, can purchase siRNA reagents either individually or as “libraries,” which are curated collections of reagents used to study the effect of gene silencing on particular groups of interrelated genes.

The market for siRNA reagents is currently highly concentrated. It is effectively limited to four significant suppliers of siRNA reagents worldwide—Thermo Fisher, Life, Sigma-Aldrich Corp. (“Sigma-Aldrich”), and Qiagen N.V. (“Qiagen”)—each of which holds a license for intellectual property (the “Tuschl patents”) necessary to manufacture and supply high-quality siRNA reagents. Thermo Fisher and Life currently dominate the supply of siRNA reagents both in the United States

Analysis to Aid Public Comment

and worldwide due to the breadth of their product offerings and their reputation for superior quality. Only Thermo Fisher and Life offer a siRNA library for the full human genome, as well as technologically advanced second-generation siRNA reagents. For sales of individual siRNA reagents, Thermo Fisher and Life have a combined market share exceeding 50%, whether measured by U.S. or worldwide sales. For siRNA libraries, Thermo Fisher and Life combine for a market share in excess of 90%.

In addition to the four suppliers of siRNA reagents with licenses to the Tuschl patents, there is a fringe group of suppliers that offers “design-around” siRNA reagents. None of these companies, however, has a full set of individual siRNA reagents, nor do they have library offerings. Because customers view design-around siRNA reagents as significantly less reliable, there is substantially less demand for these products than for Tuschl siRNA reagents. The combined sales by, and market share of, these fringe suppliers are very low.

Cell Culture Media and Sera

Living cells in an organism obtain necessary nutrients directly from the blood and biological tissues that surround them. To grow cells for use and study outside the body, scientists utilize cell culture products like media and sera. Cell culture media are mixtures of a variety of components—including salts, sugars, amino acids, and vitamins—that create a healthy environment for cells to grow. Cell culture serum, derived from animal blood, is rich in nutrients and growth factors and is used as a supplement to cell culture media for propagating mammalian cells. Serum is primarily a byproduct of the cattle industry, since bovine blood is extracted as cattle are slaughtered. The most common and widely used type of cell culture serum is fetal bovine serum (“FBS”) due to its high quality and low risk for contamination, although other types of sera, including adult bovine sera, newborn calf sera, calf sera, equine sera, and porcine sera are used to a limited degree. Many areas of research depend on cell culture media and sera, including immunology, oncology, pathology, stem cell research, neuroscience, and virology.

The cell culture media market is currently concentrated, with three suppliers worldwide, Thermo Fisher, Life, and Sigma-

Analysis to Aid Public Comment

Aldrich, controlling a combined share of more than 80% of the market. These three firms have the largest market shares because customers, especially large biopharmaceutical companies, view them as having the best reputations for high-quality products and the necessary production scale to meet their needs. Other market participants in the cell culture media market include Lonza Group Ltd., a distant fourth player, and a fringe of other firms that collectively account for a small share of the market. Post-acquisition, Thermo Fisher and Life would have at least a 50% share of the cell culture media market, whether measured by U.S. or worldwide sales.

The market for cell culture sera is also highly concentrated and controlled by three major players: Thermo Fisher, Life, and Sigma-Aldrich. Life's market share is approximately 40%, while Thermo Fisher's is approximately 20%. Sigma-Aldrich is a somewhat smaller player than Thermo Fisher. Other than these three firms, there are fringe suppliers that participate in the cell culture sera market, but they are of limited competitive significance because, among other things, they lack reputations and track records for quality and reliability.

RELEVANT GEOGRAPHIC MARKET

The relevant geographic market in which to evaluate the competitive effects of Thermo Fisher's proposed acquisition of Life in each of the relevant product markets is no narrower than the United States and may be as broad as the entire world. While some of the relevant products are subject to U.S. federal regulation and protected by patents, sophisticated foreign suppliers with existing products—in the case of siRNA reagents, those with a license to the Tuschl patents—can establish reputations for high-quality products and good customer service and compete for business in the United States. Further, foreign suppliers who lack a U.S. presence are able to contract with third-party service and distribution partners and compete for sales opportunities in the United States.

ENTRY

It is highly unlikely that new entry or repositioning, or expansion by current market participants would deter or

Analysis to Aid Public Comment

counteract the anticompetitive effects of the proposed transaction, let alone in a timely manner. The most significant barrier to entry and expansion in the market for siRNA reagents is access to the Tuschl patents technology, which only Thermo Fisher, Life, Qiagen, and Sigma-Aldrich are currently licensed to use. No additional firms are likely to gain access to Tuschl patents licenses in the future. Additional barriers to entry include the technical difficulty of designing and producing siRNA reagents and the substantial upfront investment required to compete effectively in the market. Similarly, timely entry into the markets for cell culture media and sera is unlikely because of the premium customers place on suppliers' track records and reputations for reliable, high-quality products. In addition, the cost of building sufficient capacity to supply large customers, like biopharmaceutical companies, is substantial and largely unrecoverable, making entering either of these markets, which have only limited sales opportunities for an untested entrant, unattractive.

EFFECTS OF THE ACQUISITION

The proposed acquisition likely would cause significant competitive harm to consumers in the markets for siRNA reagents, cell culture media, and cell culture sera. Thermo Fisher and Life, the two leading suppliers of siRNA reagents, are particularly close competitors, targeting the same customers and frequently cutting prices specifically to gain an advantage against one another. Moreover, Thermo Fisher and Life compete directly to develop improved, higher-quality siRNA reagents. The elimination of this close competition and the significant increase in concentration in the siRNA reagent market generally, is likely to result in substantial anticompetitive effects, including in the form of higher prices and reduced choice and innovation.

The proposed acquisition would also likely result in substantial anticompetitive effects in the cell culture media and sera markets by eliminating the close competition between Thermo Fisher and Life, which has benefited consumers significantly. Customers currently benefit from this head-to-head competition by leveraging Thermo Fisher and Life against each other to receive better pricing and higher quality products and services. By eliminating Life as an independent competitor and

Analysis to Aid Public Comment

substantially increasing concentration in the cell culture media and sera markets, the proposed acquisition would likely result in increased prices and reduced services to customers, as well as diminished innovation.

THE CONSENT AGREEMENT

The Consent Agreement eliminates the competitive concerns raised by Thermo Fisher's proposed acquisition of Life by requiring Thermo Fisher to divest assets and provide necessary transitional services to acquirer GE Healthcare. The divested assets include Thermo Fisher's gene modulation business, Dharmacon, which includes its siRNA reagents business, and HyClone, Thermo Fisher's cell culture media and sera business.

GE Healthcare, the proposed acquirer, has the relevant industry experience, reputation, and resources to restore the benefits of competition that would be lost through the proposed transaction. GE Healthcare is headquartered in the United Kingdom and has operations in North America, Europe, Asia, South America, and Australia. GE Healthcare manufactures and sells a wide variety of life sciences products. It currently has a very small cell culture business, which sells both media and sera, providing it with relevant experience in the cell culture space. Although GE Healthcare does not currently sell siRNA, it has plans to integrate Dharmacon into its existing life sciences product portfolio.

Pursuant to the Consent Agreement, GE Healthcare will acquire substantially all of the HyClone cell culture media and sera assets, except assets relating to single-use-technology, which is a plastics and consumables business and not an area of competitive overlap between the merging parties. GE Healthcare will also acquire all gene modulation and siRNA reagents-related assets necessary to replace the loss of competition presented by the proposed acquisition. As part of the proposed divestiture, GE Healthcare will receive all relevant intellectual property — including licenses to the Tuschl patents—know-how, and information required to produce and sell siRNA reagents and cell culture media and sera. It also will have the right to interview and offer employment to employees associated with the divested businesses. In addition, Thermo Fisher will provide GE

Analysis to Aid Public Comment

Healthcare with transition services for a limited period to enable it to immediately compete in the relevant markets with the divested assets.

The proposed divestiture to GE Healthcare is sufficiently large that it will be reportable to several foreign competition authorities in suspensory jurisdictions. Thus, the proposed Consent Agreement provides forty-five days from the date Thermo Fisher consummates its acquisition of Life to accomplish the divestiture to GE Healthcare, with the proviso that if the foreign approvals are secured earlier, the divestiture must be accomplished within ten days of receipt of the final approval. The proposed Consent Agreement provides that the Commission may appoint a trustee to accomplish the divestitures to another approved acquirer if the divestitures to GE Healthcare are not accomplished within the specified time period.

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

Complaint

IN THE MATTER OF

**MUSIC TEACHERS NATIONAL ASSOCIATION,
INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4448; File No. 131 0118
Complaint, April 3, 2014 – Decision, April 3, 2014*

This consent order addresses Music Teachers National Association, Inc.'s ("MTNA") restraining through the non-solicitation provision of its Code of Ethics the ability of its members to solicit the clients of competing music teachers. The complaint alleges that MTNA, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act by adopting and maintaining a provision in its Code of Ethics that restrains solicitation of teaching work. The consent order requires MTNA to cease and desist from restricting solicitation among its members, and is required to disaffiliate any music teachers association that adopts or maintains provisions in its code of ethics or similar documents that restrain solicitation, advertising, or price-related competition.

Participants

For the *Commission*: Armando Irizarry and Karen Mills.

For the *Respondent*: T. Scott Gilligan, Gilligan Law Offices.

COMPLAINT

The Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, having reason to believe that Music Teachers National Association, Inc. ("Respondent" or "MTNA"), a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

Complaint

I. RESPONDENT

1. Respondent Music Teachers National Association, Inc. is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its office and principal place of business located at 441 Vine Street, Suite 3100, Cincinnati, Ohio 45202-3004.

2. Respondent is a professional association of music teachers with over 20,000 members. Many of Respondent's members provide music-teaching services for a fee, or are employed at schools, universities and music studios as music teachers. Except to the extent that competition has been restrained as alleged herein, many of Respondent's members have been and are now in competition among themselves and with other music teachers.

3. Respondent has over 500 state and local music teachers associations as affiliates ("MTNA Affiliates"), including one affiliate for each state. Members of MTNA Affiliates are also members of Respondent.

II. JURISDICTION

4. Respondent conducts business for the pecuniary benefit of its members and is therefore a "corporation," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

5. The acts and practices of Respondent, including the acts and practices alleged herein, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. NATURE OF THE CASE

6. Respondent maintains a Code of Ethics applicable to the commercial activities of its members, and encourages its members to follow its Code of Ethics. Some MTNA Affiliates have the same Code of Ethics that MTNA has, and some have adopted different codes of ethics.

Complaint

7. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics the ability of its members to solicit the customers of competing music teachers. Specifically, in 2004 MTNA added the following provision to the section of its Code of Ethics titled "Commitment to Colleagues":

The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

8. In furtherance of the combination alleged in Paragraph 7, Respondent established a process for resolving alleged violations of the Code of Ethics, including by encouraging its members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

IV. VIOLATION CHARGED

9. The purpose, effects, tendency, or capacity of the combination, agreement, acts and practices alleged in Paragraphs 7 and 8 has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among music teachers, and by depriving consumers and others of the benefits of free and open competition among music teachers.

10. The combination, agreement, acts and practices alleged in Paragraphs 7 and 8 constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested herein.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of April, 2014, issues its Complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of Music Teachers National Association, Inc. (“Respondent” or “MTNA”) and Respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order (“Order”):

1. Respondent Music Teachers National Association, Inc., is a non-profit corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its office and principal place of business located at 441 Vine Street, Suite 3100, Cincinnati, Ohio 45202.

Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Respondent” or “MTNA” means Music Teachers National Association, Inc., its directors, boards, officers, employees, agents, representatives, councils, committees, foundations, divisions, successors, and assigns.
- B. “Affiliate” means any state or local music teachers association that is affiliated with MTNA.
- C. “Antitrust Compliance Officer” means a person appointed under Paragraph IV.A. of this Order.
- D. “Antitrust Counsel” means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. § 12 *et seq.*
- F. “Certification” means the document attached to this Order as Appendix A.
- G. “Code of Ethics” means a statement setting forth the principles, values, standards, or rules of behavior that guide the conduct of an organization and its members.

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- H. “Extension of Time” means the document attached to this Order as Appendix B.
- I. “FTC Settlement Statement” means the statement attached to this Order as Appendix C.
- J. “Leaders” means MTNA’s board of directors, officers, committee chairs, council chairs, and state presidents.
- K. “Member” means a member of MTNA, including active, state, local, collegiate, international, corporate, institutional, international, patron, retired, and six-month members.
- L. “Notification Date” means the date on which Respondent makes the notification required by Paragraph III.A.3. of this Order.
- M. “Organization Documents” means any documents relating to the governance, management, or direction of the relevant organization, including, but not limited to, bylaws, rules, regulations, Codes of Ethics, policy statements, interpretations, commentaries, or guidelines.
- N. “Prohibited Practice” means Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against any of the activities described in Paragraph II.B.1, II.B.2., and II.B.3.
- O. “Regulating” means (1) adopting, maintaining, recommending, or encouraging that Members follow any rule, regulation, interpretation, ethical ruling, policy, commentary, or guideline; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

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II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

- A. Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against solicitation of teaching work, through any means, by any Member or any organization with which Members are affiliated; and
- B. Accepting as an Affiliate, or maintaining a relationship with any Affiliate, that MTNA knows engages in conduct Regulating, restricting, restraining, impeding, declaring unethical or unprofessional, interfering with or advising against:
 - 1. Solicitation of teaching work, through any means, by any Member or any organization with which Members are affiliated;
 - 2. Advertising or publishing the prices, terms or conditions of sale of teaching services, or information about teaching services that are offered for sale or made available by Members or by any organization with which Members are affiliated; and
 - 3. Price-related competition by its Members, including, but not limited to, restricting the provision of free or discounted services, restricting terms of payment, or restricting Members from offering their services unless they conform to rules established by MTNA;

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from adopting and enforcing, or

Decision and Order

accepting as an Affiliate or maintaining an affiliate relationship with any Affiliate that adopts and enforces, reasonable principles, rules, guidelines, or policies governing: (i) the conduct of its Members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act or (ii) the conduct of judges during music competitions sponsored or held by Respondent or any Affiliate.

III.

IT IS FURTHER ORDERED that:

- A. No later than thirty (30) days from the date this Order is issued, Respondent shall:
1. Post and maintain for five years on the Code of Ethics page of MTNA's website, together with a link from Respondent's home or menu page that is entitled "Antitrust Compliance," the following items:
 - a. An announcement that states "MTNA agreed to change its Code of Ethics and will not adopt, encourage its members to follow, or enforce any Code of Ethics provision relating to solicitation of teaching work that does not comply with the FTC Consent Order,"
 - b. The FTC Settlement Statement; and
 - c. A link to the Federal Trade Commission's website that contains the press release issued by the Commission in this matter; and
 2. Distribute electronically or by other means a copy of the FTC Settlement Statement to its Leaders, employees, and Affiliates; and

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3. Notify each Affiliate that, as a condition of continued affiliation with MTNA, such Affiliate must execute and return a Certification to Respondent no later than one hundred twenty (120) days from the date Respondent notifies such Affiliate.
- B. No later than sixty (60) days from the date this Order is issued Respondent shall:
1. Remove from MTNA's Organization Documents and MTNA's website any statement that is inconsistent with Paragraph II. of this Order, and
 2. Publish on MTNA's website any revisions of MTNA's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement.
- C. Respondent shall publish, in the font that is customarily used for feature articles:
1. Any revisions of MTNA's Organization Documents, the press release issued by the Commission in this matter, and the FTC Settlement Statement in the next available edition of the "American Music Teacher" magazine; and
 2. The FTC Settlement Statement in the edition of the "American Music Teacher" magazine, or any successor publication, on or as close as possible to the first and second anniversary dates of first publication of the FTC Settlement Statement.
- D. For a period of five (5) years after this Order is issued, distribute electronically or by other means, a copy of the FTC Settlement Statement to each:
1. New Affiliate no later than thirty (30) days after the date the organization becomes an Affiliate;

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2. New Member no later than thirty (30) days after the date of commencement of the membership; and
 3. Member who receives a membership renewal notice at the time the Member receives such notice.
- E. Respondent shall:
1. Immediately terminate any Affiliate that fails to provide an executed Certification no later than one hundred twenty (120) days from the Notification Date and shall not permit the terminated Affiliate to use the phrase “Affiliated with Music Teachers National Association” until such time as the Affiliate provides an executed Certification;

Provided, however, that Respondent may allow an Affiliate to file an Extension of Time to provide Respondent an executed Certification no later than than two hundred fifty (250) days from the Notification Date (“Extended Time Period”);

Provided further that if such Affiliate does not provide Respondent the executed Certification within the Extended Time Period, Respondent shall proceed against the Affiliate pursuant to Paragraph III.E.2. of this Order; and
 2. Terminate for a period of one (1) year, no later than one hundred twenty (120) days after Respondent learns or obtains information that would lead a reasonable person to conclude that the Affiliate has, following the date this Order is issued, engaged in any Prohibited Practice; unless, prior to the expiration of the one hundred twenty (120) day period, said Affiliate informs Respondent in a verified written statement of an officer that the Affiliate has eliminated and will not reengage in such Prohibited Practice, and Respondent has no reasonable grounds to believe otherwise.

Decision and Order

- F. Respondent shall include with the 2014-2015 dues statement sent to each Member a copy of the FTC Settlement Statement.
- G. Respondent shall maintain and make available to Commission staff for inspection and copying upon reasonable notice records adequate to describe in detail any:
 - 1. Action against any Member or Affiliate taken in connection with the activities covered by Paragraph II. of this Order, including but not limited to enforcement, advisory opinions, advice or interpretations rendered; and
 - 2. Complaint received from any person relating to Respondent's compliance with this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an antitrust compliance program to assure compliance with this Order and the Antitrust Laws:

- A. No later than thirty (30) days from the date this Order is issued, Respondent shall appoint and retain an Antitrust Compliance Officer for the duration of this Order to supervise Respondent's antitrust compliance program.
- B. For a period of three (3) years from the date this Order is issued, the Antitrust Compliance Officer shall be the Chief Executive Officer of Respondent after which a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a member of the Board of Directors, or employee of Respondent.
- C. For a period of five (5) years from the date this Order is issued, Respondent shall provide in-person annual training to its Leaders and employees concerning Respondent's obligations under this Order and an

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overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct.

- D. Respondent shall implement policies and procedures to:
1. Enable persons (including, but not limited to, its Leaders, employees, Members, and agents) to ask questions about, and report violations of, this Order and the Antitrust Laws, confidentially and without fear of retaliation of any kind; and
 2. Discipline Leaders, employees, and agents for failure to comply fully with this Order.
- E. For a period of five (5) years from the date this Order is issued, Respondent shall:
1. Conduct a presentation at each annual meeting of (i) MTNA, and (ii) the State Presidents Advisory Council, that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and
 2. Provide an antitrust compliance guide to Affiliates to use at each annual meeting of such Affiliates that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

- A. No later than (i) ninety (90) days after the date this Order is issued, (ii) one hundred eighty (180) days after the date this Order is issued; and

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- B. No later than one (1) year after the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission staff may request.

VI.

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

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

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, 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 books, ledgers, accounts, correspondence, memoranda and all other records and documents 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 its expense; and

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- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on April 3, 2034.

By the Commission.

APPENDIX A

CERTIFICATION

Name of Music Teacher Association

As a condition of being affiliated with the Music Teachers National Association, Inc. (“MTNA”), the music teacher association named above (the “Association”) makes the following representations to MTNA:

1. **NO RESTRICTIONS ON STUDENT OR JOB SOLICITATIONS:** As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation, ethical ruling, guideline or recommendation which would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from soliciting teaching work. Examples of the type of provisions that restrict solicitation include any of the following:

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- Restricting a member from soliciting a pupil of another teacher.
- Restricting a member from enrolling a pupil of another teacher unless the pupil's financial obligations to the former teacher have been satisfied and the relationship with the teacher has been severed.
- Restricting a member from seeking a job opening unless notice has been given of impending vacancy.
- Restricting a member from writing or publishing reviews or criticisms of the performance or skills of other teachers or their students.
- Restricting a member from writing or publishing for public media.

2. NO RESTRICTIONS ON ADVERTISING PRICES OR TERMS OF TEACHING SERVICES: As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation, ethical ruling, guideline or recommendation which would restrict, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from advertising prices or other terms of teaching services. Examples of the type of provisions that restrict advertising include any of the following:

- Restricting a member from advertising free scholarships or tuition.
- Restricting a member from offering opportunities for study to gifted but underprivileged students in the form of free lessons or scholarships as inducements to study with a particular teacher.

3. NO RESTRICTIONS ON COMPETING ON PRICE-RELATED TERMS: As of the date this Certification is executed, the Association does not maintain in its bylaws, rules, regulations, code of ethics, policies, or website any type of rule, interpretation,

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ethical ruling, guideline or recommendation which would restrict, restrain, impede, declare unethical or unprofessional, or interfere with or advise against a member of the Association from competing on price-related terms. Examples of the type of provisions that restrict competing on price-related terms include any of the following:

- Restricting a member from charging fees that are lower than the average fees being charged in the community.
- Restricting a member from allowing a student to pay tuition in terms other than in advance by the month or term.
- Restricting a member from offering make-up lessons for lessons missed unless the student provides sufficient notice or reasonable excuse.

On behalf of the Association named above, the undersigned officer certifies that all of the foregoing representations are accurate as of the date listed below:

Officer's Signature _____

Officer's Name _____

Officer's Title _____

Date: _____

EXTENSION OF TIME. Due to scheduling of annual membership meetings and various constitution and bylaw requirements, some state and local music teacher associations may not be able to take the necessary action to eliminate the prohibited provisions described in the above Certification from their organizational documents or policies by the deadline set forth for the return of the Certification. If the Association faces such obstacles, but is taking all necessary steps to eliminate the prohibited provisions as soon as practical under the Association's organizational documents, it may execute the Extension of Time set forth on the next page and return it by the deadline.

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APPENDIX B

EXTENSION OF TIME

Name of Music Teacher Association

The Association certifies that (i) before it can make the required Certification, it has to eliminate certain prohibited provisions from its organizational documents, (ii) it is precluded from doing so by the deadline imposed for the return of the Certification because of time constraints set by the Association's organizational documents, (ii) it shall not enforce any prohibited provision, and (iv) it is taking all necessary steps to eliminate the prohibited provisions as set forth below:

(a) Description of the prohibited provision(s) (attach a copy):

(b) Description of the Association action required to eliminate prohibited provision (attach copy of the rules or bylaws that contain the procedure the Association must follow):

(c) Schedule for the required action and the date by which action to eliminate the prohibited provision(s) will be completed:

The Association understands that it must provide the Certification within fifteen (15) days of the date listed in Section (c) above that the prohibited provision(s) has been eliminated.

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On behalf of the Association named above, the undersigned officer certifies that all of the foregoing representations are accurate as of the date listed below:

Officer's Signature: _____ Date: _____
Officer's Name: _____
Officer's Title: _____

APPENDIX C

(Letterhead of MTNA)

Dear Member:

As you may know, the Federal Trade Commission conducted an investigation concerning the provision in MTNA's Code of Ethics that stated:

The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

The Federal Trade Commission alleges that this provision violates the Federal Trade Commission Act because it unnecessarily restricts members of MTNA from competing for students, thereby depriving students from the benefits of competition among music teachers.

To end the investigation expeditiously and to avoid disruption to its core functions, MTNA voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission. As a result, MTNA has removed, and will not enforce, the above provision from its Code of Ethics.

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In general, the Federal Trade Commission has prohibited MTNA from engaging in certain activities that restrict members from soliciting students or other teaching work, including activities that restrict members from offering services directly to students who may be receiving similar services from other music teachers.

Some state and local music teacher associations that are affiliated with MTNA have codes of ethics or similar documents that contain provisions that restrict its members from: (a) advertising prices or other terms of teaching services, (b) competing on price-related terms, or (c) soliciting students or other teaching work. The Federal Trade Commission has prohibited MTNA from accepting or maintaining as an affiliate any association that has such a code of ethics or similar document that contains these prohibited restrictions.

In order to maintain their affiliation with MTNA, each state and local music teacher association must review its constitution and bylaws, code of ethics, operational policies, and membership requirements to determine if they contain any of these prohibited restrictions on members. Examples of these prohibited restrictions would include the following:

- An association restricting a member from offering opportunities for study to gifted students in the form of free lessons or scholarships as inducements to study with a particular member.
- An association restricting a member from engaging in advertising free scholarships or tuition.
- An association restricting a member from soliciting the pupil of another music teacher by inducements or other acts.
- An association restricting a member from enrolling a pupil of another teacher unless the pupil's financial obligations to the former teacher have been satisfied and relations with that teacher have been severed.
- An association restricting a member from charging fees that are lower than the average in the community.
- An association restricting how members accept tuition payments from pupils.

Decision and Order

- An association imposing restrictions or requirements on members regarding make-up lessons or missed lessons.
- An association restricting a member from writing or publishing for public media or from reviewing or criticizing colleagues or colleagues' students for any purpose whatsoever.
- An association restricting a member from seeking a job opportunity unless notice has been given of an impending vacancy.

State and local music teacher associations that are affiliated with MTNA and which have any of these prohibited restrictions in their constitution and bylaws, codes of ethics, operational policies, membership requirements, or elsewhere will have the opportunity to remove them. If they do not certify to MTNA that they do not have any such restrictions prior to the deadline set forth in the Decision and Order, MTNA will have to disaffiliate from them until such time as they comply with the Decision and Order.

The Decision and Order does not prohibit MTNA or its affiliates from adopting and enforcing codes of ethics or similar documents that govern the conduct of its members with respect to representations that MTNA or its affiliates reasonably believe would be false or deceptive within the meaning of the Federal Trade Commission Act, or the conduct of judges during music competitions sponsored or held by MTNA or any affiliate.

The Decision and Order also requires that MTNA implement an antitrust compliance program.

A copy of the Decision and Order is enclosed. It is also available on the Federal Trade Commission website at www.FTC.gov, and through the MTNA web site.

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from the Music Teachers National Association, Inc. (hereinafter “MTNA”). The Commission’s complaint (“Complaint”) alleges that MTNA, acting as a combination of its members and in agreement with at least some of its members, restrained competition among its members and others in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by adopting and maintaining a provision in its Code of Ethics that restrains solicitation of teaching work.

Under the terms of the proposed Consent Agreement, MTNA is required to cease and desist from restricting solicitation among its members, and is required to disaffiliate any music teachers association that adopts or maintains provisions in its code of ethics or similar documents that restrain solicitation, advertising, or price-related competition.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed order, subject to final approval, contained in the Consent Agreement. The proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order (“the Proposed Order”).

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment. It is not intended to constitute an official interpretation of the proposed Consent Agreement and the accompanying Proposed Order or in any way to modify their terms.

Analysis to Aid Public Comment

The Consent Agreement is for settlement purposes only and does not constitute an admission by MTNA that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. The Respondent

MTNA is a non-profit professional association of more than 20,000 music teachers. Many of MTNA's members provide music-teaching services for a fee, or are employed at schools, universities and music studios as music teachers. Respondent has over 500 state and local music teachers associations as affiliates, including one affiliate for each state. Members of MTNA affiliates are also members of MTNA.

MTNA maintains a Code of Ethics applicable to the commercial activities of its members, and encourages its members to follow its Code of Ethics. In 2004, MTNA added the following non-solicitation provision to the section of its Code of Ethics titled "Commitment to Colleagues":

The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

Some MTNA affiliates have the same Code of Ethics that MTNA has, and some have adopted different codes of ethics. Leaders of several state affiliates have exhorted MTNA members to comply with the non-solicitation restraints.

B. The Anticompetitive Conduct

The Complaint alleges that MTNA has violated Section 5 of the Federal Trade Commission Act by restraining through the non-solicitation provision of its Code of Ethics the ability of its members to solicit the clients of competing music teachers. MTNA also established a process for resolving alleged violations

Analysis to Aid Public Comment

of the Code of Ethics, including by encouraging its members to resolve privately disputes arising out of the Code of Ethics, and by establishing a mechanism by which MTNA may sanction violations of the Code of Ethics.

The Complaint alleges that the purpose, effect, tendency, or capacity of the combination, agreement, acts and practices of MTNA has been and is to restrain competition unreasonably and to injure consumers by discouraging and restricting competition among music teachers.

II. The Proposed Order

The Proposed Order has the following substantive provisions. Paragraph II requires MTNA to cease and desist from restraining or declaring unethical the solicitation of teaching work by its members. It also requires MTNA to cease and desist from maintaining a relationship with an affiliate that MTNA knows engages in conduct that restrains solicitation, advertising, or price-related competition by its members.

The Proposed Order does not prohibit MTNA from adopting and enforcing, or maintaining an affiliate relationship with an affiliate that adopts and enforces, reasonable principles (i) to prevent false or deceptive representations, or (ii) to govern the conduct of judges during music competitions sponsored or held by MTNA or its affiliates. The conduct of judges is exempt from the Proposed Order because MTNA has a valid justification for prohibiting solicitation in competitions. MTNA is concerned that if judges could solicit the students they are judging, it could give judges an unfair advantage over other MTNA members, and could adversely affect the integrity of competitions. This exemption is limited to the duration of a competition; prohibitions on pre or post-competition solicitation would violate the Proposed Order.

Paragraph III of the Proposed Order requires MTNA to remove from its organization documents and website any statement inconsistent with the Proposed Order. MTNA also must publicize to MTNA's members, new members, affiliates, new affiliates, leaders, employees, and the public the changes that

Analysis to Aid Public Comment

MTNA must make to the Code of Ethics and a statement describing the Consent Agreement.

Paragraph III also requires MTNA to notify each of its affiliates that, as a condition of continued affiliation with MTNA, each affiliate must execute and return to MTNA a Certification that the affiliate does not have restrictions on student or job solicitations, advertising, or price-related competition. For example, the Certification, which is Appendix A to the Proposed Order, specifies that an affiliate does not restrict its members from publishing criticisms of other teachers, advertising free scholarships or tuition, or charging fees that are lower than the average fees in their community.

MTNA must disaffiliate any affiliate that does not provide an executed Certification within one hundred and twenty days of when MTNA gave notice to the affiliate. However, MTNA may allow an affiliate to execute an Extension of Time to avoid disaffiliation if the affiliate is not able to execute the Certification within the time allowed due to scheduling of its annual membership meetings or constitution or bylaw requirements. Thereafter, the Proposed Order requires MTNA to terminate an affiliate for one year after learning that the affiliate has restrained or declared unethical solicitation, advertising, or price-related competition, unless the affiliate informs MTNA that the affiliate has eliminated and will not reengage in such practices.

Paragraph IV of the Proposed Order requires MTNA to design, maintain, and operate an antitrust compliance program. MTNA will have to appoint an Antitrust Compliance Officer for the duration of the Proposed Order. For a period of five years, MTNA will have to provide in-person annual training to its leaders and employees, conduct a presentation at its annual meeting and to the presidents of the state affiliates, and provide an antitrust compliance guide to affiliates to use at their annual meeting concerning the antitrust laws and MTNA's obligations under the Proposed Order. MTNA must also implement policies and procedures to enable persons to ask questions about, and report violations of, the Proposed Order and the antitrust laws confidentially and without fear of retaliation, and to discipline its

Statement of the Commission

leaders, employees and agents for failure to comply with the Proposed Order.

Paragraphs V-VII of the Proposed Order impose certain standard reporting and compliance requirements on MTNA.

The Proposed Order will expire in 20 years.

* * *

Statement of the Federal Trade Commission

The Federal Trade Commission is today issuing for public comment proposed consent orders with two professional associations, the Music Teachers National Association, Inc. (“MTNA”) and California Association of Legal Support Professionals (“CALSPro”).¹ We take this step because we have reason to believe that these professional associations and their respective members have violated the antitrust laws by agreeing not to engage in fundamental forms of competitive activity.

MTNA, the umbrella organization for about 500 state and local music teacher associations across the country, is a professional association of over 20,000 private music teachers. Collectively, MTNA members generate an estimated \$500 million in annual revenues. In 2004, MTNA revised its code of ethics and imposed a ban on solicitations, prohibiting teachers from actively recruiting students from one another. A number of MTNA affiliates have adopted even more aggressive competitive restrictions, including prohibitions on certain advertising, charging less than the community average, and offering

¹ Both MTNA and CALSPro are non-profits but it is well established that the Commission has jurisdiction over non-profit organizations that confer, or are organized for the purpose of conferring, economic benefits to their for-profit members. *See Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 767 n.6 (1999).

Statement of the Commission

scholarships or free music lessons. CALSPro, a California association of legal support service providers, is comprised of more than 350 company and individual members. CALSPro's code of ethics prohibits its members from offering discounted rates to rivals' clients, engaging in certain comparative advertising, and recruiting employees of competitors without first notifying the competitor.

Professional associations like MTNA and CALSPro typically serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. But, because trade organizations are by their nature collaborations among competitors, the Commission and courts have long been concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct.²

Competing for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition. Agreements among competitors not to engage in these activities injure consumers by increasing prices and reducing quality and choice. Absent a procompetitive justification, these types of restrictions on competition are precisely the kind of unreasonable restraints of trade that the Sherman Act was designed to combat. *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (condemning ethics restriction on competitive bidding). For a professional association to proscribe honest competition as "unethical" behavior is particularly problematic because, as the Supreme Court has recognized, association members can be "expected to comply in order to assure that they [do] not discredit themselves by departing from professional norms." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792-93 (1975). Here, neither

² *See, e.g., Inst. of Store Planners*, 135 F.T.C. 793 (2003) (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, 135 F.T.C. 1 (2003) (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, 134 F.T.C. 606 (2002) (restraints on price competition); *Cnty. Ass'ns Inst.*, 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs*, 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

Statement of the Commission

association advanced a legitimate business rationale for its restrictions. We therefore conclude that the principal tendency and likely effect of the challenged restraints is to harm consumers through higher prices, lower quality, and less choice.

Our proposed remedies will restore competition without imposing an undue burden on the parties or interfering with the legitimate functions of either organization. We have required MTNA and CALSPro to modify their codes of ethics and to cease any efforts to impede members of these associations from freely competing with one another. The MTNA order also requires the association to take affirmative steps to discourage anticompetitive conduct on the part of its state and local affiliates.

As with all of the Commission's enforcement activity, our goal in these cases is to stop the anticompetitive conduct at issue and remedy any anticompetitive effects associated with the challenged behavior. We also seek to provide guidance more broadly and deter other professional and trade organizations from imposing unjustified limits on competition. Maintaining a competitive marketplace requires that we monitor behavior among rivals and take action whenever we see competition being compromised to the detriment of consumers.