

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

In the Matter of

HOLOGIC, INC.,
a corporation.

Docket No. C-4165

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of intellectual property and other assets relating to breast biopsy systems from the Fischer Imaging Corporation by Hologic, Inc. (hereafter referred to as “Respondent” or “Hologic”), and Hologic having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect and having 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 Hologic, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 35 Crosby Street, Bedford, MA 01730.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Hologic” means Hologic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Hologic, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Siemens” means Siemens AG, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Postfach 32 60 91050 Erlangen, Germany.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means Siemens, or any other Person that receives the prior approval of the Commission to acquire the Fischer Breast Biopsy System Assets.
- E. “Affiliate” means any entity or acquired business which directly or indirectly is controlled by either Hologic or Acquirer, but only so long as such control subsists, control being the direct or indirect ownership of at least fifty percent (50%) of the stock entitled to vote upon election of directors or persons performing similar functions, or direct or indirect ownership of the maximum percentage permitted under local laws or regulations in those countries where fifty percent (50%) ownership by a foreign entity is not permitted.
- F. “Breast Biopsy System” means equipment used for guiding percutaneous breast biopsy procedures for the minimally-invasive removal of suspicious tissue, which incorporates an elevating prone table for patient positioning, a stereotactic x-ray imaging system capable of acquiring images at two distinct angles necessary to plot coordinates, and a guidance mechanism for directing biopsy sampling devices to coordinates specific to regions within

the breast. Breast Biopsy System includes research and development, and clinical testing activities related to the incorporation of an ultrasound scanning mechanism on the Breast Biopsy System and the use of the Breast Biopsy System for purposes of patient positioning during brachytherapy procedures. *PROVIDED, HOWEVER*, Breast Biopsy System does not include equipment for biopsy sampling, surgery, or therapy, whether or not capable of being attached to the Breast Biopsy System, including but not limited to equipment manufactured or sold by Suros Surgical Systems, Inc.

- G. “Divestiture Agreement” means the Siemens Divestiture Agreement, or the agreement between the Divestiture Trustee and Acquirer for the divestiture of the Fischer Breast Biopsy System Assets.
- H. “Effective Date” means the date on which the divestiture required by Paragraph II or III of this Order is completed.
- I. “Excluded Assets” means:
 - 1. the trade name Fischer Imaging or any derivative thereof, any registered trademark containing the name Fischer Imaging or any derivative thereof, or any domain name containing the name Fischer Imaging or any derivative thereof;
 - 2. Licensed Intellectual Property to the extent it cannot be transferred as part of the divestiture because the licensor will not agree to such transfer;
 - 3. Intellectual Property and assets exclusively Related To Fischer’s SenoScan business and products;
 - 4. Intellectual Property, assets, and documents received by Hologic as a result of its acquisition of Suros Surgical Systems, Inc.; and
 - 5. the non-exclusive, limited license to continue to use the Intellectual Property Related To Mammothest granted to Fischer Imaging Corporation in order to allow Fischer Imaging Corporation to fulfill certain continuing obligations as described in the Fischer-Hologic APA, including any sublicenses granted in accordance with the provision of the Fischer-Hologic APA by Fischer, including but not limited to the license agreement by and between Fischer Imaging Corporation and Eastman Kodak Company dated January 23, 2006.
- J. “Fischer” means Fischer Imaging Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 370 Interlocken Blvd., Suite 400, Broomfield, Colorado, 80021.

K. “Fischer Breast Biopsy System Assets” means:

1. all Intellectual Property and other information and assets acquired by Hologic pursuant to the Fischer-Hologic APA Relating To Mammotest, and still in the possession of Hologic, including, but not limited to,
 - a. all United States and foreign patents, trademarks, trade names, domain names, service marks and copyrights and any applications for and registrations of such patents, trademarks, trade names, domain names, service marks and copyrights and any renewal, derivation, divisions, reissues, continuation, continuations-in part, modifications or extensions thereof including, but not limited to, Fischer’s currently pending patent applications EPO 02713506.0 and 97911697.7 or, if the patents have already been issued on the basis of said applications, the resulting patents.
 - b. all processes, formulae, algorithms, methods, schematics, trade secrets, technology, mask works, know-how, inventions and tangible or intangible proprietary information or material, including, but not limited to, all catalogs, research material, technical information, designs, drawings, formulae, processes, procedures, documentation, diagrams, flow charts, methods and schematics;
 - c. all computer software programs or applications (in all forms received, including but not limited to object code and source code form), and data contained therein;
 - d. past and present customer lists for Mammotest, including the name, address, and relevant contact person of each such customer, a detailed list of each prospective customer of Fischer that has previously received a sales quote for Mammotest from Fischer including the name, address and relevant contact person of each prospective Mammotest customer accompanied by all Mammotest quote reports, and all other data and information relating to said customers and Mammotest sales activities relating thereto, to the extent and in the form such information was provided to Hologic pursuant to the Fischer-Hologic APA;
 - e. all vendor lists detailing the name, address, and relevant contact person for each past and present vendor supplying products or services to Fischer relating to Mammotest (“Fischer Vendors”);
 - f. all existing data and information relating to any of Fischer’s approvals, clearances, licenses, registrations, permits, franchises, product registrations or authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body, Relating To Mammotest including, without limitation, all clinical trial data, filings, engineering and design documentation, manufacturing and test results and procedures;

- g. if any, all licenses or sublicenses previously held by Fischer and now held by Hologic to any of the Intellectual Property described in this Paragraph; and
 - h. all rights to sue for past infringements of any of the Intellectual Property Relating To Mammothest;
- 2. all service and sales contracts Relating To Mammothest, if any;
- 3. all Intellectual Property, information, research and development, and assets, if any, developed or acquired since the consummation of the Fischer-Hologic APA based on Mammothest up to the date this Order is accepted by the Commission for public comment; and

and included as part of the system, and (2) technology, research and development, and clinical testing activities respecting said system, including but not limited to any technology, research and development, and clinical testing activities respecting the incorporation of an ultrasound scanning mechanism on the system and the use of the system for purposes of patient positioning during brachytherapy procedures.

- R. "Patents" means all patents, patent applications, and statutory invention registrations (which shall be deemed to include provisional applications, invention disclosures, certificates of invention and applications for certificates of invention), in each case existing as of the date this Order is accepted by the Commission for public comment, and includes all reissues, divisions, continuations, continuations-in-part, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, Related To any Breast Biopsy System of or owned by Hologic as of the date Hologic signs the Agreement Containing Consent Orders in this matter.
- S. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- T. "Relating To" or "Related To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- U. "Siemens Divestiture Agreement" means the June 26, 2006, Sale and License-Back; Covenant Not to Sue Agreement between Hologic, Inc., and Siemens AG.
- V. "Third Party" means any private entity other than the following: (1) Hologic, or (2) the Acquirer.
- W. "Trust Agreement" means the agreement between Hologic and the Divestiture Trustee that transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Fischer Breast Biopsy System Assets pursuant to this Order.

II.

IT IS FURTHER ORDERED that:

- A. Not later than five (5) days after the date on which this Order is accepted for public comment, Hologic shall divest the Fischer Breast Biopsy System Assets to Siemens absolutely and in good faith, pursuant to and in accordance with the Siemens Divestiture Agreement. The Siemens Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix A. Any failure by Hologic to comply

with the Siemens Divestiture Agreement shall constitute a failure to comply with this Order. The Siemens Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Siemens, or any obligations of Hologic, under the Siemens Divestiture Agreement. If any term of the Siemens Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Hologic’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Siemens Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Siemens Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

PROVIDED, HOWEVER, if Hologic has divested the Fischer Breast Biopsy System Assets to Siemens prior to the date this Order becomes final, and if, at the time the Commission

- C. The purpose of this Paragraph II of this Order is to ensure the continuation of the Fischer Breast Biopsy System Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition of the Intellectual Property and assets of Fischer Imaging Corporation by Hologic, to ensure that the Fischer Breast Biopsy System Assets are used independently of, and in competition with, Hologic, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Hologic has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Fischer Breast Biopsy System Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest the Fischer Breast Biopsy System Assets in a manner that satisfies the requirements of Paragraph II of this Order ("Divestiture Trustee"). In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Hologic shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. 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 Hologic to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Hologic, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Hologic has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of notice by the staff of the Commission to Hologic of the identity of any proposed Divestiture Trustee, Hologic shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Within ten (10) days after appointment of a Divestiture Trustee, Hologic 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 divestitures required by this Order.

- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Hologic shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Fischer Breast Biopsy System Assets consistent with the terms of this Order including the right of Hologic to receive a non-exclusive license as described in Paragraph IV of this Order.
 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Trust Agreement described herein to accomplish the divestiture, which

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 and, in the case of a court-appointed Divestiture Trustee, by the court, 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 Hologic, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in

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IV.

IT IS FURTHER ORDERED that the Divestiture Agreement shall include the following provisions:

- A. Hologic shall covenant to the Acquirer that Hologic shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer (the Acquirer's successor or Affiliate, or any Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) to the extent that such suit alleges that any Breast Biopsy System developed, designed, manufactured, licensed, or otherwise sold by or on behalf of Acquirer infringes any Patent, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution or sale of Breast Biopsy Systems, *PROVIDED, HOWEVER*, that such covenant not to sue shall not apply to any Patent issued after the date this Order is accepted by the Commission for public comment; and
- B. Hologic shall covenant to the Acquirer that: (1) any Third Party assignee, transferee or licensee of the Patents shall agree to provide a covenant not to sue the Acquirer (the Acquirer's successor, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) at least as protective as those extended pursuant to the preceding Paragraph IV.A, as a condition of such assignment, transfer or license; and (2) with respect to any Third Party patents existing as of the date this Order is accepted by the Commission for public comment and licensed to Hologic, and as to which Hologic does not control the right of prosecution of any legal action, Hologic shall not actively induce, assist or participate in any legal action or proceeding Relating To Breast Biopsy Systems against the Acquirer (the Acquirer's successor or Affiliate, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).
- C. Hologic shall be allowed to receive, as part of the negotiated Divestiture Agreement, a royalty free, non-exclusive, perpetual, irrevocable, transferable, worldwide right and license to the Fischer Breast Biopsy System Assets to use such rights and licenses in any form to develop, have developed, make, have made, use, sell, have sold, offer for sale, import, export, or otherwise dispose of any products or services of any kind without restriction, and subject to the forgoing including the right to grant sublicenses to its Affiliates at any time but not the right to grant sublicenses to Third Parties.
- D. Hologic shall covenant to the Acquirer that Hologic will not interfere with, restrict, or otherwise impair the Fischer Vendors and the Hologic Vendors from dealing with the Acquirer, *PROVIDED, HOWEVER*, that if Hologic has an exclusive contract arrangement,

assist or participate in any legal action or proceeding relating to Breast Biopsy Systems against the Acquirer (the Acquirer's successor or Affiliate, or the Person or Persons to whom the Acquirer transfers, licenses, or authorizes to manufacture, develop or sell Breast Biopsy Systems pursuant to Intellectual Property of the Fischer Breast Biopsy System Assets) unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order);

4. until the divestiture required pursuant to Paragraph II is completed, take such actions as are necessary to maintain the viability and marketability of the Fischer Breast Biopsy System Assets as they exist as of the date Hologic signs the Agreement Containing Consent Order in this matter, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Fischer Breast Biopsy Systems Assets, as they exist as of the date Hologic signs the Agreement Containing Consent Order in this matter; *PROVIDED, HOWEVER*, that nothing in this paragraph limits or precludes Hologic from promoting, marketing, and selling its own products and services.
- B. Hologic shall place no restrictions on the use by any Acquirer of any of the Fischer Breast Biopsy System Assets.
 - C. Hologic shall not interfere with, restrict, or otherwise impair the Fischer Vendors and the Hologic Vendors from dealing with the Acquirer, *PROVIDED, HOWEVER*, that if Hologic has an exclusive contract arrangement, or similar arrangement with a Hologic Vendor as of the signing of the Agreement Containing Consent Order, such exclusivity arrangement shall be waived as to the Acquirer only for a period of two (2) years beginning on the Effective Date; *PROVIDED, FURTHER, HOWEVER*, that Hologic is permitted to alter or terminate the Hologic Vendor relationships at its sole discretion consistent with the terms of this Paragraph V.C.
 - D. The purpose of this Paragraph V of this Order is to ensure the continuation of the Fischer Breast Biopsy System Assets as part of an ongoing viable enterprise engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition of the Intellectual Property and assets of Fischer Imaging Corporation by Hologic, to ensure that the Fischer Breast Biopsy System Assets are used independently of, and in competition with, Hologic, and to remedy ~~the~~ lessening of competition alleged in the

- A. acquire any assets of or financial interest in any Person who develops, manufactures, or sells Breast Biopsy Systems;
- B. enter into any contract to participate in the management of any person who develops, manufactures, or sells Breast Biopsy Systems.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as “the Notification), *PROVIDED, HOWEVER*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Hologic and not from any other party to the transaction. Hologic 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), Hologic 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.

VII.

IT IS FURTHER ORDERED that:

- A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until the divestiture pursuant to Paragraphs II and III of this Order has been completed, Hologic 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 the terms of this Order. Hologic shall submit at the same time a copy of these reports to the Divestiture Trustee, if one is appointed.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain

Assets, and the Divestiture Agreement. Hologic shall submit at the same time a copy of these reports to the Divestiture Trustee, if the Divestiture Trustee has been appointed and has not completed his or duties pursuant to Paragraph III.

VIII.

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

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

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on August 9, 2016.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: August 9, 2006

NONPUBLIC APPENDIX A

SIEMENS DIVESTITURE AGREEMENT

**[REDACTED FROM THE PUBLIC RECORD VERSION BUT
INCORPORATED BY REFERENCE]**