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

COMMISSIONERS: **Edith Ramirez**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation.

and

MERCK & CO., INC.,
a corporation.

Docket No. C-4268

**APPLICATION FOR APPROVAL OF THE SALE OF THE BARCELONETA
MANUFACTURING FACILITY TO MERIAL BARCELONETA LLC**

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I. INTRODUCTION

Pursuant to Section 2.41(f) of the Federal Trade Commission (the “**FTC**” or the “**Commission**”) Rules of Practice and Procedure¹ and Paragraph III of the Decision and Order issued by the Commission in this matter on October 29, 2009 (the “**Order**”),² Merck & Co., Inc. (“**Merck**”) hereby petitions the Commission to approve the sale of the assets and properties held and used by Merck in connection with the manufacture of Heartgard® and Heartgard Plus® (together, the “**Heartgard® Products**”), including the real estate property and improvements located at State Road #2, Kilometer 56.7, Barceloneta, Puerto Rico (the “**Barceloneta Manufacturing Facility**”) to Merial Barceloneta LLC (“**Merial**”) (a subsidiary of Merial Inc.) (the “**Transaction**”) pursuant to the Asset Purchase Agreement between MSD International

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manufacture, marketing, and sale of the Animal Health Products.”⁴ The Transaction will sever the supply relationship between two animal health competitors, allow Merial to obtain certainty and control over its own supply of the Heartgard® Products, and achieve the Commission’s objective that Merial be completely independent of Merck. The Transaction will include all physical assets, contracts, permits (to the extent transferrable) and other government approvals, employees and personnel files, know-how, inventory and maintenance stores, and ancillary support necessary to ensure that Merial will be an independent, viable, and effective competitor for the sale of Animal Health Products.

For the reasons set forth above, and as explained in greater detail below, Merck respectfully requests that the Commission approve the proposed sale of the Barceloneta Manufacturing Facility to Merial.

II. RELEVANT BACKGROUND

A. The Order

On March 6, 2009, Schering-Plough Corporation (“**Schering-Plough**”) and Merck (together, the “**Respondents**”) entered into an Agreement and Plan of Merger whereby Schering-Plough proposed to acquire Merck and to maintain the surviving entity under the Merck name (the “**Acquisition**”). The FTC filed a complaint on October 29, 2009 alleging that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended,⁵ and Section 5 of the Federal Trade Commission Act, as amended,⁶ “by lessening competition in the market for the manufacture and sale of NK1 receptor antagonists for CINV and PONV in

⁴ Order, Paragraph II.D.3.

⁵ 15 U.S.C. § 18.

⁶ 15 U.S.C. § 45.

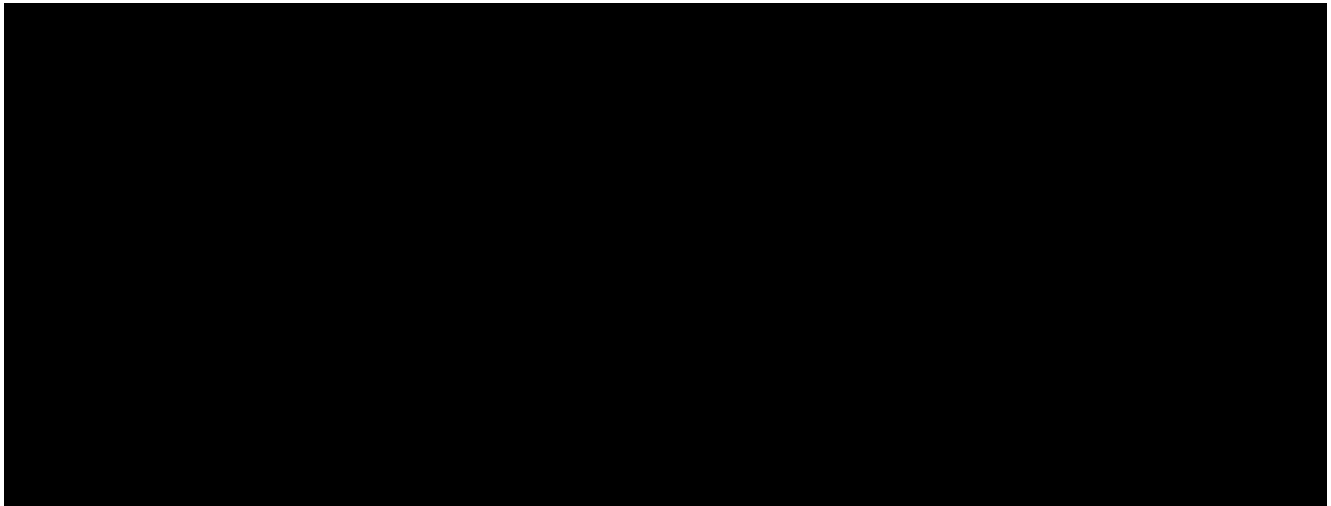
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humans and the manufacture and sale of numerous animal health products in the United States, including live poultry vaccines, killed poultry vaccines and cattle gonadotropins.”⁷ The Heartgard® Products, which are Ivermectin-based products used to treat heartworms in companion animals, were not among the Animal Health Products identified as raising any competitive concerns by the Acquisition.

On October 29, 2009, Respondents and the Commission entered into an Agreement Containing Consent Order that included the Order to settle the Commission’s allegations. To address the Commission’s concerns relating to Respondents’ animal health businesses, the Order required Merck to divest its interest in Merial Limited (a subsidiary of Merial Inc.), an animal health joint venture in which Merck was a 50% owner, to its joint venture partner, Sanofi-Aventis S.A. (“**Sanofi**”).

On September 18, 2009, prior to the entry of the Order and with the approval of the Commission, Merck sold its interest in Merial to Sanofi. The divestiture eliminated all animal health overlaps between Merck and Schering-Plough and thereby resolved all competition concerns relating to Animal Health Products raised by the Acquisition as alleged by the Commission. Merck and Schering-Plough

supply requirements to another provider. Merck's temporary obligation to supply Merial with the Heartgard® Products after the Acquisition was memorialized in the Supply Agreement, which was incorporated into the Order as a Remedial Agreement.



C. The Barceloneta Manufacturing Facility

Merck has supplied Merial with the Heartgard® Products using the Barceloneta Manufacturing Facility since 1989.⁹ At this time, Merck does not use the Barceloneta Manufacturing Facility to supply itself or any other entity with any other product, animal health-related or otherwise. The Heartgard® Products are the only products manufactured at the Barceloneta facility. All units of the Heartgard® Products manufactured at the Barceloneta Manufacturing Facility are sold directly to Merial. The Barceloneta Manufacturing Facility has never, and currently does not, manufacture any units of the Heartgard® Products for sale by Merck, in generic form or otherwise. The Transaction for which approval is sought would result

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in the transfer to Merial of the very assets that Merck currently uses to manufacture the Heartgard® Products on behalf of Merial.

III. THE PROPOSED TRANSACTION SATISFIES THE PURPOSE AND OBJECTIVES OF THE ORDER AND RAISES NO COMPETITIVE ISSUES

A. The Transaction Raises No Competition Concerns

The Animal Health Products raising competition concerns that were identified in the Complaint and subject to remedial action set forth in the Order related to poultry vaccines and cattle gonadotropins. The Acquisition did not raise any competition concerns relating to Animal Health Products that are used to treat heartworms in companion animals, such as the Heartgard® Products. This Transaction, for which prior approval is sought, likewise does not raise any competition concerns relating to the Heartgard® Products (or any other Animal Health Products). The Transaction is a sale of manufacturing and related assets; it does not involve any competing products and it will not result in any change in market concentration for any putative relevant market in which the Heartgard® Products compete. Indeed, the result of the Transaction will be an improvement of the *status quo* as Merial will no longer rely on a competitor for its supply requirements for the Heartgard® Products.

B. The Transaction Will Grant Certainty and Control to Merial Over its Own Supply Requirements for the Heartgard® Products

The supply obligations for the Heartgard® Products set forth in the Supply Agreement,

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2. Contracts

The Transaction will include the contracts relating exclusively to the manufacture of the Heartgard® Products or the Barceloneta Manufacturing Facility, to the extent that such contracts are immediately assignable. Contracts that are not immediately assignable are not critical to the operation of the Barceloneta Manufacturing Facility, and the parties have agreed to work cooperatively to transfer those contracts as expeditiously as possible. No contract that is not immediately assignable will impede Merial's ability to immediately commence supplying itself with the Heartgard® Products.

3. Permits and Other Government Approvals

The Transaction will include all permits, authorizations, licenses, franchises, plans, approvals, and any other similar documents issued or granted by a Governmental Authority, as defined in the Agreement ("**Permits**"), to the extent that such Permits are assignable. For those Permits that are non-assignable and require new applications, and to account for any time required to transfer assignable Permits,

The inability of the parties to immediately transfer all existing Permits will not impede Merial's ability to immediately commence supplying itself with the Heartgard® Products.

4. Employees and Personnel Files

Merial has determined the specific employees necessary for its continued, uninterrupted

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IV. REQUEST FOR EXPEDITIOUS APPROVAL

For the reasons discussed herein, Merck respectfully requests that the Commission approve the proposed sale of the Barceloneta Manufacturing Facility to Merial, as described in the attached Agreement, as soon as practicable after expiration of the public comment period.

V. REQUEST FOR CONFIDENTIAL TREATMENT

This application, including the attached Agreement and related documents, contains certain confidential and competitively-sensitive business information relating to the sale of the Barceloneta Manufacturing Facility. Disclosure of such confidential information may prejudice Merck and Merial, and cause harm to the ongoing competitiveness of both companies. Pursuant to Sections 2.41(f)(4) and 4.9(c) of the FTC's Rules of Practice and Procedure,¹¹ Merck has redacted such information from the public version of this application, and requests confidential treatment for such information under Section 4.10(a)(2) of the FTC's Rules of Practice and Procedure¹² and Sections 552(b)(4) and (b)(7) of the Freedom of Information Act.¹³ In the event that a determination is made that any material marked as confidential is not subject to confidential treatment, Merck requests that the FTC provide immediate notice of that determination and adequate

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