

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

_____)	
In the Matter of)	
)	
ZIMMER HOLDINGS, INC.,)	
a corporation;)	
)	Docket C-4534
LVB ACQUISITION, INC.,)	
a corporation)	
)	
and)	
)	
BIOMET, INC.,)	
a corporation.)	
_____)	

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition by Respondent Zimmer Holdings, Inc. (“Zimmer”) of the voting securities of Respondent LVB Acquisition, Inc. (“LVB”) and its subsidiary, Respondent Biomet, Inc. (“Biomet”), collectively (“Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their 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 the Complaint, a

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, 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 Zimmer Holdings, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 345 East Main Street, Warsaw, IN 46580.
2. Respondent LVB Acquisition, Inc. is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.
3. Respondent Biomet, Inc. is a wholly owned subsidiary of LVB Acquisition, Inc. and is a corporation organized, existing and doing business under and by virtue of the laws of Indiana, with its office and principal place of business located at 56 East Bell Drive, Warsaw, IN 46582.
4. The Commission has jurisdiction over the Respondents and their actions, and the Commission hereby orders that the Respondents shall comply with the Commission's orders and decisions.

D.

P. “Cobalt Background IP” means all patents

11. Copies of customer credit and other records for the Cobalt Products in the United States;
12. Copies of all books, ledgers and other business records for the Cobalt Products in the United States;
13. Copies of clinical, regulatory, and customer sales databases for the Cobalt Products in the United States; and
14. All licenses, permits and authorizations related to the Cobalt Products in the United States, to the extent transferrable, and all dossiers to the current and/or pending authorizations held or sought for the Cobalt Products in the United States.

provided, however, that “Cobalt Business” does not include the Retained Business; and

provided further, however, that with respect to documents or other materials included in the Cobalt Business that contain information (a) that relates both to Cobalt Products and

control history, current and historical information associated with the FDA Approval(s)

AA. “Discovery Background IP” means all patents, copyrights, trade secrets or other intellectual property rights owned by Biomet as of the Closing Date (other than trademarks or trade dress), that are related to and used in or would otherwise be infringed by the Discovery Business as of the Closing Date but that are not included in the Discovery Business.

BB. “Discovery Background IP License” means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the Discovery Business under any Discovery Background IP to operate the Discovery Business, including the research, Development, manufacture, distribution, marketing or sale of Total Elbow Implants in the United States.

CC. “Discovery Business” means all of the rights, titles and interest in the United States in the elbow products marketed under the brand name Discovery™ Elbow, including associated instrumentation, any improvements as of the Closing Date, and all such products under Development as of the Closing Date, including the right to Develop, manufacture and use with a view to its marketing and sale in the United States only, including, but not limited to:

1. Finished product inventory designated for the United States;
2. Instrumentation inventory for the Discovery Products in the United States;
3. Advertising, marketing and promotional materials for the Discovery Products in the United States;
4. Copies of all design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records for the Discovery Products in the United States.

any such intellectual property rights related to Vivacit-E® antioxidant stabilized polyethylene technology.

FFF. “ZUK Background IP License” means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive license to the Commission-Approved Acquirer of the ZUK Business under any ZUK Background IP to operate the ZUK Business, including the research, Development, manufacture, distribution, marketing or sale of Un

- JJJ. “ZUK Products” means the partial knee system marketed under the brand name Zimmer® Unicompartmental High Flex Knee System, including instrumentation (including patient specific instrumentation), any improvements at the Closing Date and any pipeline products at the Closing Date.
- KKK. “ZUK Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information, to the extent each of the foregoing are related to the research, Development, manufacture, marketing, distribution, or sale of ZUK Products in the United States.

II.

IT IS FURTHER ORDERED

Acquirer, or for the continued research, Development, manufacture, distribution, marketing or sale of Bone Cement in the United States by the Commission-Approved Acquirer.

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Cobalt Assets To Be Divested;
2. deliver all Confidential Business Information related to the Cobalt Assets To Be Divested to the Commission-Approved 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;
3. pending complete delivery of all such Confidential Business Information to the Commission-Approved Acquirer, provide the Commission-Approved Acquirer and the Interim 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 Cobalt Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with the requirements of this Order, any Remedial Agreement, or any Law) related to the Cobalt Business for the manufacture, Development, marketing or sale of Bone Cement in or into the United States, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person except in connection with the divestiture of the Cobalt Assets To Be Divested, to the Interim Monitor, if any, and to the Divestiture Trustee, if any, *provided however*, that:

1. This Paragraph II.D. shall not apply to any Confidential Business Information related to the Cobalt Business that Respondents can demonstrate to the Commission that Zimmer obtained other than in connection with the Acquisition;
2. This Paragraph II.D. shall not apply to any Confidential Business Information to the extent related to Retained Products or the Retained Business;
3. This Paragraph II.D. shall not apply to the use of Confidential Business Information by Respondents to defend against legal claims brought by any Third Party, or investigations or enforcement actions by Government Entities; and

4. This Paragraph II.D. shall not apply to the use of Confidential Business Information by Respondents to the extent consented to by the Commission-Approved Acquirer;

provided, however, that Respondents shall require any Biomet employees or agents who as of the Closing Date have access to Confidential Business Information related to the Cobalt Business to enter into, no later than thirty (30) days after the Closing Date, confidentiality agreements with Respondents and the Commission-Approved Acquirer not to disclose such Confidential Business Information except as set forth in this Paragraph II.D.

- E. Respondents shall enter into an agreement to supply Cobalt Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture Cobalt Products in commercial quantities at economical costs at its own facility.
- F. Respondents shall:
 1. Not later than ten (10) business days after signing a Remedial Agreement related to the Cobalt Assets To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the Cobalt Business and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;
 2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the Cobalt Assets To Be Divested for the proposed Commission-Approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any one or more of the Business Service Providers related to the Cobalt Business; and (b) to make offers of employment or agency to any one or more of the Business Service Providers;
 3. Not interfere, directly or indirectly, with the hiring or employing by the proposed Commission-Approved Acquirer of Business Service Providers related to the Cobalt Business, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the proposed Commission-Approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the proposed Commission-Approved Acquirer, subject to the Closing occurring and the limitations on the number and locations of the Business Service Providers contained in the Remedial Agreement as approved by the Commission. In order to induce the Business Service Providers to accept employment or agency with the Commission-Approved Acquirer, Respondents shall pay a bonus to any Business Service Provider who enters into employment or agency with the Commission-Approved Acquirer in an amount contained in the Remedial Agreement as approved by the Commission, but

- J. The purpose of the divestiture of the Cobalt Assets To Be Divested to a Commission-Approved Acquirer is to create an independent, viable and effective competitor in the market for the Development, license, manufacture, marketing, distribution, and sale of Bone Cement in the United States and to remedy the lessening of competition from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Acquisition Date, Zimmer shall divest the Discovery Assets To Be Divested, absolutely and in good faith, to DJO pursuant to, and in accordance with, the DJO Agreement(s) (which agreement(s) 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 the Commission-Approved Acquirer or to reduce any obligations of Zimmer under such agreement(s)), and each such agreement, if it becomes a Remedial Agreement, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Discovery Assets To Be Divested to DJO prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that DJO is not an acceptable purchaser of the Discovery Assets To Be Divested, then Respondents shall immediately rescind the transaction with DJO, in whole or in part, as directed by the Commission, and shall divest the Discovery Assets To Be Divested 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;

C. Respondents shall:

1. submit to the Commission-Approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Discovery Assets To Be Divested;
2. deliver all Confidential Business Information related to the Discovery Assets To Be Divested to the Commission-Approved 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;
3. pending complete delivery of all such Confidential Business Information to the Commission-Approved Acquirer, provide the Commission-Approved Acquirer and the Interim 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 Discovery Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

D. Respondents shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with the requirements of this Order, any Remedial Agreement, or any Law) related to the Discovery Business for the manufacture, Development, marketing or sale of Total Elbow Implants in or into the United States, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any Person except in connection with the divestiture of the Discovery Assets To Be Divested.

4. This Paragraph III.D. shall not apply to the use of Confidential Business Information by Respondents to the extent consented to by the Commission-Approved Acquirer;

provided, however, that Respondents shall require any Biomet employees or agents who as of the Closing Date have access to Confidential Business Information related to the Discovery Business to enter into, no later than thirty (30) days after the Closing Date, confidentiality agreements with Respondents and the Commission-Approved Acquirer not to disclose such Confidential Business Information except as set forth in this Paragraph III.D.

E. Respondents shall enter into an agreement to supply Discovery Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture Discovery Products in commercial quantities at economical costs at its own facility.

F. Respondents shall:

1. Not later than ten (10) business days after signing a Remedial Agreement related to the Discovery Assets To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the Discovery Business as agreed with the proposed Commission-Approved Acquirer and approved by the Commission, and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;

2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the Discovery Assets To Be Divested for the proposed Commission-Approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any one or more of the Business Service Providers related to the Discovery Business; and (b) to

4. Not, for a period of one (1) year following the date any Business Service Provider accepts employment or agency with the Commission-Approved Acquirer, without the Commission-Approved Acquirer's prior written consent, directly or indirectly, solicit or otherwise attempt to induce any of the Business Service Provider to terminate their employment or agency with the Commission-Approved Acquirer; *provided, however*, that Respondents may:
 - a. Advertise for employees in newspapers, trade publications or other media not targeted specifically at Business Service Providers, or
 - b. Hire Business Service Providers who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph.

Provided, however, that this Paragraph shall not prohibit Respondents from making offers of employment or agency to or employing any Business Service Provider after the Closing Date where the Commission-Approved Acquirer has notified Respondents in writing that the Commission-Approved Acquirer does not intend to make an offer of employment to that Business Service Provider.

- G. Respondents shall include in any Remedial Agreement at the option of the Commission-Approved Acquirer a Transition Services Agreement, subject to the approval of the Commission, *provided however*, the term of any Transition Services Agreement shall be at the option of the Commission-Approved Acquirer, but not longer than the time sufficient for the Commission-Approved Acquirer to successfully manufacture Discovery Products in commercial quantities at economical costs at its own facility.
- H. No later than the Closing Date, Respondents shall waive any rights under any Exclusive Supplier Contracts that would prevent the Commission-Approved Acquirer from entering into a contract with the Supplier for the supply of inpuuld preDiy

2. deliver all Confidential Business Information related to the ZUK Assets To Be Divested to the Commission-Approved 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;
3. pending complete delivery of all such Confidential Business Information to the Commission-Approved Acquirer, provide the Commission-Approved Acquirer and the Interim 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 ZUK Assets To Be Divested that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order s the 56 0 Td (i)-[4(

confidentiality agreements with Respondents and the Commission-Approved Acquirer not to disclose such Confidential Business Information except as set forth in this Paragraph IV.D.

- E. Respondents shall enter into an agreement to supply ZUK Products to the Commission-Approved Acquirer at no more than Respondents' Actual Cost for a period of time, subject to the approval of the Commission, sufficient for the Commission-Approved Acquirer to successfully manufacture ZUK Products in commercial quantities at economical costs at its own facility.
- F. Respondents shall:
 - 1. Not later than ten (10) business days after signing a Remedial Agreement related to the ZUK Assets To Be Divested provide to the proposed Commission-Approved Acquirer a list of Business Service Providers related to the ZUK Business as agreed with the proposed Commission-Approved Acquirer and approved by the Commission, and for each Business Service Provider provide the name, title and work location, and such other information as the proposed Commission-Approved Acquirer may reasonably request;
 - 2. Provide an opportunity for six (6) months from the signing of any Remedial Agreement related to the ZUK Assets To Be Divested for the proposed Commission-Approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any one or more of the Business Service Providers related to the ZUK Business; and (b) to make offers of employment to any one or more of the Business Service Providers;
 - 3. Not interfere, directly or indirectly, with the hiring or employing by the proposed Commission-Approved Acquirer of Business Service Providers related to the ZUK Business, and shall remove any impediments or incentives within the control of Respondents that may deter these employees from accepting employment with the proposed Commission-Approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the proposed Commission-Approved Acquirer, subject to the Closing occurring and the limitations on the number and locations of the Business Service Providers contained in the Remedial Agreement as approved by the Commission. In addition, Respondents shall not make any counteroffer to a Business Service Provider who receives a written offer of employment from the proposed Commission-Approved Acquirer; and

- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.
 2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Interim Monitor shall serve at least until the latter of (i) the end of the last supply agreement entered into pursuant to Paragraphs II.E., III.E., and IV.E. of this Order, and (ii) the end of the last Transition Services Agreement entered into pursuant to Paragraph II.G., III.G., and IV.G. of this Order.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order, including, but not limited to, its obligation
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VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to divest the Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest the Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be. 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, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be. 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 Respondents to comply with this Order.

B. The Commission shall find that Respondents have violated the Commission's antitrust laws if the Commission finds that Respondents have engaged in such a price-fixing arrangement as to affect interstate commerce.

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 believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.
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 Cobalt Assets To Be Divested, the Discovery Assets To Be Divested, or the ZUK Assets To Be Divested, as the case may be, and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents 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 Respondents' 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*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement

3. A description of all Confidential Business Information delivered to the Commission-Approved Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery;
4. A description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and
5. A description of all technical assistance provided to the Commission-Approved Acquired during the reporting period.

IX.

Non-Public Appendix A

DJO Agreement

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

Non-Public Appendix B

S&N Agreement

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