

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman  
Noah Joshua Phillips  
Rohit Chopra  
Rebecca KellySlaughter  
Christine S. Wilson

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In the Matter of )  
)  
)  
E. & J. Gallo Winery, )  
a corporation, )  
)  
Dry Creek Corporation, ) ORDER TO MAINTAIN ASSETS  
a corporation, and ) Docket No. C-  
)  
Constellation Brands, Inc., )  
a corporation. )

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ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent E. & J. Gallo Winery, a wholly-owned subsidiary of Respondent Dry Creek Corporation of certain assets of Respondent Constellation Brands, Inc. (“Constellation”), collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders (“Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

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The Commission, having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, hereby issues its Complaint, makes the following jurisdictional findings, and issues its Order to Maintain Assets

1. Respondent E. & J. Gallo Winery is a corporation organized, existing, and doing business under, and by virtue of the laws of the state of California with its executive offices and principal place of business located at 600 Yosemite Boulevard, Modesto, California 95354.
2. Respondent Dry Creek Corporation is a corporation organized, existing, and doing business under, and by virtue of the laws of, the State of Delaware with its executive offices and principal place of business located at 600 Yosemite

executive offices and principal place of business located at 1910 Fairview Avenue East, Suite 400, Seattle, Washington, 98102.

- D. "Sazerac" means Sazerac Company Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of, the State of Louisiana, with its executive offices and principal place of business located at 101 Magazine Street, Fifth Floor, New Orleans, Louisiana 70130, and Sazerac Investments, LLC, a corporation organized, existing and doing business under, and by virtue of the laws of, the State of Delaware, with its offices and principle place of business located at 101 Magazine Street, Fifth Floor, New Orleans, Louisiana 70130.
- E. "Vie-Del" means Vie-Del Company, a corporation organized, existing, and doing business under, and by virtue of the laws of, the State of Nevada, with its executive offices and principal place of business located at 11903 S. Chestnut Ave, Fresno, California 93725.
- F. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.
- G. "Orders" means this Order to Maintain Assets and the Decision and Order.
- H. "Monitor" means any person appointed by the Commission to serve as a Monitor pursuant to the Decision and Order and this Order to Maintain Assets.

## II. Asset Maintenance

IT IS FURTHER ORDERED that until Respondents fully transfer a Divestiture Business and related Divestiture Assets to an Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Business and related Divestiture Assets are operated and maintained in the ordinary course of business consistent with past practices, and shall:

- A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Business, to minimize the risk of loss of competitive potential of the Divestiture Business, to operate the Divestiture Business in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of the Divestiture Assets, ~~except~~ ordinary wear and tear.
- B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets, or terminate of the operations of the Divestiture Business, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.
- C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with the Divestiture Business
- D. Provide the Divestiture Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital



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that is in all material respects equivalent to the manner in which Respondents operated them prior to the Acquisition:

1. As set forth 52 718









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D. Respondent Gallo shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, acquire or lease the Mission Bell Facility, or any Mission Bell Assets used, or used within 6 months of the Acquisition Date, at the Mission Bell Facility,

Provided, however, that Paragraph VI.D shall not apply to the assets identified in the Non-Public Appendix V attached to the Decision and Order

E. No later than 2 days after the Divestiture Date for the Concentrate Business, Respondent Gallo shall create and maintain a website with the URL MegaNatural.com except as otherwise agreed to in writing by Respondent Gallo and CBI. The website shall contain only one webpage that contains the following:

1. No logos, trade dress or other imagery used by Respondent Gallo or Delve-
2. The title MegaNatural; and
3. Two buttons of identical size, format and prominence and related statements of identical font, font size and placement that comply with the following
  - a. A button captioned "Color Concentrates" that links to [www.dela.com](http://www.dela.com) and is located directly above the statement, "click here if you are interested in MegaNatural color concentrates products, including Mega Redor Mega Purple," and
  - b. A button captioned "Polyphenolics" that links to [www.polyphenolics.com](http://www.polyphenolics.com) and is located directly above the statement, "click here if you are interested in MegaNatural Polyphenolics products."

F. Gallo shall not use or retain information regarding any third party who selects the Color Concentrates button on the MegaNatural.com website.

G. Starting on the Divestiture Date for the Concentrate Business until the earlier of 5 years after issuance of the Decision and Order or 2 years after Respondent CBI ceases to supply products under Paragraph VI.D above, Respondent Gallo shall:

1. Not directly link any webpage on the website polyphenolics.com, or any other website Respondent Gallo creates or maintains for the primary purpose of selling polyphenolics, to a website or webpage used or maintained by Gallo that markets products that compete with Concentrate Products;
  2. Not use the MEGANATURALBP.com or MEGANATURABP.com domain
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regarding the term MegaNatural in connection to advertising words, sponsored links, hyperlinks, search priorities, or any other domain name.

#### VII. Monitor

IT IS FURTHER ORDERED that:

- A. The Commission appoints William Berlin as the Monitor to observe and report on Respondents' compliance with the terms of the Orders. The Monitor shall serve pursuant to the agreement between the Monitor and Respondents contained in the Monitor Agreement Appendix to the Orders, provided, however, such agreement shall not limit, or be construed to limit, the terms of the Monitor Paragraph of the Orders.
- B. No later than one day after th

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relevant, each Acquirer's or its Manufacturing Designee's progress toward obtaining the Product Approvals necessary to manufacture each Divestiture Product acquired by that Acquirer, independently of Respondents; and

9. Shall serve until 30 days after all Divestiture Agreements to provide Transition Manufacturing or transition services have expired or been terminated or until such other time as may be determined by the Commission or its staff.
- D. Respondents shall (i) provide the Monitor full and complete access to all information and facilities, and, as necessary, make such arrangements with third parties, to allow the monitor to monitor Respondents' compliance with its obligations under the Orders; and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his/her duties pursuant to the Orders.
  - E. Respondents shall indemnify and hold the Monitor harmless against losses, claims, damages, liabilities, or expenses (including attorneys' fees and out of pocket costs) that arise out of, or in connection with, any claim concerning the Monitor's performance of the Monitor's duties under the Orders, whether or not such claim results in liability, except, to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph, the term "Monitor" shall include all persons retained by the Monitor in the performance of his or her duties under the Orders.
  - F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter in, n(nde)-(s)-1 (i)-2t4- und2 (o e)4 c

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Agreement Appendix to the Orders or (ii) is approved by the Commission and confers on the substitute Monitor the rights, powers, and authority of a Monitor under the Monitor Paragraph of the Orders.

- I. 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 Orders.

#### VIII. Divestiture Trustee

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II of the Decision and Order with respect to some or all of the Divestiture Assets, the Commission may appoint a Divestiture Trustee to divest the relevant Divestiture Assets and perform Respondents' other obligations in a manner that satisfies the requirements of the Decision and Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Monitor.
- B. 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 relevant assets in accordance with the terms of the Decision and 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

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest relevant Divestiture Assets and takes such other action as may be ~~needed~~ required to perform Respondents' other obligations in a manner that satisfies the requirements of the Decision and Order;
2. The Divestiture Trustee shall have 12 months from the date the Commission approves the ~~trustee~~ 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 year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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; The Divestiture Trustee shall have 12 months from the date the Commission approves the ~~trustee~~ agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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;
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 the Decision and Order 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers as required by the Decision and Order, provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for Divestiture Assets related to a particular Divestiture Business, and if the Commission determines to approve more than one such acquiring entity for the divestiture, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission, provided further, however, that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval;

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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 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 the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part

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