UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeny

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Smucker is not acquiring the Memphis, Tennessee plant where Conagra produces Wesson products today or hiring any Conagra employees.

2. Respondents’ own documents show that the effect of the Acquisition “may be

competitor [Wesson] out of the marketplace and allows us to more effectively manage pricing/trade." This statement clearly acknowledges that Smucker would have the power and incentive to increase prices on Crisco and Wesson products post-acquisition. Put simply, by "taking out" Wesson as a competitor, Smucker would be able to eliminate the price discounts that each Respondent has been forced to offer as a result of their vigorous head-to-head competition. Year after year, Respondents have internally complained about each other's use of price discounts as "irresponsible" and "irrational". In Smucker's view, this price competition is a "race to the bottom" that "unnecessarily tak[es] dollars out of the category." Retailers and consumers have and continue to benefit from the discounts that head-to-head competition between Crisco and Wesson has generated.

3. Smucker's documents go further, including a model showing that the company recognizes that raising prices on both Wesson and Crisco products would be profitable even though price increases would decrease the brands' overall sales volume. In fact, Smucker admits that it will increase prices: "Once we close the deal, our plan would be to execute a price increase on Wesson consistent with our latest Crisco pricing action." These quintessential anticompetitive effects are rarely so clearly touted by merging parties as intended consequences of a merger or acquisition.

4. Conagra also recognizes that the Acquisition will enable Smucker to increase prices, ultimately harming U.S. consumers. Ordinary course documents make clear that the presence of an independent Wesson constrains Crisco's prices today. In trying to persuade a retailer to resume carrying Wesson products, Conagra's broker stated:

> [P]art of Wesson's reason-to-be is that we keep Crisco 'honest'. Without another National Brand, [Crisco] play[s] off the fact that they will be highest priced Cooking Oil and will appeal to the Consumer looking for a National Brand and willing to pay a little more for it. The drawback is that they don't have to get 'ultra' aggressive with thei[(A)3.m]2 (r)35(i)-120222 Tw 0.78oasss (r)3 (3 (t)-2 (ha)4 (s)-11 ((ha)4-0.0

compete vigorously. Without Wesson following Crisco's lead, and vice versa, each brand has had to "invest[] back" by offering additional discounts to retailers in an attempt to regain lost sales and customers resulting from its price increase attempt.

7.

cooking sprays. Crisco produces all its cooking oil and shortening products at its plant in Cincinnati, Ohio. Smucker purchases crude oil from the commodities market, refines it, and then packages it in the bottles found on retailers' store shelves. In calendar year 2016, retail sales of

16. Respondents do not sell their products directly to end consumers. Instead, both Respondents sell their branded canola and vegetable oils to retailers, including grocery stores (such as Giant), mass merchants (such as Target), club stores (such as BJ's Wholesale Club), and convenience stores. Retailers purchase canola and vegetable oils at wholesale from suppliers such as Smucker and Conagra and sell them at retail to their in-store customers, the end consumers.

17. Each Respondent establishes the prices paid by retailers for canola and vegetable oils in two stages. First, each Respondent publishes a list price that generally applies to all retailers. Second, each Respondent negotiates trade funding (sometimes called "promotional funds") individually with each retailer. Trade funding acts as a discount off the list price. Retailers frequently play Respondents against each other to induce them to offer more trade funds during these negotiations. Retailers then apply a markup and set the shelf price paid by end consumers. Retailers, often in consultation with Respondents, commonly use trade funding in ways designed to encourage sales of Respondents' products, including reduced everyday shelf prices, temporary reductions in shelf prices, promotional prices (e.g., buy-one-get-one-free), features in promotional and advertising materials, prominent shelf space, and placement on in-store displays (e.g., "endcap" displays at the end of a grocery aisle). Some retailers take a consistent, "every-day-low-price" ("EDLP") approach to pricing, while other retailers (called "hi-lo" retailers) vary prices through in-store promotions, coupons, and other vehicles.

18. Depending on the retailer (e.g., grocery stores, mass merchants, club stores), different retailers procure different sizes of canola and vegetable oils to offer to their end consumers. Grocery stores and mass merchants generally offer canola and vegetable oils in a wide variety of sizes, including 16-, 32-, 48-, 96-, and 128-ounce (i.e., one-gallon) bottles. The highest selling, and therefore most important, sizes of canola and vegetable oils for grocery stores are 48- and 128-ounce bottles. Club stores, including Costco, Sam's Club, and BJ's Wholesale, tend to carry larger package sizes such as 160-ounce (i.e., five-quart) bottles.

19. In addition to buying canola and vegetable oils from the national brands, retailers also frequently sell canola and vegetable oils under their own label. Most retailers that have "private label" canola and vegetable oils typically price it at a lower retail price than the national brands, usually 10-20% below the brand price. Retailers generally contract with a third-party oil producer, such as Cargill or Stratas, to manufacture their private label oils. The process by which retailers supply themselves with private label canola and vegetable oils is separate, and different, from the way retailers buy and sell branded canola and vegetable oils.

20. The private label supply process generally differs from the branded supply process. It does not involve negotiations over trade funds, but instead begins with a request-for-proposal in which the retailer sets forth its requirements in terms of oil type, degree of refinement, package size, and terms of delivery and payment. Private label suppliers submit bids and the retailer selects the winner, generally choosing the lowest-cost option. The price that the retailer pays for private label oil is closely tied to the cost of the input product (for example,

IV.

ELEVANT MAKET

25. The relevant market in which to evaluate the effects of the Acquisition is no broader than the sale of canola and vegetable oils ("CV oils") to retailers in the United States.

A.

e l evant Product Market

26. The sale of CV oils to retailers is a relevant product market.

27. Canola and vegetable oils have similar physical properties and are suitable for similar uses. They have relatively high smoke points (i.e., the temperature at which an oil burns). Both oils appear light in color and are odorless and flavorless. Because of these properties, canola and vegetable oils are suitable for—and consumers use them for—a wide range of cooking applications, including baking, frying, and sautéing, as well as using them in marinades and vinaigrettes.

28. Canola and vegetable oils are typically the least expensive cooking oil types, sitting at the bottom of the price spectrum among all cooking oils. Canola and vegetable oils are similarly priced and are often included in the same promotions and advertisements. Each Respondent's list price for canola oil is similar to its list price for vegetable oil. Retailers also generally price canola oil and vegetable oil similarly. Respondents and retailers promote canola and vegetable oils at the same time, often discounting them at the same time and including both in the same promotions and advertisements.

29. Even if canola and vegetable oils are not sufficiently interchangeable to compose a single relevant market, the sale of CV oils to retailers can be analyzed as a cluster market. The competitive conditions for the sale of canola oil to retailers and the sale of vegetable oil to retailers are similar. The set of competitors and their market shares for the sale of each oil to retailers are similar, as are the customers to which they are sold.

30. Retailers could not switch their purchases of CV oils to other oils, or non-oil cooking agents, in sufficient numbers to render unprofitable a small but significant non-transitory increase in price ("SSNIP") on CV oils.

31. The sale of branded CV oils to retailers is also a relevant product market. Retailers would not switch their purchases of branded CV oils to other products in sufficient numbers to render unprofitable a SSNIP on branded CV oils. Differences in the prices that retailers pay to procure branded and private label CV oils reflect their perception of meaningful product differentiation between branded and private label CV oils. Differences in shelf prices for branded and private label CV oils reflect end consumers' perception of meaningful product differentiation between branded and private label CV oils. End consumers who buy branded CV oils generally pay a signif (a)461 (ic30-1.1o1)-2 (a)il ls would (a) [((i)-2 (c (t)-2 (a)4 (i)-2 (l-2 (e)4 (r)3 (s)-1 (

Other Products Are Not Substitutes for CV Oils

32. Retailers and end consumers do not view other base oils—in particular, corn oil and peanut oil—as substitutes for CV oils. Consumers who buy CV oils perceive other base oils to be of lower quality than CV oils, as imparting distinctive flavors to food, as appropriate for only limited applications, such as deep frying, or possessing a combination of all three of these characteristics. These oils also typically have higher prices than CV oils because they have higher ingredient and refining costs. For example, corn oil is typically at least 10% more expensive than canola and vegetable oils, and peanut oil is typically twice as expensive as canola and vegetable oils. For these reasons, retailers could not switch their purchases of CV oils to other base oils in response to a SSNIP on CV oils.

33. Retailers and end consumers do not view olive oil as a substitute for CV oils. Extra virgin olive oil ("EVOO"), the most common type, has a dark green color and a strong, distinctive flavor. It also has a relatively low smoke point. These features render EVOO unsuitable for many of the most common oil applications, including baking and deep frying. There are other types of olive oil that are highly refined and share some physical properties with CV oils, but retailers and end consumers do not consider them as substitutes for CV oils. All types of olive oil are much more expensive than CV oils (on average, three to four times the price of CV oils). For these reasons, retailers could not switch their purchases of CV oils to olive oil in response to a SSNIP on CV oils.

34. Specialty oils such as coconut oil, avocado oil, grapeseed oil, sunflower oil, and other flavored oils, are not substitutes for CV oils in the eyes of retailers or end consumers. These oils often are heavily flavored and used for specific cooking applications and recipes. They also tend to be priced at a substantial premium—even higher than olive oil. For these reasons, retailers could not switch their purchases of CV oils to specialty oils in response to a SSNIP on CV oils.

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39. Many large retailers have locations across multiple regions of the United States.

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50. The Acquisition would result in a post-acquisition HHI exceeding 4,000, with an increase of more than 700, in a market for the sale of CV oils to retailers in the United States.

51. The Acquisition would result in a post-acquisition HHI exceeding 6,000, with an increase of approximately 3,000, in a market for the sale of branded CV oils to retailers in the United States.

52. The Acquisition would result in market shares and concentration levels beyond what is necessary to establish a presumption of competitive harm.

53. Evidence showing that the Acquisition would substantially lessen competition and result in significant anticompetitive effects bolsters the presumption of competitive harm.

54. The Acquisition is presumptively illegal under relevant case law.

VI.

ANTICOMPETITIVE EFFECTS

55. The Acquisition would eliminate substantial direct competition between Crisco and Wesson, resulting in increased prices for retailers and end consumers. In fact, that is Smucker's intent and rationale for the Acquisition.

The Acquisition Would Eliminate Vigorous Competition and Result in Higher Prices for Retailers and End Consumers

56. The Acquisition would end the pro-consumer and pro-competitive environment that exists today and has allowed retailers to pit Crisco and Wesson against each other to get lower prices. With all pricing, strategy, and competition brought under one roof and one management, Crisco would be able to "take out" Wesson and its pricing strategies that have undermined Crisco's attempts to increase prices. Thus, after the Acquisition closes, Smucker would have the power and incentive to increase prices on Crisco and Wesson CV oils. In fact, Smucker's analysis of the Acquisition and its go-forward plans for Wesson and Crisco show that Smucker recognizes that it will have the power to profitably increase prices.

57. Respondents have internally complained about the other brand's competitive behavior that has led to lower prices and the need to provide more trade funding to stay competitive with each other:

a. In [redacted], Smucker's Region Sales Manager for [redacted] described a Wesson advertisement for [redacted] gallons of canola, vegetable, and corn oil as "downright irresponsible trade spending by our friends at Con Agra." [redacted], Smucker's Director of [redacted], responded, "that's clearly irresponsible trade spending," and stated, "if you feel some of the recent Wesson tactics are going to materially impact your fiscal year projections, we'll want to talk about it sooner than later. Again, we're hopeful that our tactical spending and innovation will help offset any of Wesson's targeted tactics."

b. In , Smucker described Wesson's $ and $ retail price points for bottles as "plain irresponsible" because Smucker would prefer avoiding having to offer additional trade funds to compete with Wesson.

c. In August 2016, Conagra's recaps from a meeting about the Wesson brand included: "Crisco is running deeper price points at major retailers (i.e.); Crisco's pricing strategy is irrational; Crisco did not follow [Wesson's list] price increase; [and] Tom is asking to grow share having lost volume [by] pulling out trade [funding]."

58. Crisco believes that price competition with Wesson amounts to a "race to the bottom" and results in low retail prices for end consumers that "unnecessarily tak[e] dollars out of the category."

59. Over the last several years, Conagra and Smucker have each increased list prices on their CV oils. In each instance, whenever one increased its list prices on CV oils, the other opted against following the increase, forcing the price-increasing brand, in effect, to walk back much of its list price increase by offering more trade funding to retailers.

60. In spring 2016, Conagra announced a list price increase on Wesson, but after the new list prices became effective, "Wesson lost more volume than expected" because "Crisco decreased price as Wesson increased, creating significant [price] gaps on [the] shelf." As a result of the Wesson list price increase, "[s]ome retailers responded by awarding Wesson promotion events to Crisco." To reverse the sales decline, Conagra offered more trade funding to key retailers, including, among others, . For example, Conagra approved additional trade funding, so that could reduce retail prices on one-gallon bottles by $0.70, "Wesson is 10.69 versus Crisco's 9.99; I've attached a [planning scenario] to see what it would take to get to 9.99 for parity." Following its 2016 list price increase and the resulting loss in sales to Crisco, Wesson internal documents state that Wesson's profit-maximizing price is to .

61. Similarly, Smucker was forced to increase the amount of trade funding it offered to retailers when Conagra did not follow the Cr

63. Smucker decided to acquire Wesson—for which it paid $285 million, beating the second-place bidder by nearly —

a. In August 2016, Smucker's distributor reported that "Wesson has given

deals through the end of the year on 48 oz and they are below $ unit every day. . . . [I]f they are $, we will not get any ads at with our current program even with the additional ad pull that we have been giving them (which puts us at $ unit)." As this news was reported up the chain at Smucker, Smucker employees commented, "[w]e continue to see the hard court press from Wesson in " and "Wesson is putting some serious pressure on us."

b. In September 2016, Conagra reported that there was a 20 million "CSU [Conagra Sales Unit]" decline at , noting "Crisco investing to lower everyday price to $2.69. Wesson 48oz. up +$0.20 vs. [Year Ago] driving wider gap to Crisco."

c. On December 13, 2016, Smucker saw that Wesson had invested in everyday pricing at "to reduce their everyday pricing on and oz. items to be in-line with our current Crisco pricing (i.e. $ on , $ on oz.)." Upon seeing Wesson's new pricing, Smucker immediately delayed by several weeks the list price increase it had planned to announce the next day, so that it could "evaluate the scope of Wesson's investment (is it beyond ?), and ultimately, understand the volume implications if Wesson doesn't follow our [list price] increase."

d. In May 2017, a Conagra spreadsheet prepared for the employees who would be assuming responsibility for the oil and sprays business instructed, for all Wesson customers, "Let teams know to keep you in the loop on what they hear about any competitors but Crisco most of all – June/July/Aug are holiday planning months and we should know quickly if we are competitive or getting beat."

70. Conagra's current pricing strategy for Wesson demonstrates the closeness of Respondents' price competition.

71. Respondents also closely track each other's list prices. Unlike retail prices, list prices are not publicly available and change infrequently. Nevertheless, Respondents' ordinary course documents show that they monitor each other's list prices because doing so provides important competitive information about the other's cost structure and (by comparing the list price to the shelf price) the amount of trade funding offered to retailers. Respondents adjust their own pricing strategy in response. For example:

a. In July 2016, Smucker learned that Wesson had recently increased its list prices, to same level as before Price Decline ( ) which Crisco never followed."

b. Conagra obtained a copy of Smucker's January 2017 list price increase on Crisco within days of the announcement to customers. When Conagra's broker for Wesson recirculated this information a month later, the broker wrote, "Attached is a Crisco Oil price list with new pricing; definitely compare to your Wesson Lists and see where we fall!" and "[l]everage where we can."

Head-to-Head Competition Between Crisco and Wesson Leads to Increased Trade Funding, and, Thereb y

72. Vigorous head-to-head competition between Respondents has led to increased trade funding offered to retailers. The following examples show that Respondents have provided additional trade funding to retailers as a competitive response to one another:

a. Conagra approved an additional $ in trade funding for in July 2016 "to help [Wesson] through the Holiday season considering our price to Crisco will be ~$1.50 higher."

b. In October 2016, Conagra's team handling the account submitted a request for $ in trade funding, noting that "Crisco rarely sits at retail at full list/white tag [price] so [Conagra's] team prepared the incremental plan based on the best situation after Holiday and current Crisco promotions." , Conagra's Manager of Customer Strategy Planning, approved the requested trade funding and stated, "[w]e are making these select changes as part of a strategic decision to become more competitive with competing brands."

c. In a February 2017 email discussing buy-one-get-one ("BOGO") promotions at for -ounce canola and vegetable oils, Smucker recognized that "[t]hese BOGO's have traditionally been in the plan for several years at . There is [a] significant impact on Share/[equivalent units]/Trade if we walked away from these events. In addition would immediately ask Wesson to support the

Retailers Use Trade Funds To Lower Ever y

74. Head-to-head competition between Respondents has led to lower everyday shelf prices on CV oils. The following examples from Respondents' ordinary course documents are just some of the many instances in which competition with one another has led to lower everyday shelf prices:

a. In fall 2016, Conagra "[a]sked teams for plans that meet two objectives:

Conagra approved the plans and increased trade funding to achieve these objectives at five key retailers. The following table is reproduced from an internal ordinary course Conagra document and shows the amount by which Wesson's retail price would decrease as a result of this initiative:

a. In June 2016, a Conagra employee who manages the account reported that “called me and told me that [Wesson’s] program is now at risk of being pull [sic] because Crisco is offering $1.97.” To save the program, which was a one-week promotional price on 48-ounce canola and vegetable oils, Conagra reduced its unit price to from $2.13 to $2.07. Conagra lowered unit price because it recognized that “we need to put our best offer on the table now with Crisco’s offer being $1.97.”

b. In August 2016, Conagra observed that Crisco’s shelf price for 48-ounce was $2.69 at , while the price for Wesson was $3.99. To be more competitive, Wesson “approved a $1 mega and 2/$5” promotion.

c. In October 2016, Conagra approved more than $240,000 in incremental trade funding for various promotions at

to compete with Crisco. For example, Conagra approved over $ in incremental trade funding for to “Secure Holiday-10 (g1)]TE (g1)] (au)- 0 Tc (e)-10(a)-20 (f3t)]T 0 T.1c (e)-1ea (y3t)]T (e)]T

NEED any volume for F or should I simply reject the request and stay with my plan to run the event? However, rejecting this request would mean that Wesson would get the BOGO. Also, my BOGO could be at risk."

b. In May 2017, Wesson pursued an "[o]pportunity to kick out crisco [sic] in if we can deliver a display ready pallet to them."

After seeing its private label strategy fall short of expectations, solicited bids from Smucker and Conagra because it wanted to offer Crisco or Wesson during the 2017 holiday season. Smucker and Conagra submitted bids, and Conagra won after offering a lower price on Wesson than Smucker offered on Crisco.

VII.

LACK OF COUNTERVAILING FACTORS

84. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, and sufficient to offset the anticompetitive effects of the Acquisition. Entry by another private label supplier would be insufficient to replace the competition lost between the bra

COUNT I – ILLEGAL ACQUISITION

91. The allegations of Paragraphs 1 through 88 above are incorporated by reference as though fully set forth.

92. The Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the seventh day of August, 2018, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21