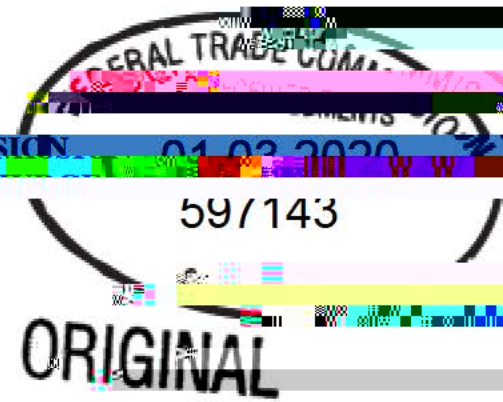


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE



In the Matter of

Post Holdings, Inc.
a corporation,

and

TreeHouse, Inc.
a corporation

Docket No. 9388

PUBLIC VERSION

**ANSWER AND DEFENSE OF
RESPONSE OF POST HOLDINGS, INC.**

Pursuant to Rule 101 of the Federal Trade Commission's ("FTC" or "Commission")
Rules of Practice for Adjudicative Proceedings, Respondent Post Holdings, Inc. ("Post") hereby
Complaint ("Complaint") filed by the Commission:

INTRODUCTION AND STATEMENT

The Complaint is premised on the assertion that respondents should be held liable in a
narrow market limited to only the sale of the wholesale level of conventional private
to Eat (the "Private Label Market") and not the retail level of conventional private
labels and law, including precedent specifically involving RTE cereal, precedent involving other
private label products, and D.C. Circuit precedent rejecting wholly
retail level competition. It is limited only to the wholesale level and thus ignores the
constraint of RTE cereal retail competition.

organic RTE cereal, whether branded or private label. The Complaint’s market definition would require the Court to believe, for example, that Kroger’s private label corn flakes do not compete with Kellogg’s Corn Flakes or that the corn flakes that are offered at Whole Foods that happen to be natural and organic are in a different market than other types of corn flakes.

In fact, the relevant market is all RTE cereal. The courts and the FTC itself have held that RTE cereal overall is the relevant market, held that private label RTE cereal competes with branded RTE cereal, and rejected attempts to sub-divide that market.

€ In *New York v. Kraft General Foods, Inc.*, in litigation challenging the proposed merger of Kraft and Nabisco, the Southern District of New York rejected the claim that the relevant market was only adult RTE cereal and instead held that “[t]he relevant product market is the entire RTE cereal industry” and that “[p]rivate label RTE cereal manufacturers position their cereals to compete directly against branded RTE cereal products.” 926 F. Supp. 321, 347, 360 (S.D.N.Y. 1995).

€ In *In the Matter of General Mills, Inc.*, which concerned a transaction between

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99 F.T.C. 8, 130 (1982). The FTC Administrative Law Judge adjudicating the case found that “[p]rivate label products compete pricewise with branded products.” *Id.* at 131.

The precedent in other food products also rejects private label-only markets like the Complaint alleges here. See *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 840-41, n.11 (2d Cir. 1980) (rejecting alleged market for private label frozen waffles, finding that the “product market... includes both private label and brand name frozen waffles” with “[t]he two types of waffles are sold side by side in the same frozen food cases and distinguished only by label and price,” with “private label waffles [are made] in the same plant, from the same formula, and by the same process”); *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129, 134 (N.D. Cal. 1966) (rejecting alleged market for private label beer, finding “[a]ll brands and types of beer compete with each other in price, image, point of sale advertising, media advertising, shelf space, floor display, refrigerator position and in attention from wholesalers and retailers.”). Indeed, the FTC has never brought a case alleging a private-label only market.

The precedent also rejects the Complaint’s attempt to define a wholesale-only market that ignores retail-level competition. The FTC tried to define a wholesale-only market in the early 2000s when challenging a merger of two baby foods suppliers. But the D.C. Circuit “reject[ed] the FTC’s argument... that ‘wholesale’ competition... is an entire Wo assaceoe ; Ws sn

cereal. Today, Post is only the third-largest player with 22% market share, behind General Mills with 32% and Kellogg's with 31%. Other competitors include Quaker with 6%, Gilster with 2%, and a number of other players. TreeHouse is just 3% of this market. Thus, Post's acquisition of TreeHouse's RTE cereal business combines a 22% share with a 3% share, and Post remains the number three player behind General Mills and Kellogg's.

The facts demonstrate that the market is all RTE cereal and that branded and private label RTE cereals compete head-to-head. There is no question that branded and private label RTE cereals are functionally identical and reasonably substitutable. The whole goal with private label products is to offer a product that closely matches the branded product. Branded and private label products sit right next to one another on the grocery store shelf, with private label boxes designed to look as much like the branded boxes as possible, specifically to encourage substitution between them. The same customers are buying both branded and private label RTE cereal. The prices of branded and private label RTE cereal move in lockstep. For example, prices for Kellogg's Corn Flakes and private label corn flakes move up and down together. There is demand substitution between them. Over the last five years private label RTE cereal sales have declined by about 40%, while overall RTE cereal sales have declined by only about 10%, reflecting customers moving away from private label and toward branded. If a private label supplier tried to raise prices, private label would become relatively more expensive compared to branded products. That would further shift demand away from private label and toward branded because (1) consumers would buy less private label and more branded product and (2) retailers would shift shelf space away from private label products and toward branded products (e.g., replacing private label Lucky Charms on the shelf with another branded product). There is supply substitution between them: they use the same ingredients, the same production

process, and the same type of equipment. In short, the “practical indicia” show that the relevant market is RTE cereal overall. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

The Complaint fixates on the existence of a price gap between branded and private label RTE cereal and essentially bases its whole case on the existence of this gap. But of course there is a price gap: private label RTE cereals must offer a discount off the branded equivalent to attract consumers who otherwise would buy the brand. The price gap is the embodiment of the competition between brands and private label, not support for a separate market. The existence of a price gap alone is insufficient to support a relevant market, especially where, as here, the products are functionally identical, where there is head-to-head competition with products sitting side-by-side on the shelf, and where prices move in lockstep. The prior cases rejecting private-label only markets stand for the proposition that price gaps alone cannot define a relevant market in the face of all this other evidence. *See also Brown Shoe*, 370 U.S. at 326 (rejecting argument that the “medium-priced shoes which [one defendant] manufactures occupy a product market different from the predominantly low-priced shoes which [the other defendant] sells” and stating “further division of product lines based on ‘price/quality’ differences would be ‘unrealistic.’”).

In addition to the competition from branded RTE cereals, many other factors demonstrate that Post’s acquisition of TreeHouse is not likely to significantly reduce competition.

The transaction will generate significant efficiencies that will help Post to compete more aggressively by combining the complementary production and distribution networks of Post and TreeHouse, reducing costs in manufacturing, shipping, distribution, and other areas. As one example, Post has a limited West Coast presence today, but with the acquisition would acquire

TreeHouse’s production facility i \$ Th s i but w

efficiencies in prior transactions and achieved the exact same type of cost savings anticipated here when it acquired MOM Brands cereal in 2015. The overall decline in the RTE cereal industry and the aggressive competition from branded RTE cereal creates an even greater need for efficient production and distribution so that private label RTE cereal can compete aggressively against branded RTE cereal.

There also are many other companies that make RTE cereal and do or could offer private label cereal. Gilster-Mary Lee is a significant competitor, as the Complaint admits, and Post has both won and lost business from Gilster. While the Complaint asserts that other competitors are smaller, in fact there are many other companies that make RTE cereal, including, Nature's Path, Organic Milling, California Cereal, Brüggem, Balchem, Kerry, Hearthside, and others. The Complaint attempts to exclude some of these competitors by claiming that natural and organic RTE cereal is in a separate market. But any company that makes natural and organic RTE cereal could easily make conventional cereal. The Complaint also claims that some of these competitors currently only co-manufacture for branded RTE cereal suppliers. But if they make branded cereal, they could easily make private label cereal. The bottom line is that the sheer number of companies that make RTE cereal belies any claim of competitive harm.

Branded suppliers also could readily expand into private label. Post expanded from branded cereal into private label cereal in 2012 in just a few months at the request of a major retailer. General Mil

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because that might cannibalize branded sales, that shows that brands and private label compete.

[REDACTED]

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To the extent the Complaint’s preamble requires a response, Post denies the allegations including that the acquisition violates the FTC Act, the Clayton Act, or any other statute.

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1. Post denies the allegations of Paragraph 1 except that it admit · | Đ LĐ P 0 @UÓ Gđ

4. Post denies the allegations of Paragraph 4 that there is a relevant market for the sale of private label RTE cereal, that the merger is presumptively anticompetitive, that in a properly defined relevant market there is high concentration, or that the merger would significantly increase concentration. To the extent the allegations relate to the Horizontal Merger Guidelines, Post refers to the Horizontal Merger Guidelines themselves for their true and complete content. To the extent that a response is required as to the allegations about the Horizontal Merger Guidelines, Post denies that Paragraph 4 provides a true and complete characterization of the Horizontal Merger Guidelines, that Paragraph 4 properly applies the Horizontal Merger Guidelines to this case, or that the Horizontal Merger Guidelines can establish that a merger is presumptively anticompetitive as a legal matter. Post otherwise denies the allegations of Paragraph 4.

5. Post denies the allegations of Paragraph 5.

6. Post denies the allegations of Paragraph 6.

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7. The allegations of Paragraph 7 are legal conclusions to which no response is required.

8. The allegations of Paragraph 8 are legal conclusions to which no response is required.

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9. Post admits the allegations of Paragraph 9, except that it denies that it produces approximately 28 formulations of private label RTE cereal.

10. Post admits that it understands that TreeHouse is headquartered in Oak Brook, Illinois and is a publicly traded corporation headquartered in Delaware. Post admits that

TreeHouse manufactures private label RTE cereal. Post is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10, and on that basis denies them.

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11. Post admits the allegations of Paragraph 11, except that (a) Post denies that it will incorporate TreeHouse’s RTE cereal business into Post’s “existing private label RTE cereal business” and states that it will incorporate TreeHouse’s RTE cereal business into Post’s overall RTE cereal business; and (b) Post denies that it is acquiring all of the plants that TreeHouse uses to produce RTE cereal and states that some of the assets that TreeHouse uses to produce RTE cereal are located in TreeHouse plants that TreeHouse uses to produce other products and Post is not acquiring those plants.

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12. Post denies the allegations of Paragraph 12.

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13. Post denies the allegations of Paragraph 13.

14. Post admits the allegations of Paragraph 14 except that it denies the characterization of the decline in demand as “gradual” and is without knowledge or information sufficient to form a belief as to the truth of whether RTE cereal is a “popular” food.

15. Post admits that it sells RTE cereal to retailers. Post admits that it competes in the sale of RTE cereal and states that it competes with General Mills, Kellogg’s, Quaker, Gilster-Mary Lee, Nature’s Path, Organic Milling, California Cereal, Brügggen, and other RTE cereal producers in addition to TreeHouse. Post denies that it sells RTE cereal products only to retailers, as Post also sells RTE cereal to the foodservice industry, to the military, and to other types of customers. Post denies that retailers always sell RTE cereal under retailers’ proprietary

trades names as over 90% of RTE cereal is branded cereal sold under brand names owned by the cereal manufacturer. Post otherwise denies the allegations of Paragraph 15.

16. Post admits that many retailers offer private label RTE cereal and other private label products. Post denies that private label RTE cereal is always lower cost than nationally branded RTE cereal as there are often promotional discounts for branded RTE cereal that result in similar pricing between branded RTE cereal and private label RTE cereal and some types of private label RTE cereals could be priced greater than or equal to some types of branded RTE cereal or some retailers might charge more for private label RTE cereals than other retailers charge for branded RTE cereal. Post admits that a retailer's private label brand is generally only available at that retailer's

19. Post is without knowledge or information sufficient to form a belief as to the truth of Paragraph 19's allegations, and on that basis denies them.

20. Post denies the allegations of Paragraph 20. Post further states that in addition to retailers switching from private label RTE cereals to branded RTE cereals, end consumers would switch from private label RTE cereals to branded RTE cereals if private label RTE cereal prices increased and that this switching by end consumers must be considered in analyzing whether a SSNIP is profitable.

21. Post denies the allegations of Paragraph 21, except that Post is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to retailer and end consumer views and behavior and on that basis denies them. Post states that many of the suppliers of conventional RTE cereals also supply natural and organic RTE cereals, including General Mills, Kellogg's, and Post. Post further states that in addition to retailers switching from conventional private label RTE cereals to natural and organic RTE cereals, end consumers would switch from conventional private label RTE cereals to natural and organic RTE cereals if conventional private label RTE cereal prices increased and that this switching by end consumers must be considered in analyzing whether a SSNIP is profitable.

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22. To the extent the allegations of Paragraph 22 are legal conclusions, no response is required. To the extent a response is required, Post denies the allegations and states that many companies supply RTE cereal into the United States from outside of the United States, including for example Post, Kellogg's, and Nature's Path from Canada, Brüggen from Europe, and Golden Foods from Mexico.

23. Post admits that competition often occurs at the national level, but denies that competition always occurs at the national level. Post admits that many large retailers have locations in multiple regions across the United States. Post d

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31. Post denies the allegations of Paragraph 31.

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32. Post denies the allegations of Paragraph 32, except that Post is without knowledge or information sufficient to form a belief as to the truth of Paragraph 32’s allegations regarding retailers’s views and on that basis denies them.

33. Post denies the allegations of Paragraph 33.

34. Post denies the allegations of Paragraph 34 that there is “private label

allegations of Paragraph 34, except that it denies that the process “typically” starts with an RFP as retailers can and often do negotiate terms outside of the RFP process.

35. Post denies the allegations of Paragraph 35, except to the extent specifically stated in Post’s answers to sub-paragraphs a through e. To the extent that Paragraph 35 characterizes the contents of Post documents, Post refers to the documents, for their true and complete content. Post is without knowledge or information sufficient to form a belief as to the truth of Paragraph 35’s allegations regarding the statements in TreeHouse documents. Post incorporates this general response into its responses to each of sub-paragraphs a through e.

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business, or why [REDACTED] opened its business up for a bid and on that basis denies them.

- b. Post denies the allegations of sub-paragraph 35b except that (a) Post admits that in 2018 [REDACTED] conducted an RFP process and that it was ultimately awarded [REDACTED] private label RTE cereal SKUs at [REDACTED]; and (b) Post is without knowledge or information sufficient to form a belief as to the truth of sub-paragraph 35b's allegations regarding the number of items TreeHouse produced for [REDACTED] at the time of the RFP, whether the items that Post won resulted from [REDACTED] moving items from TreeHouse to Post, or the size of the purported savings and on that basis denies them.
- c. Post denies the allegations of sub-paragraph 35c, except that (a) Post admits that it has responded to RFPs at [REDACTED]; and (b) Post is without knowledge or information sufficient to form a belief as to the truth of sub-paragraph 35c's allegations regarding TreeHouse's incumbent status, whether TreeHouse bid, and how Post's bid compared to other bids and on that basis denies them.
- d. Post denies the allegations of sub-paragraph 35d, except that (a) Post admits that in 2018 it was awarded some private label RTE cereal business at [REDACTED]; and (b) Post is without knowledge or information sufficient to form a belief as to the truth of sub-paragraph 35d's allegations regarding whether TreeHouse bid, Treehouse's specific bidding strategy, or how Post's bidding compared to other bids and on that basis denies them.

Post is without knowledge or information sufficient to form a belief as to the truth of Paragraph 39's allegations regarding what retailers have indicated or the statements of TreeHouse documents and on that basis denies them.

40. Post denies the allegations of Paragraph 40, except that Post is without knowledge or information to form a belief as to the truth of the allegations of the precise relative size of other suppliers of private label RTE cereal and on that basis denies them. To the extent these allegations are characterizing Post documents, Post refers to the documents for their true and complete content.

41. Post admits that competition from b c # b ng f tc
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FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to comply with Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the Administrative Complaint and the contemplated relief are not in the public interest.

THIRD DEFENSE

There is no presumption of competitive harm or illegality and to the extent there is any such presumption it is rebutted by many factors including the existence of branded RTE cereal competition, the existence of retail-level competition, the many other RTE cereal manufacturers, the ease of entry and expansion, the significant efficiencies, and [REDACTED]

[REDACTED].

FOURTH DEFENSE

The Complaint fails to adequately allege an appropriate relevant market.

FIFTH DEFENSE

The efficiencies and other procompetitive benefits of the transaction outweigh any purported anticompetitive effects.

SIXTH DEFENSE

[REDACTED]

SEVENTH DEFENSE

[REDACTED]

EIGHTH DEFENSE

Entry or expansion would be likely, timely, and sufficient.

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Post reserves the right to assert other defenses as discovery and the proceedings continue.

* * *

WHEREFORE, Post respectfully requests that the Commission (i) dismiss the Complaint in its entirety with prejudice, (ii) award Post its costs of suit, including attorneys' fees, and (iii) award such other and further relief as the Commission may deem proper.

Dated: January 3, 2020
Washington, D.C.

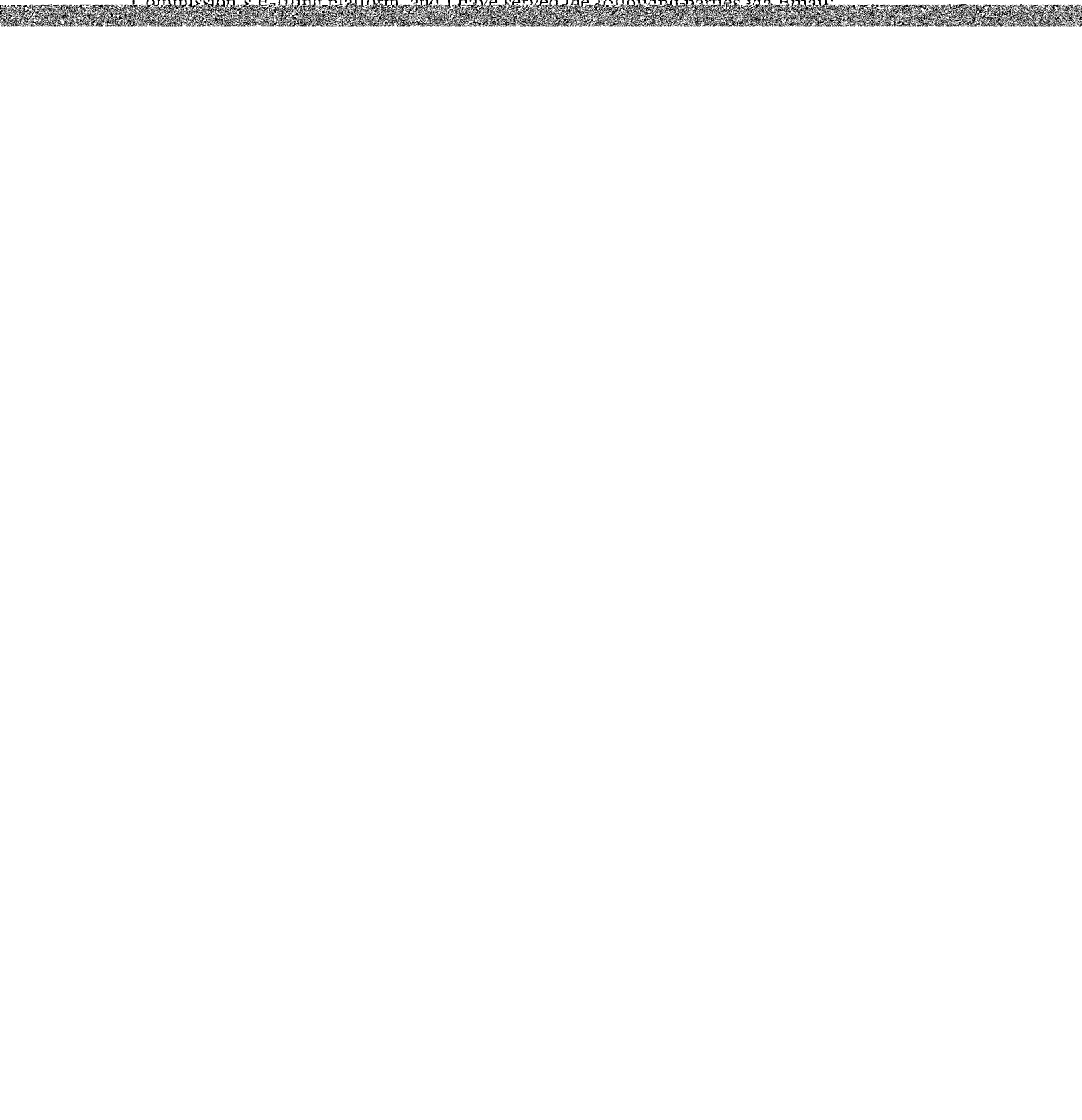
/s/ Kenneth S. Reinker

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 3, 2020, I caused a true and correct copy of the foregoing Answer and Defense to the Complaint to be filed through the Federal Trade Commission's E-filing platform, and I have served the following parties via Email:



Notice of Electronic Service

I hereby certify that on January 03, 2020, I filed an electronic copy of the foregoing Answer and Defense of Respondent Post Holdings, Inc., with:

D. Michael Chappell
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I hereby certify that on January 03, 2020, I served via E-Service an electronic copy of the foregoing Answer and Defense of Respondent Post Holdings, Inc., upon:

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