

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

_____)	
In the Matter of)	
)	
Medtronic plc,)	DECISION AND ORDER
a public limited company,)	Docket No. C-4763
)	
Medtronic, Inc.,)	
a corporation, and)	
)	
Intersect ENT, Inc.,)	
a corporation.)	
_____)	

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Medtronic, Inc., a wholly owned subsidiary of Respondent Medtronic plc, of Respondent Intersect ENT, Inc. (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

Q. "FDA" means the United States Food and Drug Administration.

R. "Fiagon Assets" means Respondent's rights, title, and interests in and to all tangible and intangible assets, wherever located in or related to the Respondent's business.

- W. "Governmental Permit" means all consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of Fiagon Assets to the Acquirer and for such Acquirer to operate the Fiagon Business. Governmental Permits includes all communications with the FDA
- X. "Intellectual Property" means all Intellectual property of any kind, including patents, patent applications, mask works, trademarks, service marks applications, copyrights, trade dress, commercial names, trade names, inventions, discoveries, written and unwritten know-how, customer lists, trade secrets, proprietary information, internet web sites, internet domain names, social media, and content related exclusively to the Fiagon Products and Fiagon Business that is displayed on any website.
- Y. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders
- Z. "Orders" mean this Order and the Order to Maintain Assets entered in this action.
- AA. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, governmental body, or other entity.
- BB. "Third Party" means any Person other than the Respondents or the Acquirer.
- CC. "Transition Assistance" means technical services, personnel, assistance, training, and other logistical, administrative, and transitional support as required by the Acquirer approved by the Commission to facilitate the transfer of Fiagon Assets to the Acquirer, including support related to audits, finance and accounting, human resources, information technology and systems, maintenance and repair of Fiagon Facilities and equipment, manufacturing, manufacturing, purchasing quality control, research and development, technology transfer, regulatory compliance, sales and marketing, customer service, supply chain management, and custom transfer logistics.

II. Divestiture

IT IS FURTHER ORDERED that:

- A. No later than 10 days after the Acquisition Date, Respondents shall divest the Fiagon Assets, absolutely and in good faith, as an ongoing business, to Hemostasis
- B. If Respondents have divested the Fiagon Assets to Hemostasis prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. Hemostasis is not acceptable as the acquirer of the Fiagon Assets, then Respondents shall immediately rescind the Divestiture Agreements, and shall

divest the Fiagon Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of ~~Fiagon Assets to Hemostasis~~ was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the ~~Fiagon Assets~~ as the Commission may determine are necessary to satisfy the requirements of this Order.
- C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Fiagon Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as ~~part of~~ due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Business Information, ~~Fiagon Facilities~~ with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.
- D. Respondents shall obtain, ~~prior to~~ the Divestiture Date and at their sole expense, all consents from ~~Third Parties~~ and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Fiagon Assets to the Acquirer and for the Acquirer to operate all ~~aspects~~ of the Fiagon Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all consents from ~~Third Parties~~ P by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant ~~third party~~ that are acceptable to the Commission, or has otherwise obtained all necessary consents and ~~waiver~~;
 2. With respect to any Governmental Permits relating to the Fiagon Assets that are not transferable or not transferred on the Divestiture Date, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the Fiagon Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and Respondents shall provide such ~~assistance~~ as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.
- E. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Fiagon Products under any patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's ~~freedom~~ to manufacture, distribute, market, sell, or offer for sale any Fiagon Products anywhere in the world, including new versions of the Fiagon Products.

- F. Upon written notice from an Acquirer to Respondents, Respondents shall, in a timely manner and at no greater than Direct Cost, the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to Intellectual Property related to a Fiagon Product acquired by the Acquirer pursuant to Section II
- G. For any lawsuit related to a Fiagon Product that is filed prior to the Divestiture Date which Respondent Intersect is alleged to have infringed the Intellectual Property of a Third Party which Respondent Intersect has prepared or is preparing to defend against as of the Divestiture Date, Respondents shall:
1. Cooperate with the Acquirer and provide any and all necessary technical and legal

IV. Transition Assistance

IT IS FURTHER ORDERED that:

- A. Until Respondents have transferred all Business Information included in the Fiagon Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.
 - B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Fiagon Assets to the Acquirer and (2) assist the Acquirer in operating the Fiagon Assets and Fiagon Business in material respects in the manner in which Respondent Intersect did so prior to the Acquisition.
 - C. Respondents shall provide such Transition Assistance
 1. As set forth in the Divestiture Agreements, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date)
 2. At Direct Cost; and
 3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, for one year after the Divestiture Date;
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B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide the Acquirer a list of all Fiagon Employees and provide Employee Information for each;
2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of Respondents with any of the Fiagon Employees, and to make offers of employment to any of the Fiagon Employees;
3. Remove any impediments within the control of Respondents that may deter Fiagon Employees from accepting employment with the Acquirer, including removal of any noncompete or confidentiality provisions of employment or other Contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Fiagon Employee who receives an offer of employment from the Acquirer;

Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Fiagon Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits they are employed by Respondents;
5. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Fiagon Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Fiagon Employee by the Acquirer.

C. Respondents shall provide financial incentives for Fiagon Employees to continue in their positions and, as may be necessary, to facilitate their employment by the Acquirer.

D. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Fiagon Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;
2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Fiagon Employees; or
3. Hire an employee who has applied for employment with Respondents, as long as

such application was not solicited or induced in violation of Section

1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets or the Divestiture Agreements; or
2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Fiagon Assets or Fiagon Business, or as required by law.

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3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;
 4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and
 5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.
- E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.
- F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.
- Respondents:
1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;
 2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and
 3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission approved agreement referenced in Paragraph III.B; or (b) receives Commission approval.

- G. The Commission may on its own initiative or at the request of the ~~Monitor~~ such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Fiagon Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver, or otherwise convey ~~the~~ assets in a manner that satisfies the requirements of this Order.

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;
2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the

manner as provided in Section X, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section X.

- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Respondents' Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without prior approval of the

XIII. Change in Respondent

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

- A. The proposed dissolution of Medtronic plc or Medtronic Inc., respectively
- B. The proposed acquisition, merger, or consolidation of Medtronic plc or Medtronic Inc. or
- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes affect compliance obligations arising out of this Order.

XIV. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate on June 27, 2032.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: June 27, 2022

Nonpublic Appendix A

Divestiture Agreements

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