

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

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

<p>In the Matter of</p> <p>WESTERN DIGITAL CORPORATION, a corporation.</p>

Docket No. C-4350

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Western Digital Corporation (“Western Digital” or “Respondent”) of Viviti Technologies Ltd. (“HGST”), a wholly owned subsidiary of Hitachi, Ltd. (“Hitachi”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets (“Order to Maintain Assets”), 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, and having carefully considered the

comment filed by an interested person, and having modified this Decision and Order in certain respects, 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 Western Digital Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3355 Michelson Drive, Irvine, California 92612.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Western Digital” means Western Digital Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Western Digital (including, after the Acquisition Date, HGST), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Hitachi” means Hitachi, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 6-6 Marunouchi 1-chome, Chiyoda-ku, Tokyo, 100-8280, Japan. HGST is a wholly owned subsidiary of Hitachi, Ltd.
- C. “HGST” means Viviti Technologies Ltd. (“HGST”), a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its headquarters address at 3403 Yerba Buena Road, San Jose, California 95135.
- D. “Commission” means the Federal Trade Commission.
- E. “3.5 Inch HDD” means a three and a half (3.5) inch wide fixed, re-writeable, magnetic data storage device with one or more flat, circular platters coated with a magnetically sensitive material, enclosed in a vacuum sealed case with recording heads, used for the purpose of storing and retrieving electronic data.

- F. “3.5 Inch HDD Manufacturing Assets” means the manufacturing equipment, machinery, tools, and other parts primarily related to the fully configured production lines for the production of 3.5 Inch HDD Products including, but not limited to:
1. sixteen (16) Primary Production Lines used to manufacture 3.5 Inch HDDs at the Shenzhen Facility;
 2. four (4) Re-Work lines used to disassemble 3.5 Inch HDDs at the Shenzhen Facility; and
 3. at the Acquirer’s option, the Shenzhen Facility Option Assets.
- G. “3.5 Inch HDD Product(s)” means the HGST *Mars* product lines for 3.5 Inch HDDs with one, two, or three platters, used in non-portable desktops and tower personal computers.
- H. “3.5 Inch HDD Products Business” means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of 3.5 Inch HDD Products by HGST before the Acquisition Date, including any contracts, agreements or other arrangements by HGST with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.
- I. “3.5 Inch HDD Products Business Assets” means the following assets primarily related to the 3.5 Inch HDD Products Business:
1. the 3.5 Inch HDD Manufacturing Assets;
 2. the 3.5 Inch HDD Products Business Records;
 3. the 3.5 Inch HDD Products Intellectual Property License; and
 4. the 3.5 Inch HDD Products Patents License.
- J. “3.5 Inch HDD Products Business Employee(s)” means any employee whose duties primarily related to the 3.5 Inch HDD Products Business at any time during the twelve (12) month period prior to the Closing Date.
- K. “3.5 Inch HDD Products Business Firewalled Employees” means:
1. all employees at the Shenzhen Facility whose duties involve the contract manufacture of the 3.5 Inch HDD Products for the Acquirer;
 2. all 3.5 Inch HDD Products Business Key Employees;
 3. all employees of Respondent seconded to the Acquirer until May 15, 2015;

4. all employees of Respondent whose duties involve the supply of Heads and/or Media to the Acquirer; and
 5. all employees of Respondent with access to Confidential Business Information related to the 3.5 Inch HDD Products whose duties relate to Respondent's own 3.5 Inch HDD business.
- L. "3.5 Inch HDD Products Business Key Employee(s)" means an employee designated by the Acquirer as a Product Manager, a Design Manager, a Manufacturing Manager, and a Quality Assurance Manager.
- M. "3.5 Inch HDD Products Business Records" means (i) all documents and records (including all electronic records and files wherever stored) that are exclusively used in the 3.5 Inch HDD Products Business and (ii) copies of all documents and records (including all electronic records and files wherever stored) that are primarily related to 3.5 Inch HDD Products Business including, without limitation:
1. all documents and information related to employees, contractors, and others employed or contracted by Respondent whose duties primarily relate to the 3.5 Inch HDD Products Business;
 2. all Software primarily related to 3.5 Inch HDD Products; and
 3. all 3.5 Inch HDD Products Manufacturing Documents.
- N. "3.5 Inch HDD Products Business Divestiture Agreement" means:
1. the WD-Toshiba Asset Purchase Agreement; or
 2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- O. "3.5 Inch HDD Products Contract Manufacturing Agreement" means:
1. the Manufacturing Agreement by and between Toshiba Corporation, Hitachi Global Storage Products (Shenzhen) Co. Ltd., and Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto as of the Closing Date. This Manufacturing Agreement is attached to this Order and contained in non-public Appendix A; or

2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the supply of 3.5 Inch HDD Products entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- P. “3.5 Inch HDD Products Intellectual Property License” means a worldwide, fully paid-up, perpetual, non-revocable and royalty-free license(s) to all documents, Intellectual Property and Know-How primarily related to 3.5 Inch HDD Products in a manner and form substantially similar to the WD-Toshiba License Agreement; *provided, however*, the 3.5 Inch HDD Products Intellectual Property License(s) does not include (i) corporate names or corporate trade dress of “WD,” “HGST,” or “Hitachi,” or any other trademark, trade dress, or corporate name, or (ii) patents owned by Respondent.
- Q. “3.5 Inch HDD Products Manufacturing Documents” means the books, records, files and other documentation, including electronic copies, primarily related to the research, development, production, manufacturing or testing of 3.5 Inch HDD Products including, but not limited to, tooling documentation, specifications, schematics, product designs, failure analysis data, quality data, and qualification data.
- R. “3.5 Inch HDD Products Input Supply Agreement(s)” means:
1. the Head Supply Agreement;
 2. the Media Supply Agreement; or
 3. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and the Acquirer for the supply of Heads or Media necessary for the manufacture of 3.5 Inch HDD Products.
- S. “3.5 Inch HDD Products Patents License” means a worldwide, fully paid-up, perpetual, non-revocable, non-exclusive license to all WD or HGST patents used or useful in making, using, or selling HDDs that are issued or have a first effective filing date on or before September 29, 2017 in a manner and form substantially similar to the Toshiba Cross-License Agreement; *provided, however*, the 3.5 Inch HDD Products Patents License shall not include design patents.
- T. “Acquirer” means the following:
1. Toshiba; or
 2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

- U. “Acquisition” means the acquisition of Viviti Technologies Ltd. by Western Digital as contemplated by the Stock Purchase Agreement by and among Hitachi, Ltd., Viviti Technologies Ltd., Western Digital Corporation, and Western Digital Ireland, Ltd., dated March 7, 2011, and all attachments, amendments, exhibits, and schedules related thereto.
- V. “Acquisition Date” means the date on which the Acquisition occurs.
- W. “Closing Date” means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to the 3.5 Inch HDD Products Business to an Acquirer pursuant to this Order.
- X. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the operation and management of the 3.5 Inch HDD Products Business including, but not limited to, information related to the cost, supply, sales, sales support, customers, contracts, research, development, distribution and marketing of 3.5 Inch HDD Products; *provided, however, this provision shall not include:*
 - 1. information that subsequently falls within the public domain through no violation of this Order;
 - 2. information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
 - 3. information that becomes known to Respondent from a Third Party not in breach of applicable law or other confidentiality obligation.
- Y. “Design Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the research or design of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- Z. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provided the relevant assistance or service.
- AA. “Divestiture Trustee” means the person appointed to act as trustee by the Commission pursuant to Paragraph IV of this Order.
- BB. “Employee Access Period” means the later of:
 - 1. one hundred fifty (150) days from the Closing Date; or
 - 2. August 15, 2013.

- CC. “Geographic Territory” means worldwide.
- DD. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- EE. “Heads” means the components of 3.5 Inch HDDs that move above the Media and are used to write data onto Media by transforming an electrical current into a magnetic field and to read data from Media by transforming a magnetic field into an electrical current.
- FF. “Heads Supply Agreement” means the Heads Supply Agreement by and between Toshiba Corporation, Western Digital (Malaysia) SDN BHD, Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Heads Supply Agreement is attached to this order and contained in non-public Appendix C.
- GG. “Intellectual Property” means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.
- HH. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- II. “Know-How” means all knowledge, information and know-how in the possession of Respondent or within the knowledge of any employee or consultant of Respondent on or before the Closing Date that relates to the 3.5 Inch HDDs Products.
- JJ. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- KK. “Manufacturing Period” means the period beginning on the Closing Date and ending on the later of:
1. one (1) year after the Closing Date; or
 2. the date the Acquirer transfers twelve (12) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.
- LL. “Manufacturing Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the manufacture or production of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.

- MM. “Media” means the components of 3.5 Inch HDDs that consist of a flat, circular platter coated with a magnetically sensitive material used for storing electronic data.
- NN. “Media Supply Agreement” means the Media Supply Agreement by and between Toshiba Corporation, WD Media (Malaysia) SDN, and Western Digital Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Media Supply Agreement is attached to this order and contained in non-public Appendix D.
- OO. “Monitor Agreement” means the Monitor Agreement dated February 26, 2012, between ING Financial Markets LLC, and Western Digital Corporation. The Monitor Agreement is attached as Appendix E to this Order.
- PP. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- QQ. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- RR. “Primary Production Lines” means prime production lines used to manufacture and test HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.
- SS. “Product Manager” means an employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the management of a HDD product line within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- TT. “Quality Assurance Manager” means employee of Respondent, designated by the Acquirer, who has managerial or supervisory duties, in whole or in part, in the testing or quality assurance of 3.5 Inch HDD Products within the twelve (12) month period immediately prior to the Closing Date, and may be an individual identified in Confidential Appendix B.
- UU. “Remedial Agreement(s)” means:
1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final; and/or

2. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.

VV. “Reserved Capacity” means productive capacity that Respondent is obligated to reserve on behalf of the Acquirer including, at a minimum:

1. for 3.5 Inch HDD Products, the capacity of seven (7) fully configured Primary Production Lines initially, increasing to ten (10) fully configured Primary Production Lines; *provided, however*, that after the Rolling Manufacturing Asset Transfer Date, Respondent may reduce the number of lines on a rolling basis to enable the transfer of lines; and
2. for Heads and/or Media, the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from sixteen (16) fully configured Primary Production Lines; *provided, however*, Respondent shall also reserve the capacity to supply fifty (50) percent of Heads and/or Media that is required to support the number of 3.5 Inch HDD Products produced from any of the six (6) additional fully configured primary production lines from the Shenzhen Option Assets that are purchased by the Acquirer.

WW. “Re-Work Lines” means re-work production lines used to disassemble HDDs as referenced in Section 1.01(b)(i) of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement.

XX. “Rolling Manufacturing Asset Transfer Date” means the date ten (10) fully configured Primary Production Lines are reserved, after which Respondent may reduce the number of lines on a one-for-one basis as additional lines are qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

YY. “Shenzhen Facility” means Hitachi’s production plant located at 119-121, Block 1, International Commerce Centre, 1001 Honghua Road, Futian Free Trade Zone, Shenzhen, China, used primarily for the manufacture of 3.5 Inch HDDs for use in desktop and consumer electronics including, without limitation, real estate, buildings, warehouses, storage facilities, structures, manufacturing equipment, other equipment, machinery, tools, spare parts, personal property, furniture, fixtures, supplies and other tangible property.

- ZZ. “Shenzhen Facility Option Assets” means the following assets as referenced in Schedule 2.10 of the disclosure schedule to the WD-Toshiba Asset Purchase Agreement:
1. the six (6) additional production lines used to manufacture HDDs at the Shenzhen Facility; and
 2. the two (2) additional re-work lines used to disassemble HDDs at the Shenzhen Facility.
- AAA. “Software” means any and all computer programs in both source and object code form, including all modules, routines and sub-routines thereof and all related source and other preparatory materials including functional specifications and programming specifications, programming languages, algorithms, flow charts, logic diagrams, orthographic representations, file structures, coding sheets, coding and manuals or other documentation related thereto.
- BBB. “Supply Cost” means:
1. for 3.5 Inch HDD Products, the transfer price as determined under the 3.5 Inch HDD Products Contract Manufacturing Agreement; or
 2. for Heads and/or Media, the price as determined under the 3.5 Inch HDD Products Input Supply Agreement(s).
- CCC. “Third Party(ies)” means any non-governmental Person other than Respondent or the Acquirer.
- DDD. “Toshiba” means Toshiba Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its headquarters address at 1-1, Shibaura 1-chrome, Minato-Ku, Tokyo 105-8001, Japan. Toshiba America Electronic Components Inc., is a wholly owned subsidiary of Toshiba Corporation, with its principal office at 19900 MacArthur Boulevard, Suite 400, Irvine, California 92612.
- EEE. “Toshiba Cross-License Agreement” means the Form of Amended and Restated Patent Cross-License Agreement by and between Toshiba Corporation and Western Digital Technologies, Inc., dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Toshiba Cross-License Agreement is attached to this order and contained in non-public Appendix F.

FFF. “Transfer Period” means the period beginning on the Closing Date and ending on the later of:

1. one (1) year after Closing Date; or
2. the date the Acquirer transfers sixteen (16) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

GGG. “Transition Services Agreement” means:

1. the Transition Services Agreement by and between Western Digital Corporation and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This Transition Services Agreement is attached to this order and contained in non-public Appendix G; or
2. any agreement that receives the prior approval of the Commission between Respondent (or a Divestiture Trustee) and an Acquirer for the provision of transition services related to the divestiture of the 3.5 Inch HDD Products Business entered into pursuant to Paragraph II (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

HHH. “Transition Services Period” means the period beginning on the Closing Date and ending on the later of:

1. the end of the Transfer Period; or
2. if the Acquirer purchases the Shenzhen Facility Option Assets, the date the Acquirer transfers the Shenzhen Facility Option Assets and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.

III. “WD-Toshiba Asset Purchase Agreement” means the Asset Purchase Agreement by and between Western Digital Corporation and Toshiba Corporation, dated January 20, 2012, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase Agreement is attached to this order and contained in non-public Appendix H.

JJJ. “WD-Toshiba License Agreement” means the Form of Intellectual Property License and Sublicense Agreement by and between Western Digital Technologies, Inc., Hitachi Global Storage Technology Netherlands BV, and Toshiba Corporation, dated on the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto. This WD-Toshiba License Agreement is attached to this order and contained in non-public Appendix I.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest, license, transfer and/or grant absolutely, and in good faith, the 3.5 Inch HDD Products Business Assets to Toshiba pursuant to and in accordance with the 3.5 Inch HDD Products Business Divestiture Agreement, the 3.5 Inch HDD Products Patents License, and the 3.5 Inch HDD Products Business Intellectual Property License (which agreements shall not limit or contradict, or be construed to vary from or contradict, the terms of this Order), and each such agreement, if it becomes a Remedial Agreement related to the 3.5 Inch HDD Products Business Assets is incorporated by reference into this Order and made a part hereof, by the earlier of:

1. within five (5) days after Respondent has obtained the prior approval from all Government Entities of the divestiture of the 3.5 Inch HDD Products Business Assets to Toshiba and all related Remedial Agreements; or
2. June 20, 2012;

provided, however, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Toshiba is not an acceptable Acquirer of the 3.5 Inch HDD Products Business Assets then Respondent shall immediately rescind the transaction with Toshiba, in whole or in part, as directed by the Commission, and shall divest, license, transfer and/or grant the 3.5 Inch HDD Products Business Assets within six (6) months from date of determination, 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;

provided further, however, that if Respondent has complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture to Toshiba (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. At the Acquirer's option and upon reasonable notice, for the duration of the Manufacturing Period, Respondent shall supply 3.5 Inch HDD Products pursuant to a 3.5 Inch HDD Products Contract Manufacturing Agreement to allow the Acquirer, or a Third Party affiliated with the Acquirer, time sufficient to obtain all necessary Government Entity approvals and transfer the 3.5 Inch HDD Manufacturing Assets to a new location to manufacture in commercial quantities, and in a manner consistent with past practices, the 3.5 Inch HDD Products independently of Respondent.

- C. At the Acquirer's option and upon reasonable notice, for a period of three (3) years from the Closing Date, Respondent shall supply Heads and/or Media, pursuant to a 3.5 Inch HDD Products Input Supply Agreement(s) to allow the Acquirer, or a Third Party affiliated with the Acquirer, time to secure a supply of Heads and/or Media from sources other than Respondent.
- D. In accordance with the 3.5 Inch HDD Products Contract Manufacturing Agreement and/or any 3.5 Inch HDD Products Input Supply Agreement, Respondent shall:
 - 1. deliver, in a timely manner and under reasonable terms and conditions, a supply of 3.5 Inch HDD Products, Heads, and/or Media at a price not to exceed Supply Cost;
 - 2. represent and warrant to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for liabilities resulting from the failure by Respondent to deliver the 3.5 Inch HDD Products, Heads, and/or Media in the following manner:
 - a. for 3.5 Inch HDD Products, as specified in the 3.5 Inch HDD Products Contract Manufacturing Agreement Articles VIII through X and Article XIII; and
 - b. for Heads and/or Media, as specified in the 3.5 Inch HDD Input Supply Agreements Articles VII through IX and Article XII;
 - 3. give priority to supplying a Reserved Capacity of 3.5 Inch HDD Product, Head, and/or Media to the Acquirer over manufacturing and supplying of products for Respondent's own use or sale;
 - 4. during the term of any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, upon written request of the Acquirer or the Interim Monitor, make available to the Acquirer or the Interim Monitor all records that relate to the manufacture or supply of the 3.5 Inch HDD Products, Heads used in 3.5 Inch HDD Products, and/or Media used in 3.5 Inch HDD Products that are generated or created after the Closing Date; and
 - 5. not seek, pursuant to any dispute resolution mechanism incorporated in any 3.5 Inch HDD Products Contract Manufacturing Agreement and/or 3.5 Inch HDD Input Supply Agreement, a result that would be inconsistent with the terms or the remedial purposes of this Order.

- E. Within twenty (20) days of the Closing Date, Respondent shall:
1. submit to the Acquirer, at Respondent's expense, all 3.5 Inch HDD Products Business Records related to the 3.5 Inch HDD Products;
 2. deliver, in good faith, such 3.5 Inch HDD Products Business Records to the Acquirer;
 - a. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - b. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such 3.5 Inch HDD Products Business Records to the Acquirer, provide the Acquirer and the Interim Monitor with access to all such 3.5 Inch HDD Products Business Records 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 3.5 Inch HDD Products that contain such 3.5 Inch HDD Products Business Records and facilitating the delivery in a manner consistent with this Order;
 4. not use, directly or indirectly, any Confidential Business Information related to the research, development, manufacturing, marketing, or sale of the 3.5 Inch HDD Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to the Acquirer under the terms of any Remedial Agreement related to the 3.5 Inch HDD Products; or
 - c. applicable Law;
 5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information; and
 6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products to employees associated with Respondent's own 3.5 Inch HDD business;

provided, however, that Respondent may use any Intellectual Property or Know-How that is conveyed or licensed to Respondent or that Respondent retains the right to use pursuant to any Remedial Agreement; *provided further, however*, to the extent that the use of such Intellectual Property or Know-How involves disclosure of Confidential Business Information to another Person, such Person must agree to maintain the

confidentiality of such Confidential Business Information under terms and in a manner consistent with the requirements of this Order.

- F. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondent's personnel to all 3.5 Inch HDD Products Business Employee and all 3.5 Inch HDD Products Business Firewalled Employees. Respondent shall:
1. give such notification by e-mail with return receipt requested or similar transmission and keep a file of such receipts for one (1) year after the Closing Date;
 2. maintain complete records of all such agreements at Respondent's corporate headquarters and provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with; and
 3. shall provide an Acquirer with copies of all certifications, notifications, and reminders sent to Respondent's personnel.
- G. Respondent shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each 3.5 Inch HDD Products Business Firewalled Employee retained by Respondent, the direct supervisor of any such employee, and any other employee retained by Respondent and designated by the Interim Monitor sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information strictly confidential, including the non-disclosure of such information to any other employee, executive or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).
- H. Any 3.5 Inch HDD Products Business Firewalled Employee identified in Paragraph I.K.3, as a condition of continued employment by Respondent, shall be prohibited from working on Respondent's own 3.5 Inch HDD business for a period of six (6) months after such employee ceases to work with the Acquirer.
- I. For the duration of the Employee Access Period and within ten (10) days of request by the Acquirer, Respondent shall, to the extent permitted by law, provide to the Acquirer or proposed Acquirer, the following information regarding each 3.5 Inch HDD Products Business Employee whose duties relate to the 3.5 Inch HDD Products Business:
1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;

4. the most recent bonus paid, aggregate annual compensation for the last fiscal year, value of vested and unvested deferred compensation including when any unvested portions are due to vest, and current target or guaranteed bonus, if any;
 5. employment status (*i.e.*, active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- J. For the duration of the Employee Access Period, Respondent shall not interfere with the hiring or employing by the Acquirer of the 3.5 Inch HDD Products Business Employees, and shall remove any contractual impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability of those individuals to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to a 3.5 Inch HDD Products Business Employee who receives a written offer of employment from the Acquirer; *provided, however*, this Paragraph shall not prohibit Respondent from continuing to employ any 3.5 Inch HDD Products Business Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.
- K. Respondent shall provide reasonable financial incentives to the 3.5 Inch HDD Products Business Key Employees as needed to facilitate the employment of such employees by the Acquirer.
- L. For a period of one (1) year following the Employee Access Period, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any 3.5 Inch HDD Products Business Employee(s) who have accepted offers of employment with the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the 3.5 Inch HDD Products Business Employee's employment has been terminated by the Acquirer; (2) Respondent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; or (3) a 3.5 Inch HDD Products Business Employee independently applies for employment with Respondent, as long as such employee was not solicited by Respondent.
- M. During the Transition Services Period, Respondent shall provide, at no greater than Direct Cost, assistance from knowledgeable employees of Respondent in the transfer of the 3.5 Inch HDD Products Business Assets from Respondent to the Acquirer in a timely and orderly manner pursuant to a Transition Services Agreement.

- N. Until Respondent completes the divestiture required by Paragraph II.A, Respondent:
1. shall take such actions as necessary to:
 - a. maintain the full economic viability and marketability of the 3.5 Inch HDD Products Business;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the 3.5 Inch HDD Products Business;
 - d. ensure the assets required to be divested are transferred and delivered to the Acquirer in a manner without disruption, delay, or impairment of the 3.5 Inch HDD Products Business; and
 2. shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the 3.5 Inch HDD Products Business.
- O. The purpose of the divestiture of the 3.5 Inch HDD Products Business and the related obligations imposed on Respondent by this Order is:
1. to ensure the continued use of such assets in the research, development, manufacture, and sale of the 3.5 Inch HDD Products within the Geographic Territory; and
 2. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

- A. The Commission may appoint an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets, and any Remedial Agreement.
- B. The Commission appoints ING Financial Markets LLC ("ING") as Interim Monitor and approves the Monitor Agreement between ING and Respondent which agreement, *inter alia*, names Philip Comerford, Jr., as ING designated Project Manager.

- C. No later than one (1) day after the Closing Date, Respondent shall, pursuant to the Monitor Agreement and to this Order, transfer to the Interim Monitor all the rights, powers, and authorities necessary to permit the Interim Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Order.
- D. The Interim Monitor shall serve until the later of (1) the Transition Services Period or (2) the termination of all Respondent's obligations under all Remedial Agreements; *provided, however,* the Commission may extend or modify this period as may be necessary to accomplish the purposes of this Order and the Order to Maintain Assets.
- E. In the event a substitute Interim Monitor is required, the Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has 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 Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor. Not later than ten (10) days after appointment of a substitute Interim Monitor, Respondent 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 Respondent's compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreements in a manner consistent with the purposes of this Order.
- F. Respondent 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 Respondent's compliance with the terms of this Order, the Order to Maintain Assets, and the Remedial Agreements, 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, including, but not limited to:
 - a. assuring that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the this Order, the Order to Maintain Assets, and the Remedial Agreements;
 - b. monitoring any Transition Services Agreement;
 - c. assuring that Confidential Business Information is not received or used by Respondent or the Acquirer, except as allowed in this Order and in the Order to Maintain Assets, in this matter.
 - 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. the Interim Monitor shall serve for such time as is necessary to monitor Respondent's compliance with the provisions of this Order, the Order to Maintain Assets, and the Remedial Agreements.
4. subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with this Order, the Order to Maintain Assets, and the Remedial Agreements.
5. the Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.
8. Within one (1) month from the date the Interim Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under this Order, the Order to Maintain Assets, and the Remedial Agreements.

9. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; Provided, however, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- G. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Interim Monitor's duties.
 - H. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph III.
 - I. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Order to Maintain Assets, and the Remedial Agreements.
 - J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Interim Monitor under the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, all of the 3.5 Inch HDD Products Business Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest, license, transfer and/or grant any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a 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 trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

- B. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
- C. Within ten (10) days after appointment of a trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
- D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the 3.5 Inch HDD Products Business Assets that have not been divested pursuant to Paragraph II of this Order.
 2. the trustee shall have twelve (12) months from 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 twelve (12) month period, the trustee has submitted a divestiture plan or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
 4. the 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 Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer or Acquirers that receives the prior approval of the Commission, as required by this Order; *provided, however*, if the trustee receives bona fide offers for particular assets from

more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. the trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
 6. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
 7. the trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. the trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
 9. Respondent may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the trustee from providing any information to the Commission.
- E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV.

- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Interim Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that:

- A. Within five (5) days after the Acquisition Date, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondent shall submit to the Commission and, if appointed, the Interim Monitor, a verified written report setting forth in detail the manner and form in which it intends to comply, are complying, and have complied with this Order:
 - 1. within thirty (30) days after the date this Order becomes final;
 - 2. every thirty (30) days thereafter until Respondent has fully divested, licensed, transferred and/or granted the 3.5 Inch HDD Products Business Assets to an Acquirer; and
 - 3. every six (6) months thereafter so long as Respondent has a continuing obligation under this Order and/or the Remedial Agreements to render services to the Acquirer.
- C. One (1) year from the date this Order becomes final, and annually for the next nine (9) years thereafter on the anniversary of the date this Order becomes final, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Remedial Agreements. Respondent shall submit at the same time a copy of these reports to the Interim Monitor.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. access, during office hours of 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 Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 7, 2023.

By the Commission, Commissioner Ohlhausen not participating and Commissioner Wright recused.

Donald S. Clark
Secretary

ISSUED: May 7, 2013

Non-Public Confidential Appendix A
3.5 Inch HDD Products Contract Manufacturing Agreement

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

**Non-Public Confidential Appendix B
3.5 Inch HDD Products Business Key Employees**

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

**Non-Public Confidential Appendix C
Heads Supply Agreement**

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

**Non-Public Confidential Appendix D
Media Supply Agreement**

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

**Non-Public Confidential Appendix E
Monitor Agreement**

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

**Non-Public Confidential Appendix F
Toshiba Cross-License Agreement**

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

**Non-Public Confidential Appendix G
Transition Services Agreement**

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

**Non-Public Confidential Appendix H
WD-Toshiba Asset Purchase Agreement**

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

**Non-Public Confidential Appendix I
WD-Toshiba License Agreement**

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