

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

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

**In the Matter of**

**Post Holdings, Inc.**  
                                  **a corporation,**

**and**

**TreeHouse Foods, Inc.**  
                                  **a corporation.**

**Docket No. 9388**

**REDACTED PUBLIC VERSION**

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents Post Holdings, Inc. (“Post”) and TreeHouse Foods, Inc. (“TreeHouse”) have executed an asset purchase agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

**I.**

**NATURE OF THE CASE**

1. Post and TreeHouse are two of only three significant manufacturers and distributors of private label ready-to-eat (“RTE”) cereal in the United States. Pursuant to an Asset Purchase Agreement, Post plans to acquire TreeHouse’s RTE cereal assets for [REDACTED] (“the Proposed Acquisition”).

2. Respondents compete vigorously today. Respondents’ own internal business documents show that the effect of the Proposed Acquisition “may be substantially to lessen competition, or to tend to create a monopoly” in violation of the Clayton Act, and harm U.S. consumers. In internal business documents, both Post and TreeHouse recognize each other as close competitors for private label RTE cereal business. Post historically has acknowledged that TreeHouse is the

“market leader” in the private label RTE cereal category and recognizes that it has grown its own private label share by “stealing” volume primarily from TreeHouse. TreeHouse describes itself as the “#1 U.S. Private Label RTE Cereal Manufacturer.” TreeHouse correspondingly describes Post as its “largest private label competitor” and a “major threat” to take away private label RTE cereal business.

3. Respondents are often retailers’ two best options for private label RTE cereal. Retailers play Post and TreeHouse off each other to obtain lower pricing, better service, and other contract terms. Indeed, Post and TreeHouse frequently lower their prices and make other concessions to take business away from each other and to avoid losing business to each other. The Proposed Acquisition would eliminate this head-to-head competition and would give Post the power and incentive to increase prices and decrease services for private label RTE cereal for U.S. retailers and their customers post-acquisition.

4. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”), a post-acquisition market-concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index (“HHI”), and an increase in market concentration of more than 200 points, renders an acquisition presumptively anticompetitive. Based on volume of sales, the Proposed Acquisition would significantly increase concentration in an already highly concentrated market for the sale of private label RTE cereal to U.S. retailers, well beyond the thresholds set forth in the Merger Guidelines. Thus, under the Merger Guidelines, the Proposed Acquisition is presumptively anticompetitive.

5. New entry or expansion by current market participants would not be timely, likely, or sufficient to deter or counteract the likely anticompetitive effects of the Proposed Acquisition.

6. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and other evidence that the Proposed Acquisition likely would substantially lessen competition in the relevant market.

## **II.**

### **JURISDICTION**

7. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

8. The Proposed Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

### III.

#### RESPONDENTS

9. Respondent Post, headquartered in St. Louis, Missouri, is a publicly traded corporation organized under the laws of Missouri. Post has offerings in the center-of-the-store, foodservice, food ingredient, refrigerated, active nutrition, and private brand food categories. Through its Post Consumer Brands unit, Post manufactures, markets, and sells a broad portfolio of well-known national RTE cereal brands, including Honey Bunches of Oats, Pebbles, and Grape-Nuts, as well as a variety of private label RTE cereal products. Post produces approximately 28 formulations of private label RTE cereal and offers retailers natural, organic, and clean label private label RTE cereal products. In fiscal year 2018, Post Consumer Brands' retail sales of private label RTE cereal were approximately [REDACTED].

10. Respondent TreeHouse, headquartered in Oak Brook, Illinois, is a publicly traded corporation organized under the laws of Delaware. TreeHouse is a leading manufacturer of private label food and beverage products across multiple categories, with total annual revenues of approximately \$5.8 billion in fiscal year 2018. TreeHouse is the largest manufacturer of private label RTE cereal in the United States through its TreeHouse Private Brands, Inc. subsidiary. In fiscal year 2018, TreeHouse's retail sales of private label RTE cereal were [REDACTED].

### IV.

#### THE PROPOSED ACQUISITION

11. On May 1, 2019, Post and TreeHouse signed an Asset Sale Agreement pursuant to which Post will acquire TreeHouse's private label RTE cereal business, including TreeHouse's RTE cereal product formulations and manufacturing plants. Post eventually plans to integrate TreeHouse's private label RTE cereal business into Post's existing private label RTE cereal business. The total consideration for the Proposed Acquisition is approximately [REDACTED].

### V.

#### RELEVANT MARKETS

12. The relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than the sale of private label RTE cereal to retailers in the United States.

##### **A. Relevant Product Market**

13. The sale of private label RTE cereal to retailers is the relevant product market.

14. Post and TreeHouse each manufacture and sell RTE cereal. RTE cereal (or cold cereal) is food made from processed grains like wheat, rice, and oats that requires no preparation and no heating before consumption. RTE cereal is dry and sold in a variety of packaging (e.g., boxes,

bags, and cups) and can be consumed dry or with milk. RTE cereal is a popular food: the category as a whole enjoys a household penetration rate over 90 percent, although consumption has gradually declined over time.

15. Respondents do not sell their RTE cereal products to end consumers. Instead, both Respondents compete to sell their RTE cereal to U.S. retailers, including conventional grocery stores (such as Kroger), discount supermarkets (such as Aldi), and mass merchants (such as Walmart). Some retailers purchase RTE cereal as part of a Purchasing Cooperative (such as Topco). The retailers then sell these RTE cereal products under the retailer's proprietary trade names (*i.e.*, private labels) to their in-store customers, the end consumers.

16. Many retailers offer private label RTE cereal, among other private label products, in their stores. Private label products provide a lower-cost alternative to the national brands—due to lower advertising and marketing costs—while offering customers similar quality. Each retailer's private label brand is available only at that retailer's locations. For example, Walmart's "Great Value" private label RTE cereal product is only available at Walmart.

17. Typically, private label RTE cereals are "emulations" of popular RTE cereal national brands; they are also referred to as "National Brand Equivalents" or "NBEs." For example, Kroger may offer Kroger's private label Honey Nut Toasted Oats cereal, which emulates General Mills' Honey Nut Cheerios.

18. While there may be some taste, appearance, or quality differences between the branded RTE cereal and the private label emulations, the primary differences are the wholesale and retail prices. Branded RTE cereal prices are substantially higher than private label RTE cereal prices because they incur most of the costs of advertising or promotional efforts for their products. By contrast, there is very little, if any, advertising or promotional spend by private label suppliers. Therefore, there is usually a gap between the retail prices of branded and private label RTE cereal products. This price gap will vary across retailers and across emulations, but is typically between 20 and 30 percent.

19. Generally, U.S. retailers do not view branded RTE cereals as interchangeable with private label RTE cereal products. For several reasons, retailers derive a unique value from offering private label RTE cereal, which they could not replicate by simply switching private label RTE cereal inventory over to branded RTE cereal products. First, retailers find it profitable to sell private label RTE cereal products and may earn higher margins on sales of private label RTE cereal than they do on sales of branded RTE cereal. Second, retailers value having a private label RTE cereal offering because it allows them to offer a lower cost, but acceptable quality, option to consumers. Third, a retailer's private label RTE cereal offering helps differentiate that retailer from its competitors, and thereby helps promote the retailer's brand and foster customer loyalty.

20. For these reasons, retailers would not switch their purchases of private label RTE cereals to branded RTE cereals in sufficient quantity or numbers to render unprofitable a small but significant non-transitory increase in price ("SSNIP") on private label RTE cereal.

21. The relevant market does not include private label “natural and organic” RTE cereal formulations. Retailers and end consumers do not view natural and organic cereals as substitutes for conventional cereals. Retailers typically source conventional (*i.e.*, non-natural/organic) cereals through separate processes, and many of the suppliers of natural and organic cereals are different than the suppliers for conventional RTE cereals. Natural and organic cereals tend to have healthier and more expensive inputs and are consequently priced significantly higher than their conventional counterparts. Thus, retailers could not effectively defeat a SSNIP on conventional private label RTE cereals by switching their purchases to natural and organic RTE cereals.

## **B. Relevant Geographic Market**

22. The relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is no broader than the United States. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

23. Competition among private label RTE cereal suppliers occurs at the national level. Many large retailers have locations in multiple regions across the United States, generally select a single supplier for all locations, and sell the same nationally sourced private label RTE cereal products across their entire retail footprint. Post and TreeHouse have national distribution networks to transport their private label RTE cereal throughout the United States. Post and TreeHouse each produce most of the private label RTE cereal they sell to U.S. retailers within the United States.

## **VI.**

### **MARKET STRUCTURE AND THE PROPOSED ACQUISITION’S PRESUMPTIVE ILLEGALITY**

24. Post and TreeHouse are the two largest suppliers of private label RTE cereal to retailers in the United States.

25. There is only one other meaningful private label RTE supplier, Gilster-Mary Lee. Other private label RTE cereal suppliers are significantly smaller than Respondents are and have limited competitive significance. For example, the most prominent foreign manufacturer, Brüggén, accounts for less than one percent of private label RTE cereal sales in the United States.

26. Combined, Post and TreeHouse would account for over ██████████ of the market for the sale of private label RTE cereal to retailers in the United States. Based on Post’s ordinary course documents, in 2018, TreeHouse held a ██████████ share of the private label RTE cereal market, followed by Post with ██████████, and Gilster-Mary Lee with ██████████. The remainder is a mix of all other suppliers, accounting for about ██████████.

27. The Merger Guidelines and courts typically measure concentration using the HHI. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

28. Based on Post’s ordinary course estimates of market shares, the Proposed Acquisition would result in a post-acquisition HHI exceeding 5,000, with an increase of more than 2,000, in a market for the sale of conventional private label RTE cereal to retailers in the United States. These concentration levels are well beyond what is necessary to establish a presumption of competitive harm.

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

30. The Proposed Acquisition is presumptively illegal under relevant case law and the Merger Guidelines.

## VII.

### ANTICOMPETITIVE EFFECTS

31. The Proposed Acquisition would eliminate substantial direct competition between Post and TreeHouse, resulting in increased prices for retailers and end consumers.

#### **A. The Proposed Acquisition Would Eliminate Vigorous Competition and Result in Higher Prices for Retailers and End Customers**

32. Respondents are close competitors and two of only three meaningful suppliers of private label RTE cereal in the United States. TreeHouse and Post are the only two manufacturers viewed as alternatives by many retailers due to their scale, prices, breadth of product offerings, and quality. As a result, Respondents are the first and second choices for most retail customers, and predominantly compete against each other to be a retailer’s private label producer.

33. Retail customers benefit from the competition between Respondents because they use this competition to secure lower prices for private label RTE cereal.

34. Private label competition can take place during a “request for proposal” (“RFP”) process, or through informal negotiations, or some combination of the two. Typically, the private label supply process begins with an RFP in which the retailer sets forth its requirements in terms of desired private label RTE cereal product, desired nutritional requirements (*e.g.*, no artificial coloring), package size, and terms of delivery and payment. Private label suppliers submit bids and the retailer selects the winner, based on a variety of factors, including price, quality, and service. Retailers typically allow suppliers to improve upon their initial offers in order to solicit the best possible price and other contract terms.

35. The following are just a few of the examples of direct price competition between TreeHouse and Post for retail customers:

- a. In March 2018, [REDACTED] and TreeHouse had a contract for private label RTE cereal that extended until October 2018. [REDACTED] inquired if Post could “[come] to the table with an aggressive box proposal” with the inducement of switching its business from TreeHouse to Post. Post noted that this would be an opportunity to “take volume from [REDACTED].” In an initial round of negotiations, Post offered to lower prices by [REDACTED] percent but this was insufficient to win [REDACTED] business away from TreeHouse. [REDACTED] subsequently opened its business up for bid and awarded [REDACTED] SKUs to Post from TreeHouse “based on competitive pricing.”
- b. In March 2018, [REDACTED] conducted an RFP process for [REDACTED] private label RTE cereal SKUs. At the time of the RFP, TreeHouse produced [REDACTED] for [REDACTED] and Post produced [REDACTED]. Following two rounds of bidding, [REDACTED] moved [REDACTED] from TreeHouse to Post due to better pricing by Post, generating annual savings of approximately \$[REDACTED] million.
- c. In 2018 and 2019, [REDACTED] issued an RFP to Post and TreeHouse for its [REDACTED], an emulation of Kellogg’s branded [REDACTED]. TreeHouse was the incumbent supplier of this product. In the initial round of bidding, Post submitted a lower price than TreeHouse’s opening offer in an attempt to win the business. TreeHouse responded “with a lower price, providing [REDACTED] with significant savings from its previous cost for [REDACTED].”
- d. [REDACTED]
- e. In 2018, TreeHouse attempted to increase prices to [REDACTED], which “prompted [REDACTED] to bring [Post] in to quote the business.” [REDACTED] notified TreeHouse that Post provided competitive pricing on roughly [REDACTED] supplied by TreeHouse. Ultimately, [REDACTED] moved most of its business to Post, resulting in a total savings of \$1.22 million relative to TreeHouse’s pricing.

## **B. The Proposed Acquisition Would Eliminate Non-Price Competition Between the Respondents**

36. Respondents also compete aggressively on non-price terms to win retail business by offering high-quality and innovative products. Both Post and TreeHouse seek to win business by establishing the quality of their formulations (taste, texture, consistency, etc.). In addition, retailers consider quality metrics when selecting their private label RTE cereal suppliers. For example, several retailers have sought to grow their private label sales and distinguish their private label RTE cereal offerings from those of competing retailers by offering “clean label” formulations, or formulations free of certain artificial ingredients and preservatives. Post and TreeHouse raced to develop new clean label formulas for [REDACTED], submitting their products to [REDACTED] for evaluation, and refining them until they were of very high quality.

37. The head-to-head competition between Respondents results in lower prices, higher quality, and more innovation in private label RTE cereal. By eliminating this competition, the Proposed Acquisition would harm retailer customers and end consumers.

## **C. Competition from Other Suppliers Will Not Replace the Competition Eliminated by the Proposed Acquisition**

38. Competition from other private label RTE cereal suppliers would not replace the competition lost by the Proposed Acquisition. Only one other supplier, Gilster-Mary Lee, imposes any meaningful constraint on Post or TreeHouse today.

39. Numerous retailers have indicated that Post and TreeHouse offer greater innovation and manufacture higher quality private label RTE cereal products than Gilster-Mary Lee, which is why these retailers have shifted business away from Gilster-Mary Lee in favor of TreeHouse and Post. Respondents’ own ordinary course documents confirm that they do not view Gilster-Mary Lee as an equal competitor, describing Gilster-Mary Lee as using “low quality inputs,” offering “poor emulations” and having “sub-par” quality and service. Consequently, for many retailers, Gilster-Mary Lee may not be an adequate alternative to Post and TreeHouse, and would therefore not be a meaningful constraint on Post if the Proposed Acquisition were consummated.

40. Although there are other private label RTE cereal suppliers in the United States, their presence would not prevent a price increase post-acquisition. Collectively, all other private label suppliers account for approximately [REDACTED] percent of private label RTE cereal sales in the United States. These low sales figures reflect the fact that retailers do not see these other suppliers as equivalent to Post, Treehouse, or even Gilster-Mary Lee.

41. Competition by national brands will also be insufficient to constrain post-acquisition price increases. While competition from branded RTE cereal does impose some competitive constraint on private label RTE cereal prices generally, and on Post and TreeHouse prices in particular, a large part of what constrains Post and Treehouse prices is competition from each other. Removing this constraint will likely result in substantial harm to retailers and consumers.

## VIII.

### LACK OF COUNTERVAILING FACTORS

42. Neither entry by new market participants or expansion by current market participants would be timely, likely, and sufficient to deter or counteract the likely anticompetitive effects of the Proposed Acquisition.

43. Entry by a branded RTE cereal manufacturer in private label is unlikely; thus, branded manufacturers will not offset the lost competition between Respondents. [REDACTED]

[REDACTED] Thus, it is highly unlikely that branded RTE cereal manufacturers will begin producing private label RTE cereal.

44. Successful and timely entry or expansion by international suppliers is also unlikely. Retailers have a strong preference for sourcing private label RTE cereal products domestically, and international suppliers lack meaningful name recognition with U.S. retailers. Other RTE cereal companies, including co-manufacturers and ingredient suppliers, are also unlikely to replace successfully the competition lost due to the Proposed Acquisition. Co-manufacturers produce limited RTE cereal products on behalf of national brands and do not market directly to retailers.

45. Retailers are also unlikely to self-manufacture their own private label RTE cereals due to the significant costs and capital investment required to own and operate RTE cereal production facilities.

46. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and evidence that the Proposed Acquisition likely would substantially lessen competition in the relevant market.

47. Respondents also cannot establish that TreeHouse's private label RTE cereal business will fail and its assets will exit the market absent the Proposed Acquisition.

## **IX.**

### **VIOLATION**

#### **COUNT I – ILLEGAL AGREEMENT**

48. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

49. The Proposed Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

#### **COUNT II – ILLEGAL ACQUISITION**

50. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

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

### **NOTICE**

Notice is hereby given to the Respondents that the twenty-seventh day of May, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC, 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

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

provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

### **NOTICE OF CONTEMPLATED RELIEF**

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Proposed Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Proposed Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as Post and TreeHouse were offering and planning to offer prior to the Proposed Acquisition.
2. A prohibition against any transaction between Post and TreeHouse that combines their businesses in the relevant market, except as may be approved by the Commission.
3. A requirement that, for a period of time, Post and TreeHouse provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.
4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore TreeHouse as viable, independent competitor in the relevant market.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this nineteenth day of December, 2019.

By the Commission.

April J. Tabor  
Acting Secretary

SEAL: