

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

**COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill**

**In the Matter of
WESTERN DIGITAL CORPORATION,
a corporation.**

Docket No. C-4350

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Western Digital Corporation (“WD” 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 Respondents 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 Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents 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 to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

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 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, 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 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.
- G. “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.

- H. “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.
- I. “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.
- J. “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.
- K. “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.
- L. “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.
- M. “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.
- N. “Employee Access Period” means the later of:
1. one hundred fifty (150) days from the Closing Date; or
 2. the date that is sixty (60) days after the date the Acquirer transfers six (6) Primary Production Lines and such lines have been qualified as provided in the Transition Services Agreement Schedule 2.01 Part D.
- O. “Geographic Territory” means worldwide.
- P. “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.
- Q. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- R. “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.
- S. “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.
- T. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- U. “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.
- V. “Remedial Agreement(s)” means:
1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to the proposed Decision and 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

proposed Decision and Order in connection with the Commission's determination to make the proposed Decision and 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.
- W. "Third Party(ies)" means any non-governmental Person other than Respondent or the Acquirer.
- X. "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.
- Y. "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.

II.

IT IS FURTHER ORDERED that from the Acquisition Date:

- A. Respondent shall maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets, and shall prevent the destruction, removal, wasting, deterioration, or impairment of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair the 3.5 Inch HDD Products Business Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the businesses related to the 3.5 Inch HDD Products Business Assets.
- B. Respondent shall maintain the operations of the 3.5 Inch HDD Products Business Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such businesses) and shall use its best efforts

to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; employees; and others having business relations with the 3.5 Inch HDD Products Business Assets. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing the 3.5 Inch HDD Products Business Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the 3.5 Inch HDD Products Business Assets;
 2. continuing, at least at their scheduled pace, any additional expenditures for the 3.5 Inch HDD Products Business Assets, authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all marketing and sales expenditures;
 3. providing such resources as may be necessary to respond to competition against the 3.5 Inch HDD Products Business Assets and/or to prevent any diminution in sales of 3.5 Inch HDD Products prior to divestiture;
 4. making available for use by the 3.5 Inch HDD Products Business Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of the 3.5 Inch HDD Products Business Assets;
 5. providing the 3.5 Inch HDD Products Business Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business;
 6. providing such support services to the 3.5 Inch HDD Products Business Assets as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent; and
 7. maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the 3.5 Inch HDD Products Business Assets for the last fiscal year.
- C. Until the Closing Date, Respondent shall provide all 3.5 Inch HDD Products Business Employees with reasonable financial incentives to continue in their positions and to research, develop, and manufacture the 3.5 Inch HDD Products consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the 3.5 Inch HDD Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by HGST until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by applicable law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the 3.5 Inch HDD Products Business.

- D. 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.
- E. 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.
- F. 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.
- G. 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.

H. Pending divestiture of the 3.5 Inch HDD Products Business Assets, Respondent shall:

1. not use, directly or indirectly, any Confidential Business Information related to 3.5 Inch HDD Products Business other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondent's obligations to the Acquirer under the terms of any Remedial Agreement related to the 3.5 Inch HDD Products Business; or (3) applicable law;
2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or Persons specifically authorized by the Acquirer or the Commission to receive such information; and
3. 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.

I. Respondent shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary from or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondent under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

J. The English-language versions of all Remedial Agreements, as submitted to and approved by the Commission and attached to the proposed Decision and Order, shall be the versions of such agreements used in interpreting and enforcing this Order.

K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the 3.5 Inch HDD Products Business Assets within the Geographic Territory through their full transfer and delivery to the Acquirer, to minimize any risk of loss of competitive potential for the 3.5 Inch HDD Products Business Assets within the Geographic Territory, and to prevent the destruction, removal, wasting,

deterioration, or impairment of any of the 3.5 Inch HDD Products Business Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of their responsibilities as required by this Order to Maintain Assets, the proposed Decision and Order (collectively, “Orders”), and the Remedial Agreements.
- B. The Commission appoints ING Financial Markets LLC (“ING”) as Interim Monitor and approves the Monitor Agreement executed between ING and Respondent which agreement, *inter alia*, names Philip Comerford, Jr., as ING designated Project Manager.
- C. Respondent shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order to Maintain Assets, and shall take no action that interferes with or hinders the Interim Monitor’s authority, rights or responsibilities as set forth herein or any agreement between the Interim Monitor and Respondent.
- D. The Interim Monitor’s duties and responsibilities shall include the following:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondent’s compliance with: the divestiture and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified Confidential Business Information under the Orders; and, the related requirements of the Orders. The Interim Monitor 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 the Orders and in consultation with the Commission;
 - 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 3. 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 the Orders;
 - 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 normal 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 the Orders, including, but not

limited to, its obligations related to the 3.5 Inch HDD Products Business Assets. Respondent shall cooperate with all reasonable requests 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 the Orders;

5. the Interim Monitor shall serve, without bond or other security, at the expense of Respondents, 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;
 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 Respondents, and any reports submitted by an Acquirer with respect to the performance of Respondents' obligations under the Orders or any Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; and
 8. 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*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. 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 related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. 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.

- G. 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 the Orders.
- H. The Interim Monitor shall serve until termination of this Order to Maintain Assets pursuant to Paragraph VII.
- I. The Interim Monitor appointed pursuant to this Order may be the same person appointed as: (1) an Interim Monitor pursuant to Paragraph III of the proposed Decision and Order; or (2) a Divestiture Trustee pursuant to Paragraph IV of the proposed Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondent has fully complied with its obligations to divest, license, transfer and/or grant assets as required by the proposed Decision and Order in this matter, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related proposed Decision and Order; *provided, however*, that, after the proposed Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as the reports required to be submitted by Respondent pursuant to the Decision and Order.

V.

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.

VI.

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.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

- A. the day after the divestiture of all 3.5 Inch HDD Products Business Assets, as required by and described in the proposed Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer, notified the Commission that all assignments, conveyances, deliveries, grants, license, transactions, transfers and other transitions related to such divestiture are complete;
- B. the day the proposed Decision and Order becomes final; or
- C. the Commission otherwise directs that this Order to Maintain Assets be terminated;

provided, however, if the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of the Commission Rule 2.34, 16 C.F.R. § 2.34, this Order to Maintain Assets shall terminate no later than three (3) days after such action by the Commission.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: March 5, 2012