

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



In the Matter of

Post Holdings, Inc.  
a corporation,

and

TreeHouse Foods, Inc.  
a corporation.

Docket No. 9388

**TREEHOUSE FOODS, INC.’S ANSWER TO THE  
FEDERAL TRADE COMMISSION’S PART 3 COMPLAINT**

Defendant TreeHouse Foods, Inc. (“TreeHouse”), by and through its counsel, answers the Federal Trade Commission’s (“FTC”) Part 3 Complaint 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”).

**Response to Complaint No. 1:** TreeHouse admits it is a manufacturer and distributor of private label RTE cereal in the United States through its subsidiary TreeHouse Private Brands, Inc.

TreeHouse admits it entered into an Asset Purchase Agreement with Post Consumer Brands LLC to sell TreeHouse’s RTE cereal assets for [REDACTED]. TreeHouse denies that private label RTE

cereal in the United States is a proper product market, and denies that it is one of only three

significant manufacturers. The Kellogg Company (“Kellogg’s”), General Mills, Inc. (“General

Mills”), and PepsiCo, Inc./Quaker (“Quaker”) all are much more significant manufacturers of

RTE cereal than either Post or TreeHouse, and Post and TreeHouse compete with them head-to-

head. TreeHouse’s sales of RTE cereal in the United States comprise less than ██████ percent of total sales by dollar value. TreeHouse denies the remaining allegations in Paragraph 1.

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’s 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.

**Response to Complaint No. 2:** TreeHouse admits that it competes with Post, but denies that Post is its closest competitor. TreeHouse admits that the FTC correctly quotes a portion of its sales document, the Confidential Information Presentation (“CIP”), which described TreeHouse as the “#1 U.S. Private label RTE Cereal Manufacturer,” but denies this is evidence of a private-label only RTE cereal product market, or evidence that Post is its closest competitor. TreeHouse further admits that “largest private label competitor” and “major threat” are accurate quotes from TreeHouse documents. TreeHouse further states that it has voluminous internal business documents demonstrating that TreeHouse competes vigorously with branded RTE cereal manufacturers—Kellogg’s, General Mills, and Quaker—as well as other manufacturers like Gilster Mary-Lee Corporation (“Gilster”), Brügglen, Hearthside Foods, California Cereal Products, Organic Milling, and others. TreeHouse lacks knowledge and information sufficient to admit or deny the contents of Post’s internal business documents, and, therefore, denies the allegations relating to such documents. TreeHouse denies the remaining allegations in Paragraph 2.

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 retailer and their customers post-acquisition.

**Response to Complaint No. 3:** TreeHouse lacks knowledge and information sufficient to admit or deny information pertaining to retailers' beliefs about Respondents and retailers' business strategies and, therefore, denies them. TreeHouse admits that it competes against Post.

TreeHouse further states that retailers have many options for RTE cereal, and frequently switch from private label to branded cereal manufacturers or discontinue private label items in favor of branded RTE cereal items. TreeHouse denies the remaining allegations in Paragraph 3.

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.

**Response to Complaint No. 4:** TreeHouse denies the allegations of Paragraph 4 that there is a relevant market for the sale of private label RTE cereal, that the merger is presumptively anticompetitive, that in a properly defined relevant market there is high concentration, or that the merger would significantly increase concentration. To the extent the allegations relate to the Horizontal Merger Guidelines, TreeHouse refers to the Horizontal Merger Guidelines themselves for their true and complete content. To the extent that a response is required as to the allegations about the Horizontal Merger Guidelines, TreeHouse denies that Paragraph 4 provides a true and complete characterization of the Horizontal Merger Guidelines, that Paragraph 4 properly applies

the Horizontal Merger Guidelines to this case, or that the Horizontal Merger Guidelines can establish that a merger is presumptively anticompetitive as a legal matter.

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.

**Response to Complaint No. 5:** TreeHouse denies the allegations in Paragraph 5. TreeHouse further states that entry or expansion by current market participants would be quick, likely, and sufficient to deter or counteract any anticompetitive effects, evidenced by the numerous examples of branded and other manufacturers entering private label manufacturing at a retailer’s request, including in RTE cereal and adjacent categories. For example, Post began manufacturing private label RTE cereal at a large retailer’s request. Similar examples abound in other categories. Manufacturers with current RTE cereal capabilities—of which there are at least ten in the United States alone—could begin producing private label cereal with minimal capital investment.

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.

**Response to Complaint No. 6:** TreeHouse denies the allegations in Paragraph 6. TreeHouse further answers that the Proposed Acquisition will generate substantial merger-specific efficiencies resulting primarily from shifting production among facilities formerly owned by separate entities that will be combined into one entity. These efficiencies outweigh any hypothetical adverse competitive effects.

## 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.

**Response to Complaint No. 7:** The allegations in Paragraph 7 are legal conclusions to which no response is required.

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

**Response to Complaint No. 8:** The allegations in Paragraph 8 are legal conclusions to which no response is required.

### 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 products. In fiscal year 2018, Post Consumer Brands' retail sales of private label RTE cereal were approximately [REDACTED].

**Response to Complaint No. 9:** TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 9 and, therefore, denies them.

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 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].

**Response to Complaint No. 10:** TreeHouse admits that it is headquartered in in Oak Brook, Illinois, and is a publicly traded corporation organized under the laws of Delaware. TreeHouse admits that it is a leading manufacturer of private label food and beverage products across multiple categories, with total annual revenues of approximately \$5.8 billion in 2018.

TreeHouse admits that it is, or recently was, the largest manufacturer of private label RTE cereal in the United States through its TreeHouse Private Brands, Inc. subsidiary, but denies that private label RTE cereal is a relevant product market. TreeHouse states that its revenue from sales of RTE cereal in 2018 was [REDACTED], and states that its sales of RTE cereal declined by nearly [REDACTED] on an annual basis between 2016 and 2019. TreeHouse denies the remaining allegations in Paragraph 10.

#### 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].

**Response to Complaint No. 11:** TreeHouse admits that Post and TreeHouse signed an Asset Sale Agreement on May 1, 2019, pursuant to which Post will acquire TreeHouse's private label RTE cereal assets for approximately [REDACTED]. TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 11 and, therefore, denies them.

#### 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.

**Response to Complaint No. 12:** TreeHouse denies the allegations in Paragraph 12.

#### A.

#### **Relevant Product Market**

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

**Response to Complaint No. 13:** TreeHouse denies the allegations in Paragraph 13.

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.

**Response to Complaint No. 14:** TreeHouse admits that Post and TreeHouse each manufacture and sell RTE cereal. TreeHouse admits that 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. TreeHouse admits that RTE cereal is dry and sold in a variety of packaging, including boxes and bags, and can be consumed dry or with milk. TreeHouse admits that RTE cereal has approximately 90 percent household penetration, but states that its consumption has plummeted in the last few years and it continues to lose consumers year over year. TreeHouse denies the remaining allegations in Paragraph 14.

15. Respondents do not sell their RTE cereal products to end consumers. Instead, both Respondents compete to sell their RTE cereal to 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.

**Response to Complaint No. 15:** TreeHouse admits that it sells RTE cereal to retailers, and that some retailers purchase through cooperatives, although denies that it sells RTE cereal to only retailers. TreeHouse further admits that private label RTE cereal is sold to end consumers with labels that TreeHouse's customers own, and that TreeHouse does not own or otherwise control.

TreeHouse denies the remaining allegations in Paragraph 15.

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.

**Response to Complaint No. 16:** TreeHouse admits that certain retailers offer store-brand or private label RTE cereal, and that some store-brand labels are available at only one retailer.

TreeHouse admits that it competes with national brand RTE cereal manufacturers on price, with the goal of offering a lower-cost alternative to end consumers. TreeHouse denies the remaining allegations in Paragraph 16.

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.

**Response to Complaint No. 17:** TreeHouse admits the allegations in Paragraph 17.

18. While there may be some taste, appearance or quality differences between the branded 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.

**Response to Complaint No. 18:** TreeHouse admits that private label RTE cereal manufacturers compete head-to-head with branded RTE cereal manufacturers, both on price and non-price terms. TreeHouse further admits that private label RTE cereal manufacturers must price products at a significant discount to branded RTE cereal for retailers to consider purchasing private label RTE cereal. TreeHouse further admits that retailers offer private label RTE cereal to end consumers at a significant discount to branded RTE cereal because end consumers demand private label RTE cereal be priced lower than branded. TreeHouse lacks knowledge and information sufficient to admit or deny the remaining allegations in Paragraph 18 and, therefore, denies them.

19. Generally, 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.

**Response to Complaint No. 19:** TreeHouse lacks knowledge and information sufficient to admit or deny the allegations in Paragraph 19 and, therefore, denies them.

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.

**Response to Complaint No. 20:** TreeHouse denies the allegations in Paragraph 20. TreeHouse further states that in addition to retailers switching from private label RTE cereals to branded RTE cereal, end consumers would switch from private label RTE cereal to branded RTE cereal if private label RTE cereal prices increased, and that this switching by end consumers must be considered in analyzing whether a SSNIP is profitable.

21. The relevant market does not include "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.

**Response to Complaint No. 21:** TreeHouse lacks knowledge and information sufficient to admit or deny the allegations in Paragraph 21 pertaining to retailers' views and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 21. TreeHouse further states that in addition to retailers switching from conventional private label RTE cereal to natural and organic RTE cereal, end consumers would switch from conventional private label RTE cereal to natural and organic RTE cereal if conventional private label RTE cereal prices increased, and

that this switching by end consumers must be considered in analyzing whether a SSNIP is profitable.

## **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.

**Response to Complaint No. 22:** TreeHouse denies the allegations in Paragraph 22.

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 national 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.

**Response to Complaint No. 23:** TreeHouse admits that it sells RTE cereal throughout the United States. TreeHouse admits that it sells private label RTE cereal to U.S. retailers within the United States, and that many large retailers have locations in multiple regions. TreeHouse lacks knowledge and information sufficient to admit or deny the allegations pertaining to Post's distribution and sales and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 23.

## **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.

**Response to Complaint No. 24:** TreeHouse admits that both Post and TreeHouse manufacture private label RTE cereal, but denies that the sale of private label RTE cereal to retailers in the

United States is a relevant product market. TreeHouse lacks knowledge and information sufficient to admit or deny the remaining allegations in Paragraph 24 and, therefore, denies them.

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, Brügglen, accounts for less than one percent of private label RTE cereal sales in the United States.

**Response to Complaint No. 25:** TreeHouse admits that Gilster is a meaningful RTE cereal supplier. TreeHouse denies the remaining allegations in Paragraph 25.

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 ██████████.

**Response to Complaint No. 26:** TreeHouse denies the allegations in Paragraph 26 because the shares purport to describe a “market” that does not exist.

27. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the “Merger Guidelines”) and courts typically measure concentration using the Herfindahl-Hirschman Index (“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.

**Response to Complaint No. 27:** TreeHouse denies the allegations in Paragraph 27.

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.

**Response to Complaint No. 28:** TreeHouse denies the allegations in Paragraph 28.

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

**Response to Complaint No. 29:** TreeHouse denies the allegations in Paragraph 29.

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

**Response to Complaint No. 30:** TreeHouse denies the allegations in Paragraph 30.

## 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.

**Response to Complaint No. 31:** TreeHouse denies the allegations in Paragraph 31.

#### 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.

**Response to Complaint No. 32:** TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding how retailers view purchasing decisions and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 32.

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

**Response to Complaint No. 33:** TreeHouse denies the allegations in Paragraph 33.

34. Private label competition can take place during a "request for proposal" (or 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.

**Response to Complaint No. 34:** TreeHouse admits that it responds to requests for proposals, responds to informal requests for pricing, and submits bids to retailers. TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding how retailers select RTE cereal suppliers and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 34.

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

[REDACTED]

c. In 2018 and 2019, [REDACTED] issued an RFP to Post and TreeHouse for its [REDACTED] [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]

- [REDACTED]
- [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 [REDACTED] [REDACTED] supplied by THS. Ultimately, [REDACTED] moved most of its business to Post, resulting in a total savings of \$1.22 million relative to TreeHouse’s pricing.

**Response to Complaint No. 35:** TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding the contents of Post’s ordinary course documents or retailers’ statements and, therefore, denies any allegations based on them. As to Paragraph 35(a), TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations, and, therefore, denies them. As to Paragraph 35(b), TreeHouse admits [REDACTED] conducted an RFP process in March 2018, but lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations, and, therefore, denies them. As to Paragraph 35(c), TreeHouse admits that [REDACTED] conducted RFP processes in 2018 and 2019, but lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations, and, therefore, denies them. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As to Paragraph 35(e), TreeHouse admits that it accurately reflects portions of a TreeHouse document, but lacks knowledge and information sufficient to form a belief as to the truth of the allegation regarding [REDACTED] savings. TreeHouse understands that it has lost RTE cereal sales to branded manufacturers, to private label manufacturers, and because retailers discontinued certain items altogether. To the extent TreeHouse lost sales to Post or any other manufacturer, it lacks knowledge and information sufficient to form a belief as to the truth of the

allegations regarding which manufacturer(s) won business that TreeHouse lost and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 35.

## **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] cereals, submitting their products to [REDACTED] for evaluation, and refining them until they were of very high quality.

**Response to Complaint No. 36:** TreeHouse admits that it competes with all manufacturers of RTE cereal on non-price terms including quality (taste, texture, consistency, etc.). TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding Post, or what retailers consider when selecting RTE cereal suppliers, and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 36.

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.

**Response to Complaint No. 37:** TreeHouse denies the allegations in Paragraph 37.

## **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.

**Response to Complaint No. 38:** TreeHouse admits that Gilster imposes a meaningful constraint on TreeHouse, but denies that it is the only other supplier besides Post that imposes a constraint.

TreeHouse denies the remaining allegations in Paragraph 38.

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.

**Response to Complaint No. 39:** TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations about what retailers have indicated to the FTC and, therefore, denies them. TreeHouse admits that the FTC has quoted selected portions of TreeHouse documents, but denies that the documents support the FTC's position that Gilster is not an equal competitor. TreeHouse denies the remaining allegations in Paragraph 39.

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.

**Response to Complaint No. 40:** TreeHouse denies the allegations in Paragraph 40. Answering further, TreeHouse states that retailers and other RTE cereal manufacturers would prevent any price increase post-acquisition. Specifically, retailers typically do not accept price increases in RTE cereal, and will discontinue private label items or move to a branded manufacturer before accepting a price increase.

41. Competition by national brands will also be insufficient to constrain post-acquisition price increases. While competition from branded 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.

**Response to Complaint No. 41:** TreeHouse admits that competition from branded cereal manufacturers imposes a competitive constraint. TreeHouse denies the remaining allegations in Paragraph 41.

## 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.

**Response to Complaint No. 42:** TreeHouse denies the allegations in Paragraph 42.

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]

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

**Response to Complaint No. 43:** TreeHouse lacks knowledge and information sufficient to admit or deny the allegations in Paragraph 43 pertaining to the operations of [REDACTED]

[REDACTED] and, therefore, denies them, but states that Post began manufacturing private label RTE cereal at a retailer's request and that [REDACTED]

[REDACTED]

[REDACTED] TreeHouse denies the remaining allegations in Paragraph 43.

44. Successful and timely entry or expansion by international suppliers are 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.

**Response to Complaint No. 44:** TreeHouse lacks knowledge and information sufficient to form a belief as to the truth of the allegations regarding what retailers prefer and, therefore, denies them. TreeHouse denies the remaining allegations in Paragraph 44.

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.

**Response to Complaint No. 45:** TreeHouse denies the allegations in Paragraph 45, but states that retailers commonly self-manufacture private label items in other categories.

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.

**Response to Complaint No. 46:** TreeHouse denies the allegations in Paragraph 46.

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.

**Response to Complaint No. 47:** TreeHouse denies the allegations in Paragraph 47.

## **IX.**

### **VIOLATION**

#### **COUNT I - ILLEGAL AGREEMENT**

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

**Response to Complaint No. 48:** TreeHouse repeats its responses to each of the allegations contained in Paragraphs 1 through 47 as if they were stated in this Paragraph.

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.

**Response to Complaint No. 49:** TreeHouse denies the allegations in Paragraph 49.

## **COUNT II - ILLEGAL ACQUISITION**

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

**Response to Complaint No. 50:** TreeHouse repeats its responses to each of the allegations contained in Paragraphs 1 through 47 as if they were stated in this Paragraph.

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.

**Response to Complaint No. 51:** TreeHouse denies the allegations in Paragraph 51.

### **AFFIRMATIVE DEFENSES**

The inclusion of any ground within this section does not constitute an admission that TreeHouse bears the burden of proof on each or any of the matters, nor does it excuse the FTC from establishing each element of its purported claim for relief.

#### **FIRST AFFIRMATIVE DEFENSE**

The FTC fails to allege a proper product market.

#### **SECOND AFFIRMATIVE DEFENSE**

The Complaint fails to comply with the requirements of Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §45(b) because the contemplated relief would not be in the public interest.

#### **THIRD AFFIRMATIVE DEFENSE**

Efficiencies and other procompetitive benefits resulting from the acquisition outweigh any and all proffered anticompetitive effects.

#### **FOURTH AFFIRMATIVE DEFENSE**

Any presumption of anticompetitive effects is rebutted by numerous factors, including, without limitation, the lack of substantial barriers to entry or expansion, the existence of numerous competing manufacturers in RTE cereal, the economic incentive and ability of large retailers to encourage branded manufacturers to enter private label, and the retailers' leverage and ability to resist or deny any attempted price increase.

#### **FIFTH AFFIRMATIVE DEFENSE**

[REDACTED]

[REDACTED]

[REDACTED]

#### **SIXTH AFFIRMATIVE DEFENSE**

[REDACTED]

#### **OTHER DEFENSES**

TreeHouse reserves the right to assert any other defenses as they become known to TreeHouse.

WHEREFORE, TreeHouse respectfully requests the Commission:

- i. deny the FTC's contemplated relief;
- ii. dismiss the Complaint in its entirety with prejudice;
- iii. award TreeHouse the costs of defending this suit, including attorneys' fees;  
and
- iv. award any other relief as the Commission deems just and proper.

Dated: January 3, 2020

/s Raymond A. Jacobsen, Jr. \_\_\_\_\_

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*Attorneys for Defendant TreeHouse Foods,  
Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that, on January 3, 2020, I served the TREEHOUSE ANSWER TO POST-TREEHOUSE PART 3 COMPLAINT on all counsel of record via email.

/s Stephen Wu

Stephen Wu

Notice of Electronic Service

**I hereby certify that on January 03, 2020, I filed an electronic copy of the foregoing TreeHouse Answer to Post-TreeHouse Part 3 Complaint [Public Redacted Version], with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on January 03, 2020, I served via E-Service an electronic copy of the foregoing TreeHouse Answer to Post-TreeHouse Part 3 Complaint [Public Redacted Version], upon:**

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