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**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

GTCR BC HOLDINGS, LLC,

and

SURMODICS, INC.

Docket No. 9440

**RESPONDENT GTCR BC HOLDINGS, LLC'S ANSWER AND DEFENSES**

Pursuant to Rule 3.12, Respondent GTCR BC Holdings, LLC ("BC Holdings") hereby answers the Commission's Complaint.

**Introduction**

Acquiring Surmodics is a procompetitive addition to Biocoat that will combine *complementary* capabilities that support the manufacture of medical devices by, among other things, enhancing research and development and improving operations and supply-chain resiliency, ultimately benefitting customers, clinicians, and patients. In opposing the acquisition, the FTC misses the reality of competition to coat medical devices in four ways:

- (1) The FTC alleges that thermally-cured and UV-cured hydrophilic coatings readily substitute for one another and compete head-to-head. They don't: They require completely different customer equipment and have structurally different chemistries.
- (2) The FTC carves hydrophobic coatings out of its market. But its primary reason for doing so, that the heat needed to cure them can damage devices, applies to thermally-cured hydrophilic coatings as well. And it ignores that Biocoat competes today to replace hydrophobic coatings on guidewires and the inner diameter of catheters.

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- (3) The FTC dismisses customers' in-house coatings. But the reality is that in-house coatings are a threat that customers wield against the companies to get better terms.
- (4) To claim a presumption, the FTC bases market shares on revenues from competitive wins more than a decade old. But shares must reflect future competitive significance. Even the FTC acknowledges that customers don't switch coatings on commercialized devices, and the FTC's logic ignores recent major platform wins by other competitors.

The evidence Respondents will adduce at trial will show that the acquisition will not harm competition, and the FTC will fail to carry its burden of proof.

*First*, contrary to the FTC's complaint, which paints Biocoat's thermally-cured hydrophilic coating and Surmodics's UV-cured hydrophilic coating as "head-to-head" competitive products by quoting snippets of documents out of context and mischaracterizing sales activities, there is no single market for "hydrophilic coatings." The FTC correctly explains that the general purpose of hydrophilic coatings is to make medical devices like catheters more slippery ("lubricious"), so they can more easily pass through the body. But the FTC ignores that Biocoat's thermally-cured and Surmodics's UV-cured coatings are very different from each other and so are in different markets and target different devices.

The curing methodology is not an extraneous detail: thermally-cured and UV-cured hydrophilic coatings are used in different manufacturing processes with different cost profiles, work best in different situations, and have structurally different chemistries. UV-cured coatings are applied as part of a device's production process, then exposed to UV radiation to cure, typically for less than a few minutes. Thermally-cured coatings, by contrast, are applied in batches off the production line and are cured in large ovens at high temperatures: first for the base coat and again after the top coat is applied, for a total of forty minutes or more, significantly

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limiting the production rate of devices relative to UV curing. This is among the reasons that these coatings target distinct medical devices. These factors have profound impacts on the feasibility and applicability of curing methodology and are why thermally-cured and UV-cured coatings are not interchangeable in the real world:

- As described above, thermally-cured and UV-cured coatings require completely different equipment to cure the coatings. Medical device manufacturers that sell the most devices own coating equipment already. For manufacturers with UV-curing equipment—which is the vast majority—switching to an alternative UV-cured coating is a drop-in replacement. By contrast, switching to a thermally-cured coating would require the customer to acquire or replace millions of dollars of capital equipment, and is therefore almost never a commercially feasible option. And vice versa.
- As even the FTC concedes, certain applications are categorically excluded from either of these methods. UV curing cannot be employed if light cannot reach all of the device’s surfaces. Thermal curing cannot be employed where heat would damage the device, such as on devices that include soft polymers that are heat-sensitive.
- The chemistry of the coatings, and thus how they interact with the medical devices they coat, is also completely different. Medical device manufacturing customers must test which coating will work on a given device before they choose a supplier. In the coatings industry, this is typically called “feasibility testing.” Customers rarely test the same devices with both companies. But, in those few instances where they have, it is even rarer for both a thermally-cured coating and a UV-cured coating to come through this testing successfully and thus be realistic substitutes for the customers.

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These clear differences between thermally-cured and UV-cured coatings led Biocoat, in 2018, to conclude that its thermally-cured coating technology left it unable to access the 80% of customer demand for hydrophilic coatings served by UV-cured coatings. To compete for that portion of demand, Biocoat did not (and cannot today) rely on its thermal technology as an alternative for UV customers, and instead attempted to develop its own UV-cured coating. Biocoat's UV-cured coating has significantly underperformed expectations, however; Harland, DSM, ISurTec, Surface Solutions Group, Teleflex, Freudenberg, and many others all sell more UV-cured coatings than Biocoat.

The parties' track record confirms the lack of close competition. If Biocoat's thermally-cured coating were truly a powerful, number-two, direct competitor to Surmodics, then Biocoat would have been contesting and winning big, major device platforms from Surmodics. It hasn't. Meanwhile, the FTC's complaint minimizes competitors who are indeed winning those same contracts by using UV-cured coatings that are drop-in replacements for Surmodics. For example, DSM successfully converted Penumbra's catheter platform, which Penumbra itself labels the "dominant market leader," while Harland won a new Stryker-owned peripheral vascular device platform and a new Johnson & Johnson-owned cardiovascular platform that Surmodics had contested.

To avoid grappling with these technical and commercial realities, the Complaint mischaracterizes events and cherry-picks quotes. For example, the FTC cites one opportunity to coat a guidewire in paragraph 60(c), where the customer asked about a Biocoat coating because it was experiencing issues with Surmodics's UV-cured coating. But the FTC neglects to mention critical facts—including that this was Biocoat's nascent UV-cured (not thermally-cured) coating, which did attempt to directly compete with Surmodics but ultimately unsuccessfully. Similarly,

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the FTC conflates products being tested for basic compatibility with actual competition. For example, the FTC cites an example of alleged competitive pricing in paragraph 68(b) of the Complaint. But, critically, Biocoat's coating failed to work on that customer's device and therefore offered no competition. And, although the customer disclosed Biocoat's pricing to Surmodics, Surmodics ignored it. This is evidence that Biocoat's thermally-cured coatings and Surmodics's UV-cured coatings do *not* compete, not evidence that they do.

*Second*, the FTC's attempt to carve hydrophobic coatings out of its purported market also relies on factors that, if applied, would just as plausibly exclude thermally-cured hydrophilic coatings. For example, while the FTC explains that applying PTFE, a hydrophobic coating, can damage some devices, the FTC neglects to explain that this is because PTFE is bonded to devices in ovens at high temperatures—a risk also present for thermally-cured hydrophilic coatings. Furthermore, PTFE is the most common method applied to add lubricity to guidewires and the inner diameters of catheters today, and the FTC's "market" ignores that Biocoat's thermally-cured hydrophilic coating competes to replace hydrophobic coatings in these applications. In fact, Biocoat's own "base coat" is itself hydrophobic. The reality is that thermally-cured and UV-cured hydrophilic coatings are no closer to one another than they are to hydrophobic coatings, so the FTC's proposed market is both over- and under-inclusive.

In sum, Biocoat's thermally-cured and Surmodics's UV-cured coatings are not meaningful substitutes for each other, and the FTC cannot manipulate them into a single, "goldilocks" market large enough to include both thermally-cured and UV-cured coatings yet somehow small enough to exclude hydrophobic coatings. Either the markets are technology-specific—in which case Biocoat's and Surmodics's products are largely in separate markets and this merger creates little overlap. Or the market is a broader lubricious coatings market that

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includes hydrophobic coatings, which are the most common coating on many of the types of products that the FTC itself cites, such as guidewires. Either way, the merger has no potential for competitive harm.

*Third*, there is no “outsourced” market. The FTC ignores that medical device makers—companies that are orders of magnitude larger than the merging firms—in many cases provide their own lubricious coatings in-house. Party documents (that the FTC fails to cite in its complaint) reflect worry about losing sales to customers providing their own coatings. For example, Biocoat’s largest customer cited the possibility of using its in-house coating—not Surmodics or any other outsourced coating provider—to gain pricing leverage over Biocoat when renegotiating its long-term contract with Biocoat.

*Finally*, even in the FTC’s gerrymandered market, its alleged market shares fail the Supreme Court’s requirement that shares must reflect future competitive significance, not the leftover results of long-past events. In the medical coatings industry, customers rarely switch coatings for device platforms that are already FDA approved—a fact that even the FTC admits. Furthermore, coatings suppliers’ sales in any given time period are determined by the underlying sales of the medical devices they coat. As a result, the FTC’s purported market shares are based on sales figures largely reflecting that customers years or even decades ago happened to select Biocoat’s or Surmodics’s coatings for medical devices that ended up later selling well. But those customers’ long-past choices that are still producing revenues for the companies have nothing to do with the competition at issue here: namely, which coatings customers today will select for new devices with high commercial potential. Said simply, the vast majority of Biocoat’s commercial revenue comes from platforms that Biocoat won ten years ago or more, so the

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revenue on which the FTC's supposed presumption sits is derived from opportunities that customers decided in the distant past.

In sum, the complaint's allegations are divorced from both the technical and commercial realities of how competition to coat medical devices works in the real world, and the FTC is not entitled to a preliminary injunction to block this procompetitive transaction.

### **Response to the Complaint's Specific Allegations**

All allegations not expressly admitted herein are denied. Further, any allegation relying on the term "outsourced hydrophilic coatings market" is denied on the ground that term is vague and intertwined with legal conclusions. BC Holdings does not interpret the introduction, headings, subheadings, Notice, or Notice of Contemplated Relief in the Complaint as well-pled allegations to which any response is required. To the extent such a response is required, they are denied. BC Holdings reserves the right to amend and/or supplement this Answer.

Each paragraph below corresponds to the same-numbered paragraph in the Complaint:

1. BC Holdings admits that in 2022 it acquired a majority stake in Biocoat, Inc. and that Biocoat provides hydrophilic coatings in the United States. BC Holdings admits that it has proposed to acquire Surmodics, Inc. and that Surmodics provides hydrophilic coatings in the United States. BC Holdings otherwise denies the allegations in this paragraph.

2. BC Holdings admits that hydrophilic coatings are applied to interventional devices, that catheters and guidewires are examples of interventional devices, and that interventional devices may be used in certain procedures. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

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3. BC Holdings admits the allegations in the first and second sentence. The term “vast majority” is vague, and BC Holdings denies the allegations in the third sentence on that ground. BC Holdings otherwise denies the allegations in this paragraph.

4. Denied.

5. BC Holdings admits that Surmodics and Biocoat provide hydrophilic coatings. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings admits that the quoted statement in the third sentence was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings denies the existence of an “outsourced hydrophilic coatings market” and otherwise denies the allegations in this paragraph.

6. Denied.

7. BC Holdings admits that the quoted statement in the second sentence was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings otherwise denies the allegations in this paragraph.

8. BC Holdings admits the quoted statement in the third sentence was made but only insofar as Surmodics is the only UV-cured hydrophilic coating supplier with public financial information. BC Holdings admits the quoted statements in the fourth sentence were made with respect to Biocoat’s UV-cured hydrophilic coatings. BC Holdings respectfully refers the Court to the full documents referenced by the Complaint in the third and fourth sentences for a full and accurate view of the statements. BC Holdings lacks knowledge or information to form a belief as to the truth of the allegations in the fifth and sixth sentences. BC Holdings denies the



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allegations in the seventh sentence with respect to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC

Holdings otherwise denies the allegations in this paragraph.

9. Denied.

10. This paragraph contains a legal argument to which no response is required. To the extent a response is required, BC Holdings denies the allegations.

11. This paragraph contains a legal argument to which no response is required. To the extent a response is required, BC Holdings denies the allegations.

12. Denied.

13. BC Holdings admits that it announced a majority investment in Biocoat on November 2, 2022. BC Holdings otherwise denies the allegations in this paragraph.

14. BC Holdings admits the allegations in the first, third, and fourth sentences. BC Holdings admits that Biocoat has coating products and coating services segments. BC Holdings otherwise denies the allegations in this paragraph.

15. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

16. Admitted.

17. Admitted.

18. BC Holdings admits that hydrophilic coatings are a small part of the overall cost of a medical device and the allegations in the second sentence. BC Holdings otherwise denies the allegations in this paragraph.

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19. BC Holdings admits that lubricity, particulate count, and durability may be relevant criteria for assessing a hydrophilic coating's performance. BC Holdings otherwise denies the allegations in this paragraph.

20. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences. BC Holdings otherwise denies the allegations in this paragraph.

21. BC Holdings admits the allegations only as to Biocoat's hydrophilic coatings. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph with respect to other persons.

22. BC Holdings admits the allegations in this paragraph and further acknowledges that the significant variation in hydrophilic coating chemistries both impacts curing methodology and requires medical-device-level testing.

23. BC Holdings admits that some medical devices are only suitable for one method of curing and the allegations in the fifth sentence. BC Holdings denies the existence of an "outsourced hydrophilic coatings market." The term "vast majority" is vague, and BC Holdings separately denies the allegations in the first sentence on that ground. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence. BC Holdings otherwise denies the allegations in this paragraph.

24. BC Holdings admits the allegations in the first and second sentences. BC Holdings otherwise denies the allegations in this paragraph.

25. BC Holdings admits the allegation in the first sentence as to Biocoat. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the

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allegations in the first sentence with respect to other persons. BC Holdings otherwise denies the allegations in this paragraph.

26. BC Holdings admits the allegations in sentences two, three, four, and six of this paragraph. The terms “development and commercialization support” and “range of services” are vague and unspecified, and BC Holdings denies the allegations in the first sentence on those grounds. The term “regulatory support” is vague, and BC Holdings denies the allegation in the fifth sentence on that ground. BC Holdings otherwise denies the allegations in this paragraph.

27. BC Holdings denies the allegation in the first sentence as to its business. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence with respect to other persons. BC Holdings admits that successful medical devices may be sold on the market with the same hydrophilic coating for over a decade as alleged in the second sentence. BC Holdings admits that royalty structures can vary. BC Holdings otherwise denies the allegations in this paragraph.

28. Denied.

29. BC Holdings admits that, as is true of thermally-cured hydrophilic coatings, coating the outer diameter of a medical device with PTFE at the end of the manufacturing process may damage the rest of the device. BC Holdings otherwise denies the allegations in this paragraph.

30. Denied.

31. BC Holdings admits that hydrophilic coatings require specialized expertise and that hydrophilic coatings are a relatively small line item on the total cost of manufacturing a medical device. BC Holdings lacks knowledge or information sufficient to form a belief as to

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the truth of the other allegations in the second and third sentences. BC Holdings otherwise denies the allegations in this paragraph.

32. Denied.

33. BC Holdings admits that some OEMs may use contract coating services in the pre-clinical, clinical, and commercialization stages. BC Holdings otherwise denies the allegations in this paragraph.

34. Denied.

35. Denied.

36. BC Holdings admits the allegations in the second and third sentences. BC Holdings otherwise denies the allegations in this paragraph.

37. Denied.

38. Denied.

39. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings admits the allegations in the third sentence. BC Holdings otherwise denies the allegations in this paragraph.

40. BC Holdings admits that Surmodics's hydrophilic coatings are UV-cured hydrophilic coatings and that Serene and Preside are both brand names for Surmodics's coatings. BC Holdings otherwise denies the allegations in this paragraph.

41. BC Holdings admits that Biocoat earned approximately \$20 million in U.S. coating revenue in 2023. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in the first sentence. BC Holdings admits that some of Biocoat's customers pay royalties and others do not. BC Holdings otherwise denies the

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allegations in this paragraph, including the existence of an “outsourced hydrophilic coatings market.”

42. BC Holdings admits the allegations in the first, second and third sentences. BC Holdings otherwise denies the allegations in this paragraph.

43. BC Holdings denies the existence of an “outsourced hydrophilic coatings” market. BC Holdings otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

44. BC Holdings denies the existence of an “outsourced hydrophilic coatings” market. BC Holdings otherwise lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.

45. Denied.

46. The first sentence contains a legal assertion to which no response is required. To the extent a response is required, BC Holdings denies the allegations. BC Holdings admits the allegations in the second and third sentences. BC Holdings otherwise denies the allegations in this paragraph.

47. This paragraph contains a legal argument to which no response is required. To the extent a response is required, BC Holdings denies the allegations.

48. Denied.

49. BC Holdings admits that the quoted statements in this paragraph were made and respectfully refers the Court to the full documents referenced by the Complaint for a complete and accurate view of the statement. BC Holdings denies the existence of an “outsourced hydrophilic coatings market” and otherwise denies the allegations in this paragraph.

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50. BC Holdings admits that the quoted statement in sentence two of this paragraph was made and respectfully refers the Court to the full documents referenced by the Complaint for a complete and accurate view of the statements. BC Holdings otherwise denies the allegations in this paragraph.

51. BC Holdings admits that the quoted statements in sentences two and three were made and respectfully refers the Court to the full documents referenced by the Complaint for a complete and accurate view of the statements. BC Holdings admits the allegations in sentences four and five. BC Holdings otherwise denies the allegations in this paragraph.

52. BC Holdings admits that the quoted statement in sentence two was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings otherwise denies the allegations in this paragraph.

53. Denied.

54. The term “compete head-to-head” is vague and BC Holdings denies the allegations in the first sentence on that ground. BC Holdings otherwise denies the allegations in this paragraph.

55. BC Holdings denies the allegations in the first sentence with respect to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentences three, four, five, and six. BC Holdings otherwise denies the allegations in this paragraph.

56. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentences two, three, four, and five. BC Holdings otherwise denies the allegations in this paragraph.

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57. BC Holdings admits that the quoted statements in sentences five, six, and seven were made and respectfully refers the Court to the full documents referenced by the Complaint for a complete and accurate view of the statements. BC Holdings otherwise denies the allegations in this paragraph.

58. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

59. Denied.

60. Denied.

- a. BC Holdings denies that Biocoat conducted thermal coating testing in 2020 for the manufacturer referenced in this paragraph but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.
- b. BC Holdings denies that Biocoat was engaged in testing with the manufacturer referenced in this paragraph from 2020 to 2021 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.
- c. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings otherwise denies the allegations in this paragraph.
- d. Denied.
- e. BC Holdings admits that the quoted statement was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings otherwise lacks knowledge or

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information sufficient to form a belief as to the truth of the allegations in this paragraph.

- f. BC Holdings admits that the manufacturer referenced in this paragraph selected Biocoat's thermal coating for a medical device as alleged in sentence nine. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in sentence nine, as well as the allegations in sentences one, two, three, four, seven, and eight. BC Holdings otherwise denies the allegations in this paragraph.
- g. BC Holdings admits the allegations in sentence two. BC Holdings admits that the quoted statement in sentence four was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in sentence four. BC Holdings otherwise denies the allegations in this paragraph.

61. BC Holdings denies the allegations in sentence one with respect to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC Holdings otherwise denies the allegations in this paragraph.

62. Denied.

63. BC Holdings admits that it was contacted by the manufacturer referenced in this paragraph regarding a UV coating opportunity on a new guidewire. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in this paragraph.



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64. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

65. BC Holdings denies the allegations in the second sentence as to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC Holdings otherwise denies the allegations in this paragraph.

66. BC Holdings admits that the quoted statement in the second sentence was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings denies the other allegations in sentence two. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentence four. BC Holdings otherwise denies the allegations in this paragraph.

67. BC Holdings denies the allegations in the first sentence as to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings otherwise denies the allegations in this paragraph.

68. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

- a. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.
- b. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.
- c. BC Holdings admits that the quoted statements in sentences two, three, and four were made and respectfully refers the Court to the full documents referenced by

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the Complaint for a complete and accurate view of the statements. BC Holdings otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

- d. BC Holdings admits that the quoted statements in sentences three, four, and five were made and respectfully refers the Court to the full documents referenced by the Complaint for a complete and accurate view of the statements. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentence two. BC Holdings otherwise denies the allegations in this paragraph.

69. BC Holdings admits the allegations in sentences one and five. BC Holdings denies the allegations in sentence two as to Biocoat but lacks knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Surmodics. BC Holdings admits that Bob Hergenrother worked on the development of Hydak UV but otherwise denies the allegations in sentence three. BC Holdings otherwise denies the allegations in this paragraph.

70. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

71. Denied.

72. Denied.

73. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings otherwise denies the allegations in this paragraph.

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74. BC Holdings admits the allegations in sentences four and six. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentences one, three, and five. BC Holdings otherwise denies the allegations in this paragraph.

75. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. BC Holdings otherwise denies the allegations in this paragraph.

76. BC Holdings admits the allegations in sentences two and three. BC Holdings admits that the quoted statement in sentence four was made and respectfully refers the Court to the full document referenced by the Complaint for a complete and accurate view of the statement. BC Holdings otherwise denies the allegations in this paragraph.

77. BC Holdings admits the allegations in sentences two, three, and five. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegation in the fourth sentence. BC Holdings otherwise denies the allegations in this paragraph.

78. Admitted.

79. BC Holdings lacks knowledge or information sufficient to form a belief as to the truth of the allegations in sentences two, three, four, and five. BC Holdings otherwise denies the allegations in this paragraph.

80. Denied.

81. This paragraph consists of a legal claim to which no response is required. To the extent a response is required, BC Holdings denies the allegations in this paragraph.

82. Denied.

### Defenses

1. The FTC cannot show that it is entitled to a preliminary injunction, which is “an extraordinary equitable remedy that is never awarded as of right.” *Starbucks Corp. v. McKinney ex rel. NLRB*, 144 S. Ct. 1570, 1576 (2024).
2. The FTC cannot clearly establish a likelihood of ultimate success (*i.e.*, that the proposed transaction is likely to substantially harm competition under Section 7 of the Clayton Act), including because:
  - A. The Complaint fails to allege a valid product market, including because the Complaint improperly excludes in-house hydrophilic coatings and other lubricious coatings from the alleged market.
  - B. The Complaint fails to allege a valid geographic market, including because the Complaint fails to adequately account for imported hydrophilic coatings sold in the United States.
  - C. The FTC cannot show that the proposed transaction will plausibly harm consumers or competition, including because the Complaint fails to plausibly allege that Respondents exercise market power, and fails to account for the fact that new entry and expansion by competitors can be timely, likely, and sufficient.
3. The FTC cannot show that the public interest favors a preliminary injunction, including because the proposed transaction is not likely to substantially harm competition and instead will benefit competition and customers.
4. The equities do not favor a preliminary injunction, including because the proposed transaction will benefit competition and customers and because granting a preliminary injunction would seriously injure Respondents.

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5. The FTC seeks relief through an administrative process that violates Article I of the Constitution, which provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art. I, § 1. Among other things, Congress delegated to the FTC the power to decide whether to bring antitrust enforcement actions in administrative proceedings or in federal court, but did not provide the FTC with an intelligible principle by which to exercise that discretion. The FTC therefore has total, unguided discretion to decide whether to bring an antitrust enforcement action in an administrative proceeding rather than in an Article III court, in violation of the Non-Delegation Doctrine under Article I.
6. The FTC seeks relief through an administrative process that violates Article II of the Constitution and separation of powers principles because, among other things, the FTC’s Commissioners and Administrative Law Judges can only be removed for cause, and for-cause removal restrictions impermissibly restrict the President’s removal powers—especially where, as here, an agency exercises substantial executive power. Indeed, the government itself has conceded that “the for-cause removal protections for the Commissioners of the Federal Trade Commission in 15 U.S.C. § 41 . . . do not comport with the separation of powers and Article II.” Defs.’ Notice of Change in Position at 1, *Express Scripts, Inc. v. FTC*, No. 4:24-cv-1549 (E.D. Mo. Feb. 15, 2025), ECF No. 57; *see also* Letter from Sarah M. Harris, Acting Solicitor General, to Richard J. Durbin, United States Senator (Feb. 12, 2025) (reporting under 28 U.S.C. § 530D that the Department of Justice “will no longer defend” the constitutionality of the “statutory tenure protections for members of the Federal Trade Commission”).

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7. The FTC seeks relief through an administrative process that violates Article III of the Constitution by, for example, adjudicating private rights before a non-Article III body without meaningful review of the FTC's factual findings by an Article III court.
8. The FTC seeks relief through an administrative process that violates BC Holdings's right to Due Process under the Fifth Amendment by, among other things, depriving BC Holdings of its right to adjudication before a neutral arbiter. Combining investigative, prosecutorial, and adjudicative functions violates the Due Process Clause where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975). That is the case here, where the FTC Commissioners vote out the complaint, mandate its prosecution, and pass judgment on its merits; where the FTC Commissioners rely on evidence that would not be admissible in an Article III court; and where the FTC wins roughly 90% of its cases, a statistic that "reveal[s] just how tilted this game is." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring).
9. The FTC seeks relief through an administrative process that violates BC Holdings's right to Equal Protection under the Fifth Amendment. For example, the FTC and the Department of Justice ("DOJ") arbitrarily decide between them which agency will review a transaction through a black box "clearance" process. As a result of that arbitrary decision, this transaction was reviewed by the FTC, which has the ability to judge the merits of its own case through an in-house proceeding that lacks the protections of an Article III court, that permits the same decision-makers to initiate, prosecute, and decide the merits of the case, and that permits the decision-makers to rely on evidence that is inadmissible under the Federal Rules of Evidence. By contrast, if the DOJ had reviewed

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the transaction and decided to challenge it, that challenge could *only* be brought in an Article III court with all the attendant protections.

BC Holdings reserves the right to amend this answer and assert any other available defenses.

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Respectfully submitted,



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### **Certificate of Service**


I hereby certify that on March 12, 2025, I caused the foregoing document to be filed electronically using the Federal Trade Commission's e-filing system, which will send notification of such filing to:

April Tabor  
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Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm H-110  
Washington, D.C. 20580

I also certify that I caused the foregoing document to be served via email to:

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*Counsel Supporting the Complaint*

  
Daniel P. Culley