

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/2008-141;

AND IN THE MATTER OF the proposed acquisition by Elanco Animal Health Incorporated of the Animal Health Business of Bayer AG;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to sections 92 and 105 of the *Competition Act*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

– and –

ELANCO ANIMAL HEALTH INCORPORATED

Respondent

CONSENT AGREEMENT

RECITALS:

A. Elanco Animal Health Incorporated (“Elanco”) proposes to acquire the Animal Health Business of Bayer AG (the “Transaction”).

B. The Commissioner has concluded that the Transaction as originally proposed is likely to result in a substantial lessening and/or prevention of competition in the supply of low dose canine otic treatments, feline endoparasiticides with tapeworm coverage and poultry insecticides with darkling beetle coverage in Canada, and that the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction.

C. Elanco no longer proposes to acquire Canadian distribution rights to Bayer’s Tempo, Credo, QuickBayt and Annihilator Polyzone poultry insecticides in Canada, and Bayer intends to continue its poultry insecticide business.

D. Elanco does not admit but will not for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions that (i) the Transaction is likely to result in a substantial lessening and/or prevention of competition in the supply of low dose canine otic treatments, feline endoparasiticides with tapeworm coverage and poultry insecticides with darkling beetle coverage in Canada; and (ii) the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction.

E. Nothing in this Agreement affects any investigation, inquiry or proceeding other than under section 92 of the Act in respect of the Transaction.

THEREFORE Elanco and the Commissioner agree as follows:

I. DEFINITIONS

[1] Whenever used in this Agreement, the following words and terms have the meanings set out below:

- (a) **“Act”** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) **“Affiliate”** has the meaning given to it in subsection 2(2) of the Act;
- (c) **“Agreement”** means this Consent Agreement, including the schedules hereto, and references to a “Part”, “Section”, “Paragraph” or “Schedule” are, unless otherwise indicated, references to a part, section, paragraph or schedule of or to this Agreement;
- (a) **“Asset Purchase Agreement”** means the Asset Purchase Agreement made and executed as of 3 January 2020, by and between Elanco Tiergesundheit AG, Dechra Limited and Dechra Veterinary Products LLC;
- (b) **“Bayer”** means Bayer AG and its Affiliates and their directors, officers, employees, agents, representatives, successors and assigns;
- (c) **“Business Day”** means a day on which the Competition Bureau's Gatineau, Quebec office is open for business;
- (d) **“Closing”** means the completion of the Transaction under the Transaction Agreement;
- (e) **“Closing Date”** means “the date on which Closing occurs”;
- (f) **“Commissioner”** means the Commissioner of Competition appointed under the Act and includes his authorized representatives;

- (g) **“Confidential Information”** means competitively sensitive, proprietary and all other information that is not in the public domain, and that is owned by or pertains to a Person or a Person’s business, and includes, but is not limited to, manufacturing, operations and financial information, customer lists, price lists, contracts, cost and revenue information, marketing methods, patents, technologies, processes, or other trade secrets;
- (h) **“Divested Business”** means:
 - (i) Elanco’s low dose canine otic treatments business in Canada, carried on under the Osumnia brand name; and
 - (ii) Bayer’s feline endoparasiticides business with tapeworm coverage in Canada, carried on under the Profender brand name;
- (i) **“Divestiture”** means the sale, conveyance, transfer, assignment or other disposal of the Divestiture Assets to a Purchaser or Purchasers pursuant to this Agreement and with the prior approval of the Commissioner, such that Elanco will have no direct or indirect interest in the Divestiture Assets;
- (j) **“Divestiture Agreement”** means a binding and definitive agreement between Elanco and a Purchaser to effect the Divestiture pursuant to this Agreement and subject to the prior approval of the Commissioner;
- (k) **“Divestiture Applicant”** means Elanco during the Initial Sale Period or the Divestiture Trustee during the Divestiture Trustee Sale Period;
- (l) **“Divestiture Assets”** means all of the right, title and interest in, to and under, or relating to, the tangible assets, Intangible Assets, property and undertaking owned or used by Elanco or held by Elanco for use in, or relating to, the Divested Business;
- (m) **“Divestiture Process Agreement”** means the agreement described in Section 6 of this Agreement;
- (n) **“Divestiture Trustee”** means the Person appointed pursuant to Part III of this Agreement (or any substitute appointed thereto) and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;
- (o) **“Divestiture Trustee Sale”** means the Divestiture to be conducted by the Divestiture Trustee pursuant to Part III of this Agreement;
- (p) **“Divestiture Trustee Sale Period”** means the 6 month period commencing upon expiry of the Initial Sale Period;

- (q) **“Elanco”** means Elanco Animal Health Incorporated and its Affiliates and their directors, officers, employees, agents, representatives, successors and assigns;
- (r) **“First Reference Date”** shall have the meaning set out in Paragraph 22(d) of this Agreement;
- (s) **“Initial Sale Period”** means the period that commences at Closing and ends at the time set out in Confidential Schedule A to this Agreement;
- (t) **“Intangible Assets”** means intellectual property of any nature and kind, including:
 - (i) patents, copyrights, trademarks and software;
 - (ii) trade dress, industrial designs, distinguishing guises, trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
 - (iii) rights to obtain and file for patents and registrations thereof; and
 - (iv) rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;
- (u) **“Monitor”** means the Person appointed pursuant to Part IX of this Agreement (or any substitute appointed thereto), and any employees, agents or other Persons acting for or on behalf of the Monitor, provided that if no Monitor is appointed, other than in Part IX of this Agreement Monitor means the Commissioner;
- (v) **“Monitor Agreement”** means the agreement described in Section 31 of this Agreement;
- (w) **“Person”** means any individual, corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (x) **“Purchaser”** means a Person that acquires Divestiture Assets pursuant to this Agreement and a Divestiture Agreement;
- (y) **“Records”** means records within the meaning of subsection 2(1) of the Act;
- (z) **“Second Reference Date”** shall have the meaning set out in Paragraph 22(e) of this Agreement;

- (aa) **“Third Party”** means any Person other than the Commissioner, Elanco or a Purchaser;
- (bb) **“Transaction”** means the transaction described in the first recital to this Agreement;
- (a) **“Transaction Agreement”** means the Share and Asset Purchase Agreement between Elanco and Bayer dated August 20, 2019; and
- (b) **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.).

II. OBLIGATION TO COMPLETE DIVESTITURE

- [2] Elanco shall use commercially reasonable efforts to complete the Divestiture.
- [3] During the Initial Sale Period, Elanco shall use commercially reasonable efforts to complete the Divestiture in accordance with the provisions of this Part and Confidential Schedule A and subject to Part IV.
- [4] During the Initial Sale Period, Elanco shall provide to the Commissioner and to the Monitor every 30 days a written report describing the progress of its efforts to effect the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. Elanco shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of Elanco’s efforts to complete the Divestiture. An officer or other duly authorized representative of Elanco shall certify that he or she has examined the information provided in any such response and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects.

III. DIVESTITURE TRUSTEE SALE PROCESS

- [5] In the event that Elanco fails to complete the Divestiture during the Initial Sale Period, the Commissioner shall appoint a Divestiture Trustee to complete the Divestiture in accordance with this Agreement. Such appointment may be made at any time prior to the expiry of the Initial Sale Period or on such later date as the Commissioner determines.
- [6] Within 5 Business Days after the appointment of the Divestiture Trustee, Elanco shall submit to the Commissioner for approval the terms of a proposed Divestiture Process Agreement with the Divestiture Trustee and the Commissioner that confers on the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the Divestiture.
- [7] Within 5 Business Days after receipt of the proposed Divestiture Process Agreement referred to in Section 6, the Commissioner shall advise Elanco whether

or not he approves the terms of the proposed Divestiture Process Agreement. If the Commissioner does not approve the terms of the proposed Divestiture Process Agreement, he shall prescribe alternative terms that Elanco shall incorporate into a final Divestiture Process Agreement with the Divestiture Trustee and the Commissioner.

[8] Without limiting the Commissioner's discretion to require additional terms, Elanco consents to the following terms and conditions regarding the Divestiture Trustee's rights, powers and duties, and shall include such terms in the Divestiture Process Agreement:

- (a) The Divestiture Trustee shall complete the Divestiture as expeditiously as possible, and in any event prior to expiry of the Divestiture Trustee Sale Period.
- (b) The Divestiture Trustee shall use reasonable efforts to negotiate terms and conditions for the Divestiture that are as favourable to Elanco as are reasonably available at that time; however, the Divestiture shall not be subject to any minimum price. The Divestiture Trustee's opinion of what constitutes favourable terms and conditions and what constitutes reasonably available terms and conditions, is subject to review and approval by the Commissioner.
- (c) Subject to oversight and approval by the Commissioner, the Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period:
 - (i) to complete the Divestiture in accordance with the provisions of this Part and Confidential Schedule A;
 - (ii) to solicit interest in a possible Divestiture by whatever process or procedure the Divestiture Trustee believes is suitable to allow a fair opportunity for one or more prospective good faith Purchasers to offer to acquire the Divestiture Assets, and for greater certainty, in determining whether to pursue negotiations with a prospective Purchaser, may have regard to the approval criteria in Section 23;
 - (iii) to enter into a Divestiture Agreement with a Purchaser that will be legally binding on Elanco;
 - (iv) to negotiate reasonable commercial covenants, representations, warranties and indemnities to be included in a Divestiture Agreement; and
 - (v) to employ, at the expense of Elanco, such consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants as the Divestiture Trustee

believes are necessary to carry out the Divestiture Trustee's duties and responsibilities.

- (d) Where any Person makes a good faith inquiry respecting a possible purchase of Divestiture Assets, the Divestiture Trustee shall notify such Person that the Divestiture is being made and shall provide to such Person a copy of this Agreement, with the exception of the provisions hereof that are confidential pursuant to Section 57 of this Agreement.
- (e) Where, in the opinion of the Divestiture Trustee, a Person has a good faith interest in purchasing Divestiture Assets and has executed a confidentiality agreement, in a form satisfactory to the Commissioner, with the Divestiture Trustee protecting any Confidential Information that such Person may receive in the course of its due diligence review of the Divestiture Assets, the Divestiture Trustee shall:
 - (i) promptly provide to such Person all information respecting the Divestiture Assets that is determined by the Divestiture Trustee to be relevant and appropriate;
 - (ii) permit such Person to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged Records and information, including Confidential Information, that may be relevant to the Divestiture; and
 - (iii) give such Person as full and complete access as is reasonable in the circumstances to the personnel involved in managing the Divestiture Assets.
- (f) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.
- (g) The Divestiture Trustee shall provide to the Commissioner and to the Monitor, within 14 days after the later of the Divestiture Trustee's appointment and the commencement of the Divestiture Trustee Sale Period and thereafter every 30 days, a written report describing the progress of the Divestiture Trustee's efforts to complete the Divestiture. The report shall include a description of contacts, negotiations, due diligence and offers regarding the Divestiture Assets, the name, address and phone number of all parties contacted and of prospective Purchasers who have come forward. The Divestiture Trustee shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding the status of the Divestiture Trustee's efforts to complete the Divestiture.
- (h) The Divestiture Trustee shall notify Elanco and the Commissioner immediately upon the signing of any letter of intent or agreement in principle relating to the Divestiture Assets, and shall provide to Elanco a

copy of any executed Divestiture Agreement upon receipt of the Commissioner's approval of the Divestiture contemplated in such Divestiture Agreement.

- [9] Elanco shall not be involved in the Divestiture process during the Divestiture Trustee Sale Period or in any negotiations with prospective Purchasers undertaken by the Divestiture Trustee, nor will Elanco have contact with prospective Purchasers during the Divestiture Trustee Sale Period.
- [10] Subject to any legally recognized privilege, Elanco shall provide to the Divestiture Trustee full and complete access to all personnel, Records, information (including Confidential Information) and facilities relating to the Divestiture Assets, to enable the Divestiture Trustee to conduct its own investigation of the Divestiture Assets and to provide access and information to prospective Purchasers.
- [11] Elanco shall take no action that interferes with or impedes, directly or indirectly, the Divestiture Trustee's efforts to complete the Divestiture.
- [12] Elanco shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Elanco shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Divestiture Trustee on behalf of Elanco.
- [13] Elanco will do all such acts and execute all such documents, and will cause the doing of all such acts and the execution of all such documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that the Divestiture Assets are divested in the Divestiture Trustee Sale Period and that agreements entered into by the Divestiture Trustee are binding upon and enforceable against Elanco.
- [14] Elanco shall be responsible for all reasonable fees and expenses properly charged or incurred by the Divestiture Trustee in the course of carrying out the Divestiture Trustee's duties and responsibilities under this Agreement. The Divestiture Trustee shall serve without bond or security, and shall account for all fees and expenses incurred. Elanco shall pay all reasonable invoices submitted by the Divestiture Trustee within 30 days after receipt and, without limiting this obligation, Elanco shall comply with any agreement it reaches with the Divestiture Trustee regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Elanco shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Divestiture Trustee by Elanco shall be paid out of the proceeds of the Divestiture.
- [15] Elanco shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties,

including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence 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 or bad faith by the Divestiture Trustee.

- [16] Elanco shall indemnify the Commissioner and hold the Commissioner harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability.
- [17] If the Commissioner determines that the Divestiture Trustee has ceased to act or has failed to act diligently, the Commissioner may remove the Divestiture Trustee and appoint a substitute Divestiture Trustee. The provisions of this Agreement respecting the Divestiture Trustee shall apply in the same manner to any substitute Divestiture Trustee.
- [18] Elanco may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commissioner.
- [19] The Commissioner may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, legal counsel, investment bankers, business brokers, appraisers, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Divestiture Trustee may receive from the Commissioner in connection with the performance of the Divestiture Trustee's duties.
- [20] Notwithstanding any term of this Agreement, the rights, powers and duties of the Divestiture Trustee under this Agreement shall not expire until the Divestiture is completed.

IV. COMMISSIONER APPROVAL OF DIVESTITURE

- [21] The Divestiture may proceed only with the prior approval of the Commissioner in accordance with this Part. For greater certainty, if a Divestiture is a notifiable transaction nothing in this Agreement affects the operation of Part IX of the Act. The Commissioner approves a Divestiture of Elanco's low dose canine otic treatments business to Dechra Limited and Dechra Veterinary Products LLC pursuant to the Asset Purchase Agreement, and this Part IV and Part VI of this Agreement shall not apply to that Divestiture.

[22] The Divestiture Applicant shall comply with the following process for seeking and obtaining a decision of the Commissioner regarding his approval of a proposed Divestiture:

- (a) The Divestiture Applicant shall promptly:
 - (i) inform the Commissioner of any negotiations with a prospective Purchaser that may lead to a Divestiture; and
 - (ii) forward to the Commissioner copies of any agreement that is signed with a prospective Purchaser, including non-binding expressions of interest.
- (b) The Divestiture Applicant shall immediately notify the Commissioner that it intends to enter a Divestiture Agreement with a prospective Purchaser, or has entered into an agreement that, if approved by the Commissioner, will be a Divestiture Agreement within the meaning of this Agreement. If the Divestiture Applicant has entered into or intends to enter into more than one agreement in respect of the same Divestiture Assets, the Divestiture Applicant shall identify the agreement in respect of which it seeks the Commissioner's approval and the remainder of this Part shall apply only to that agreement unless the Divestiture Applicant designates a substitute agreement.
- (c) The notice described in Paragraph 22(b) shall be in writing and shall include: the identity of the proposed Purchaser; the details of the proposed Divestiture Agreement and any related agreements; and information concerning whether and how the proposed Purchaser would, in the view of the Divestiture Applicant, likely satisfy the terms of this Agreement.
- (d) Within 14 days following receipt of the notice described in Paragraph 22(b), the Commissioner may request additional information concerning the proposed Divestiture from any or all of Elanco, the Monitor, the prospective Purchaser and, in the Divestiture Trustee Sale Period, the Divestiture Trustee. These Persons shall each provide any additional information requested from them. When they have provided a complete response to the Commissioner's request, these Persons shall comply with the following procedures:
 - (i) the Divestiture Trustee shall provide written confirmation to the Commissioner that the Divestiture Trustee has provided to the Commissioner all additional information requested from the Divestiture Trustee;
 - (ii) the Monitor shall provide written confirmation to the Commissioner that the Monitor has provided to the Commissioner all additional information requested from the Monitor;

- (iii) an officer or other duly authorized representative of Elanco shall certify that he or she has examined the additional information provided by Elanco in response to the Commissioner's request and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects;
- (iv) an officer or other duly authorized representative of the prospective Purchaser shall certify that he or she has examined the additional information provided by the prospective Purchaser in response to the Commissioner's request and that such information is, to the best of his or her knowledge and belief, correct and complete in all material respects.

The date on which the last of the Divestiture Trustee, Elanco, the Monitor and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"First Reference Date"**.

- (e) Within 7 days after the First Reference Date, the Commissioner may request further additional information concerning the proposed Divestiture from any or all of the Persons identified in Paragraph 22(d). These Persons shall each provide any further additional information requested from them. When they have provided a complete response to the Commissioner's request, if any, these Persons shall comply with the procedures outlined in Paragraph 22(d) in regard to the further additional information provided. The date on which the last of the Divestiture Trustee, Elanco, the Monitor and the prospective Purchaser provides to the Commissioner a confirmation or certification required under this Paragraph is the **"Second Reference Date"**.
- (f) The Commissioner shall notify the Divestiture Applicant of the approval of, or the objection to, the proposed Divestiture as soon as possible, and in any event within 14 days after the date on which the Commissioner receives the notice described in Paragraph 22(b) or, if he requests any additional information under Paragraph 22(d) or further additional information under Paragraph 22(e), within 14 days after the later of:
 - (i) the First Reference Date; and
 - (ii) the Second Reference Date, if any.
- (g) The Commissioner's determination as to whether to approve a proposed Divestiture shall be in writing.

[23] In exercising his discretion to determine whether to approve a proposed Divestiture, the Commissioner shall take into account the likely impact of the Divestiture on competition, and may consider any other factor he considers

relevant. Prior to granting his approval, the Commissioner must also be satisfied that:

- (a) the proposed Purchaser is fully independent of and operates at arm's length from Elanco;
- (b) Elanco will have no direct or indirect interest in the Divestiture Assets following the Divestiture;
- (c) the proposed Purchaser is committed to carrying on the Divested Business;
- (d) the proposed Purchaser has the managerial, operational and financial capability to compete effectively in the supply of low dose canine otic treatments and/or feline endoparasiticides with tapeworm coverage in Canada, as applicable; and
- (e) the proposed Purchaser will (i) if the Commissioner grants his approval during the Initial Sale Period, complete the Divestiture prior to the expiry of the Initial Sale Period; or (ii) if the Commissioner grants his approval during the Divestiture Trustee Sale Period, complete the Divestiture during the Divestiture Trustee Sale Period.

V. PRESERVATION OF DIVESTITURE ASSETS

[24] In order to preserve the Divestiture Assets pending completion of the Divestiture, Elanco shall maintain the economic viability, marketability and competitiveness of the Divestiture Assets and Divested Business, and shall comply with any decision of or direction given by the Monitor that relates to preservation of the Divestiture Assets. Without limiting the generality of the foregoing, Elanco shall:

- (a) maintain and hold the Divestiture Assets in good condition and repair, normal wear and tear excepted, and to standards that are, in the view of the Monitor, at least equal to those that existed at Closing;
- (b) ensure that the management and operation of the Divestiture Assets continues in the ordinary course of business and in a manner that is, in the view of the Monitor, reasonably consistent in nature, scope and magnitude with past practices and generally accepted industry practices, and in compliance with all applicable laws;
- (c) not knowingly take or allow to be taken any action that, in the view of the Monitor, adversely affects the competitiveness, operations, financial status or value, viability and saleability of the Divestiture Assets;
- (d) ensure that the Divestiture Assets are not engaged in any type of business other than the type of business conducted as of the date of this Agreement, except with the prior approval of the Monitor and the Commissioner;

- (e) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations that are, in Monitor's view subject to consultation with Elanco, advisable for the operation of the Divestiture Assets and Divested Business;
- (f) take commercially reasonable steps to honour all customer contracts and to maintain quality and service standards for customers of the Divestiture Assets that are, in the view of the Monitor, at least equal to the standards that existed during the fiscal year prior to this Agreement;
- (g) not curtail marketing, sales, promotional or other activities of the Divestiture Assets or Divested Business, except with the prior approval of the Monitor;
- (h) not alter, or cause to be altered, the management of the Divestiture Assets as it existed during the fiscal year prior to the date of this Agreement, except with the prior approval of the Monitor;
- (i) ensure that the Divestiture Assets are staffed with sufficient employees to ensure their viability and competitiveness, including by replacing any departing employees with other qualified employees such as qualified employees already employed by Elanco, provided that the Monitor has approved both the qualifications and the need for such replacement employees;
- (j) maintain inventory levels and payment terms consistent with the practices of Elanco or Bayer that existed, with respect to the Divestiture Assets, during the fiscal year prior to the date of this Agreement; and
- (k) maintain in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Divestiture Assets and the Divested Business to the extent consistent with the practices of Elanco and Bayer that existed with respect to the Divestiture Assets during the fiscal year prior to the date of this Agreement.

[25] Pending completion of the Divestiture, Elanco shall not, without the Commissioner's prior written approval:

- (a) create any new encumbrances on the Divestiture Assets or Divested Business, other than ordinary course obligations that are not due or delinquent;
- (b) enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Divestiture Assets or Divested Business, except as necessary to comply with this Agreement; or

- (c) make any material changes to the Divestiture Assets or Divested Business, except as required to comply with this Agreement.

[26] Elanco shall provide sufficient financial resources, including general funds, capital funds, working capital and reimbursement for any operating, capital or other losses, to maintain the Divestiture Assets in accordance with this Part. If the Monitor believes that Elanco has not provided, is not providing or will not provide sufficient financial and other resources under this Part, the Monitor shall forthwith refer the matter to the Commissioner, who shall make a final determination respecting the financial and other resources that Elanco must provide. Elanco shall comply with any determination made by the Commissioner on this issue.

VI. THIRD PARTY CONSENTS

[27] It shall be a condition in any Divestiture Agreement (whether negotiated by Elanco or by the Divestiture Trustee) that Elanco shall, as a condition of closing, obtain any consents and waivers from Third Parties that are necessary to permit the assignment to, and assumption by, a Purchaser of all Material Contracts, Approvals and Authorizations relating to the Divestiture Assets; provided, however, that Elanco may satisfy this requirement by certifying that the Purchaser has executed agreements directly with one or more Third Parties which make such assignment and assumption unnecessary.

VII. TRANSITIONAL SUPPORT ARRANGEMENTS

[28] Elanco, or the Divestiture Trustee on behalf of Elanco, shall enter into agreements to supply and shall supply transitional services at the option of the Purchaser. Such services shall include the transitional services described in Exhibit D of the Asset Purchase Agreement in respect of the low dose canine otic business, and similar services in respect of the other Divested Businesses.

VIII. FAILURE OF DIVESTITURE TRUSTEE SALE

[29] If, by the end of the Divestiture Trustee Sale Period, the Divestiture has not been completed, or if the Commissioner is of the opinion that the Divestiture likely will not be completed prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal, at his election, for either (i) such order as is necessary to complete the Divestiture; or (ii) such order as is necessary to ensure that the Transaction is not likely to prevent or lessen competition substantially.

IX. MONITOR

[30] The Commissioner shall appoint a Monitor, responsible for monitoring compliance by Elanco with this Agreement. Such appointment may occur at any time following registration of this Agreement. A reference in this Agreement to specific monitoring functions or tasks that are to be undertaken by the Monitor

shall in no way detract from the Monitor's general right, power and duty to monitor all aspects of Elanco's compliance with this Agreement.

- [31] Within 5 Business Days after the appointment of the Monitor, Elanco shall submit to the Commissioner for approval the terms of a proposed Monitor Agreement with the Monitor and the Commissioner that confers on the Monitor all rights and powers necessary to permit the Monitor to monitor compliance by Elanco with this Agreement.
- [32] Within 5 Business Days after receipt of the proposed Monitor Agreement referred to in Section 31, the Commissioner shall advise Elanco whether or not he approves the terms of the proposed Monitor Agreement. If the Commissioner does not approve the terms of the proposed Monitor Agreement, he shall prescribe alternative terms for the Monitor Agreement that Elanco shall incorporate into a final Monitor Agreement with the Monitor and the Commissioner.
- [33] Elanco consents to the following terms and conditions regarding the Monitor's rights, powers and duties, and shall include such terms in the Monitor Agreement:
- (a) The Monitor shall have the power and authority to monitor Elanco's compliance with this Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Agreement and in consultation with the Commissioner.
 - (b) The Monitor shall have the authority to employ, at the expense of Elanco, such consultants, accountants, legal counsel and other representatives and assistants as the Monitor believes are necessary to carry out the Monitor's duties and responsibilities.
 - (c) The Monitor shall have no obligation or authority to operate or maintain the Divestiture Assets.
 - (d) The Monitor shall act for the sole benefit of the Commissioner, maintain all confidences and avoid any conflict of interest.
 - (e) The Monitor shall have no duties of good faith (except as required by law), of a fiduciary nature, or otherwise, to Elanco.
 - (f) The Monitor shall provide to the Commissioner every 30 days after the date of the Monitor's appointment until the Divestiture is complete and thereafter annually on or before the anniversary of the Divestiture, a written report concerning performance by Elanco of its obligations under this Agreement. The Monitor shall, within 3 Business Days, respond to any request by the Commissioner for additional information regarding Elanco's compliance.

- [34] Subject to any legally recognized privilege, Elanco shall provide to the Monitor full and complete access to all personnel, Records, information (including Confidential Information) and facilities relevant to monitoring Elanco's compliance with this Agreement.
- [35] Elanco shall take no action that interferes with or impedes, directly or indirectly, the Monitor's efforts to monitor Elanco's compliance with this Agreement.
- [36] Elanco shall fully and promptly respond to all requests from the Monitor and, subject to any legally recognized privilege, shall provide all information the Monitor may request. Elanco shall identify an individual who shall have primary responsibility for fully and promptly responding to such requests from the Monitor on behalf of Elanco.
- [37] Elanco may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement in a form satisfactory to the Commissioner; provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commissioner.
- [38] The Commissioner may require the Monitor and each of the Monitor's consultants, accountants, legal counsel and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information the Monitor may receive from the Commissioner in connection with the performance of the Monitor's duties.
- [39] Elanco shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out the Monitor's duties under this Agreement. The Monitor shall serve without bond or security, and shall account for all fees and expenses incurred. Elanco shall pay all reasonable invoices submitted by the Monitor within 60 days after receipt and, without limiting this obligation, Elanco shall comply with any agreement it reaches with the Monitor regarding interest on late payments. In the event of any dispute: (i) such invoice shall be subject to the approval of the Commissioner; and (ii) Elanco shall promptly pay any invoice approved by the Commissioner. Any outstanding monies owed to the Monitor by Elanco shall be paid out of the proceeds of the Divestiture.
- [40] Elanco shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence 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 or bad faith by the Monitor.

- [41] If the Commissioner determines that the Monitor has ceased to act or has failed to act diligently, the Commissioner may remove the Monitor and appoint a substitute Monitor. The provisions of this Agreement respecting the Monitor shall apply in the same manner to any substitute Monitor.
- [42] The Monitor shall serve for such time as is necessary to monitor Elanco's compliance with this Agreement.

X. COMPLIANCE

- [43] Within 5 Business Days after the Closing Date, Elanco shall provide written confirmation to the Commissioner of the date on which the Transaction was completed.
- [44] Elanco shall provide a copy of this Agreement to each of its own and its Affiliates' directors, officers, employees and agents having managerial responsibility for any obligations under this Agreement, within 3 Business Days after the date of registration of this Agreement. Elanco shall ensure that its directors, officers, employees and agents with responsibility for any obligations under this Agreement receive sufficient training respecting Elanco's responsibilities and duties under this Agreement, and the steps that such individuals must take in order to comply with this Agreement.
- [45] Elanco shall not, for a period of 10 years after the date when the Divestiture is completed, directly or indirectly acquire any interest in the Divestiture Assets or Bayer's poultry insecticides business with darkling beetle coverage, without the prior written approval of the Commissioner.
- [46] For a period of 2 years after the date when the Divestiture is completed, Elanco shall not, without providing advance written notification to the Commissioner in the manner described in this Section, directly or indirectly:
- (a) acquire more than 10% of the assets or shares of, or any other significant interest in, any low dose otic treatments business, feline endoparasitocides business with tapeworm coverage or poultry insecticides business with darkling beetle coverage in Canada; or
 - (b) consummate any merger or other combination relating to any low dose otic treatments business, feline endoparasitocides business with tapeworm coverage or poultry insecticides business with darkling beetle coverage in Canada.

If a transaction described in (a) or (b) is one for which notice is not required under section 114 of the Act, Elanco shall supply to the Commissioner the information described in section 16 of the *Notifiable Transactions Regulations* at least 30 days before completing such transaction (or such shorter period as the Commissioner may agree). Elanco shall certify such information in the same manner as would be

- required if section 118 of the Act applied. The Commissioner may accept a competitive impact brief from Elanco instead of such information. The Commissioner may, within 30 days after receiving the information described in this Section, request that Elanco supply additional information that is relevant to the Commissioner's assessment of the transaction. In the event that the Commissioner issues such a request for additional information, Elanco shall supply information to the Commissioner in the form specified by the Commissioner and shall not complete such transaction until at least 30 days (or such shorter period as the Commissioner may agree) after Elanco has supplied all such requested information in the form specified by the Commissioner.
- [47] Six months after the date of registration of this Agreement and annually thereafter, and at such other times as the Commissioner may require, Elanco shall file an affidavit or certificate, substantially in the form of Schedule B to this Agreement, certifying its compliance with Parts VII and X of this Agreement and setting out the following information in detail:
- (a) the steps taken to ensure compliance;
 - (b) the controls in place to verify compliance; and
 - (c) the names and titles of employees who have oversight of compliance.
- [48] If any of Elanco, the Divestiture Trustee or the Monitor becomes aware that there has been a breach or possible breach of any of the terms of this Agreement, such Person shall, within 5 Business Days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the breach or possible breach, provided that notification of a possible breach is not required if such Person determines within those 5 Business Days that it could not reasonably be considered a breach of any of the terms of this Agreement. Elanco shall provide confirmation of its compliance with this provision in all affidavits and certificates of compliance filed with the Commissioner pursuant to Section 47 of this Agreement.
- [49] Elanco shall notify the Commissioner at least 30 days prior to:
- (a) any proposed dissolution of Elanco; or
 - (b) any other change in Elanco if such change may affect compliance obligations arising out of this Agreement including, but not limited to, a reorganization, material acquisition, disposition or transfer of assets, or any fundamental change for purposes of Elanco's incorporating statute.
- [50] For purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, Elanco shall, upon written request given at least 5 Business Days in advance to Elanco, permit any authorized representative(s) of the Commissioner, without restraint or interference:

- (a) to access, during regular office hours of Elanco on any Business Day(s), all facilities and to inspect and copy all Records in the possession or control of Elanco related to compliance with this Agreement, which copying services shall be provided by Elanco at its expense; and
- (b) to interview such officers, directors or employees of Elanco as the Commissioner requests regarding such matters.

XI. DURATION

[51] This Agreement shall become effective on the date when it is registered, and shall remain in effect for 10 years following the Divestiture, except that:

- (a) Parts II, III, IV, V and VI of this Agreement shall be effective only until the Divestiture is completed; and
- (b) Part VII of this Agreement shall be effective only until the term of any transitional services agreement has expired.

XII. NOTICES

[52] A notice or other communication required or permitted to be given under this Agreement is valid if it is:

- (a) in writing and delivered by personal delivery, registered mail, courier service, facsimile or electronic mail; and
- (b) addressed to the receiving party at the address(es) listed below, or to any other address designated by the receiving party in accordance with this Section.

if to the Commissioner:

Commissioner of Competition
Competition Bureau Canada
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Attention: Commissioner of Competition
Fax: (819) 953-5013
Email address: ic.avisdefusionmergernotification.ic@canada.ca

with a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services

Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Fax: (819) 953-9267
Email address: ic.cb_lsu_senior_general_counsel-
avocat_general_principal_usj_bc.ic@canada.ca

if to Elanco:

Dr. Beatrice Vos
Deputy General Counsel, Head of Legal International
Elanco Animal Health Incorporated
2500 Innovation Way
Greenfield, IN 46140
United States of America
Email address: vos_beatrice@elanco.com

with a copy to:

Navin Joneja
Blake, Cassels & Graydon LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9
Email address: navin.joneja@blakes.com

- [53] A notice or other communication under this Agreement is effective on the day that it is received by the receiving party and is deemed to have been received as follows:
- (a) if it is delivered in person, by registered mail or by courier, upon receipt as indicated by the date on the signed receipt;
 - (b) if it is delivered by facsimile, upon receipt as indicated by the time and date on the facsimile confirmation slip; or
 - (c) if it is delivered by electronic mail, when the recipient, by an email sent to the email address for the sender stated in this Section or by a notice delivered by another method in accordance with this Section, acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section.

If a notice or other communication is received after 5:00 p.m. local time, or on a day that is not a Business Day, it shall be deemed to have been received on the next Business Day.

- [54] Notwithstanding Sections 52 and 53, a notice or other communication that is not communicated in accordance with Sections 52 and 53 is valid if a representative

of the party to this Agreement that is the recipient of such communication confirms the receipt of such communication and does not, at the time of such confirmation, request that it be delivered differently.

XIII. GENERAL

[55] In this Agreement:

- (a) **Number and Gender** – Unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing gender include all genders.
- (b) **Time Periods** – Computation of time periods shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21, and the definition of “holiday” in the *Interpretation Act* shall include Saturday.

[56] The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. Elanco hereby consents to such registration. Following the filing of this Agreement, the Commissioner shall promptly issue a letter to Elanco indicating that, subject to the implementation of this Agreement, the Commissioner does not intend to make an application under section 92 of the Act in respect of the Transaction.

[57] Information in Confidential Schedule A shall be made public upon the expiry of the Initial Sale Period.

[58] The Commissioner may, after informing Elanco, extend any of the time periods contemplated by this Agreement other than Sections 45, 46 and 51. If any time period is extended, the Commissioner shall promptly notify Elanco of the revised time period.

[59] Nothing in this Agreement precludes Elanco or the Commissioner from bringing an application under section 106 of the Act. Elanco will not, for the purposes of this Agreement, including execution, registration, enforcement, variation or rescission, contest the Commissioner’s conclusions that: (i) the Transaction is likely to result in a substantial lessening and/or prevention of competition in the supply of low dose canine otic treatments, feline endoparasiticides with tapeworm coverage and poultry insecticides with darkling beetle coverage in Canada; and (ii) the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition will not result from the Transaction.

[60] Elanco attorns to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement.

- [61] This Agreement constitutes the entire agreement between the Commissioner and Elanco, and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
- [62] Until Closing, Elanco shall make reasonable efforts to ensure that Bayer preserves the Bayer Divestiture Assets in a manner consistent with Part V of this Agreement.
- [63] This Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of law rules.
- [64] In the event of a dispute regarding compliance with or the interpretation, implementation or application of this Agreement, the Commissioner or Elanco may apply to the Tribunal for directions or an order. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail. In no event shall any dispute suspend the Initial Sale Period or the Divestiture Trustee Sale Period.
- [65] This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

The undersigned hereby agree to the filing of this Agreement with the Tribunal for registration.

DATED this 2nd day of July, 2020

COMMISSIONER OF COMPETITION

[Original signed by Matthew Boswell]_____

Name: Matthew Boswell

Title: Commissioner of Competition

ELANCO ANIMAL HEALTH INCORPORATED

[Original signed by Michael-Bryant Hicks]_____

I/We have authority to bind the corporation

Name: Michael-Bryant Hicks

Title: Executive Vice President, General Counsel,
and Corporate Secretary

Elanco Animal Health Incorporated

**CONFIDENTIAL SCHEDULE A
INITIAL SALE PERIOD**

[CONFIDENTIAL]

SCHEDULE B

FORM OF COMPLIANCE CERTIFICATION/AFFIDAVIT

I, **[name]**, of **[place]**, hereby certify¹ in accordance with the terms of the Registered Consent Agreement dated • between Elanco Animal Health Incorporated (“Elanco”) and the Commissioner of Competition, that:

1. I am the **[title]** of Elanco, and have personal knowledge of the matters deposed to herein, unless they are stated to be on information and belief, in which cases I state the source of such information and believe it to be true.
2. On **[date]**, Elanco entered into a Consent Agreement (the “Consent Agreement”) with the Commissioner of Competition (the “Commissioner”) in connection with its proposed acquisition of the Animal Health Business of Bayer AG (the “Transaction”).
3. The Transaction closed on **[date]** (the “Closing Date”).²
4. The Divestiture (as defined in the Consent Agreement) to **[Purchaser]** was completed on **[date]**.
5. Pursuant to Section 47 of the Consent Agreement, Elanco is required to file **[annual reports/reports when requested by the Commissioner]** certifying its compliance with Parts VII, VIII and XI of the Consent Agreement.

Oversight of Compliance

6. **[Names/titles]** have primary responsibility for overseeing compliance with this Agreement.

Closing Date

7. Pursuant to Section 43 of the Consent Agreement, Elanco is required to provide written confirmation to the Commissioner of the date on which the Transaction was completed. Such notice was provided on **[date]**.

Circulation of Consent Agreement

8. Pursuant to Section 44 of the Consent Agreement, Elanco is required to provide a copy of the Consent Agreement to each of its own and its Affiliates’ directors, officers, employees and agents having managerial responsibility for any obligations under the Consent Agreement, within 3 Business Days after the date

¹ If this is drafted as an affidavit, the words “hereby certify” should be removed and should be replaced with “make oath and say”. An affidavit should be sworn under oath. A certification should be certified by a Commissioner for taking affidavits.

² Paragraphs 3, 4, 7 and 8 need only be included in the first certification/affidavit.

of registration of the Consent Agreement. The Consent Agreement was circulated by **[whom]** to **[provide list]** on **[dates]**.

9. Pursuant to Section 44 of the Consent Agreement, Elanco is required to ensure that its directors, officers, employees and agents with responsibility for any obligations under the Consent Agreement receive sufficient training respecting Elanco’s responsibilities and duties under the Consent Agreement. The following training has been provided: **[provide list of who was trained and by whom as well as a general statement of the content of the training]**

Transitional Support Arrangements

10. **[Describe compliance obligations arising from the Elanco’s transitional support commitments, and confirm compliance with each.]**

Notification of Breach

11. Based on my personal knowledge and my inquiries of **[provide names]**, I am not aware of any breach or possible breach of any of the terms of the Consent Agreement within the meaning of Section 48 of the Consent Agreement.

DATED ●.

Commissioner of Oaths

Name and Title of Certifying Officer