July 14, 2021

**VIA ELECTRONIC MAIL**

The Honorable Lina Khan, Chair
The Honorable Rebecca K. Slaughter, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Noah J. Phillips, Commissioner
The Honorable Christine S. Wilson, Commissioner
Ian Conner, Director, Bureau of Competition Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20530

**Re: Request to Investigate Anticompetitive Conduct by Mondelez International, Inc.**

Dear Chair Khan, Commissioners Slaughter, Chopra, Phillips and Wilson, and Director Conner:

This firm represents Leaf Brands, LLC ("Leaf"), manufacturer of Hydrox sandwich cookies.[1] Leaf requests that the Federal Trade Commission investigate the conduct of Mondelez International, Inc. ("Mondelez"), manufacturer of Oreos, in its role as Category Captain ("CC") for several national grocery retailers. As detailed below, Mondelez engaged in exclusionary conduct that eliminated competition from Hydrox, the original chocolate wafer sandwich cookie and chief rival to Oreo for most of the last century. Hydrox believes that such conduct violates Section 5 of the FTC Act, 15 U.S.C. § 45, and/or Section 2 of the Sherman Act, 15 U.S.C.S. § 2, and requests the intervention of the Commission to remedy the violations.[2]

[1] As used herein, "sandwich cookies" refer to two cookies with filling between them.

[2] Mondelez is currently under investigation by the European Commission for restricting competition. According to the EC, Mondelez's conduct, if proven, creates anticompetitive obstacles to trade within the EU Internal Market for cookies, chocolate, and coffee in breach of Articles 101 and/or Article 102 of the Treaty on the Functioning of the European Union (TFEU). *Antitrust: Commission opens formal investigation into possible trade restrictions by Mondelēz, European Commission* (Jan. 28, 2021); https://ec.europa.eu/commission/presscorner/detail/en/ip_21_281.

Under a typical CC arrangement, a retailer sells[3] authority to a leading manufacturer to explicitly or effectively dictate product selection, pricing, placement, and promotion for all products in a category and provide category-level analysis, goals, and planning.[4] This arrangement raises serious antitrust issues. It creates an unpoliced conflict of interest between how CCs should act (maximize category performance) and their own interest (maximize profits at the expense of rivals), which incentivizes anticompetitive conduct. It also bestows dominant sellers with significant and durable market power by giving them the ability and incentive to exclude rivals, control prices, and affect entry and expansion.[5] In essence, CC arrangements sell the position of "guardian of the hen house" to the hungriest fox while believing the fox will disregard its innate instincts and protect the hens.

As the biggest cookie manufacturer, Mondelez was appointed CC for several of the largest grocery retailers in the US. It used this authority to quell nascent competition from Hydrox by implementing its bag of dirty tricks, which include, among other things:

(i) moving Hydrox to less desirable locations like top shelves or away from other sandwich cookies despite increasing Hydrox sales that warranted the opposite treatment;[6]

(ii) sabotaging Hydrox by placing it behind displays or tags, pushing it to the back of shelves, and/or turning it sideways to ensure the Hydrox name is not visible;[7] and

(iii) using these and related tactics to artificially depress Hydrox sales to create a pretext for eliminating Hydrox altogether.

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[3] Retailers typically pay large fees or other forms of compensation and expend substantial resources to serve as CC. Leo S. Carameli Jr., *The Anti-Competitive Effects and Antitrust Implications of Category Management and Category Captains of Consumer Products*, 79 Chicago-Kent Law Review 1313, 1325 (2004). *See also* Subir Bandyopadhyay, Anna Rominger and Savitri Basaviah*, Developing a Framework to Improve Retail Category Management Through Category Captain Arrangements*, 16 Journal of Retailing and Consumer Sciences 315, 316 (2009) ("[CCs] often pay the retailer for the privilege of becoming a CC, as well as use their own resources to handle the task of managing the retailer's shelf space.").

[4] Gregory T. Gundlach and Alex G. Loff, *Competitive Exclusion in Category Captain Arrangements, Working Monograph*, American Antitrust Institute at 25-26 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Gundlach-and-Loff_Comp-Exc.-in-Cat-Cap_8.31.18-FINAL.pdf

[5] Robert L. Steiner, *Category Management – A Pervasive, New Vertical/Horizontal Format*, Antitrust Magazine 77, 79 (2001) ("When a manufacturer can influence a large retailer's decisions over the selection of items from its firm and from its competitors' firms, as well as their pricing, shelf positioning, and promotion, it has gained market power horizontally. Equally, it has gained market power vertically by taking over these vital functions, with their decision-making powers, that were formerly the province of the retailer."); American Bar Association, Section on Antitrust Law, Category Management Antitrust Handbook 3 (2010) ("ABA Handbook") ("A large market position, together with the power to determine retailers' plans for stocking shelves and ordering from competing suppliers, may grant the captain the power to exclude its competitors' products.").

[6] *See* Evidentiary Appendix, Exs. C, J-L.

[7] *See* Evidentiary Appendix, Exs. C-H.

Mondelez's tactics were both successful – it eliminated Hydrox from multiple national retailers in which Mondelez serves as CC – and consistent with how CCs typically abuse their authority to exclude competition. They were also corroborated by representatives for retailers (including the cookie buyer for Walmart) and numerous customers throughout the country. One customer commented:

> I hate this! Our local Ralphs (Kroger) carried Hydrox Cookies for over a year. We bought every week. Checkers said they were flying off the shelf. All of a sudden . . . Gone. An employee told me the Oreo folks threatened to cut back on their deliveries if Hydrox wasn't dropped . . . This is NOT what American competition is about. This is predatory.[8]

Independent third parties with no connection to antitrust have also taken notice. The Food Theorists, a YouTube channel that "theorizes on food, commercials, recipes, and the food industry as a whole," posted a video discussing much of this misconduct in late March of this year.[9] To date, this video has received nearly 4.4 million views and more than thirty thousand comments. More recently, the YouTube channel Hook, which produces content about "inspiring stories that will have you hooked," released a video discussing Mondelez's misconduct. This video received more than 500,000 views less than two weeks.[10] Nonetheless, Leaf and other small competitors lack the resources to address Mondelez's unlawful conduct absent Government intervention and enforcement of the antitrust laws.

In addition to identifying and curing Mondelez's anticompetitive conduct in the sandwich cookie market, the requested investigation would enable the FTC to revisit CC arrangements and grocery retail. The FTC has not investigated CC arrangements or any related grocery retail practices in nearly twenty years and therefore lacks up-to-date information about these arrangements. There is also a dearth of empirical research concerning the anticompetitive effects of CC arrangements and whether purported procompetitive justifications outweigh these effects. Therefore, by engaging in this investigation, the FTC could craft long overdue policies and/or guidelines that counter the competition concerns raised by CC arrangements and immediately improve most Americans' daily lives.

For these reasons Leaf asks the FTC to compel Mondelez to produce information under the Commission's subpoena power. Through its investigation, the FTC likely can identify anticompetitive practices beyond those articulated herein that harm consumers and smaller competitors like Leaf.

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[8] Evidentiary Appendix, Ex. C.
[9] Evidentiary Appendix, Ex. A (The Food Theorists, *Food Theory: The Dark Side of Oreo*, YouTube (Mar. 27, 2021), https://www.youtube.com/watch?v=FtpJFEBcKoE).
[10] Evidentiary Appendix, Ex. B (Hook, *Oreo Is the Knockoff. The Original Cookie Is Back for Revenge*, YouTube (Jul. 1, 2021), https://www.youtube.com/watch?v=Kc2DAJV12E8&t=833s).

## I. Category Captain Arrangements Give Manufacturers the Ability and Incentive to Engage in Anticompetitive Conduct

CC arrangements create the ability and incentive for CCs to engage in anticompetitive conduct by enabling them to make decisions concerning availability, pricing, placement, and promotion of rivals. As former FTC Commissioner Thomas B. Leary aptly explained, providing manufacturers with this power over rivals "set off every antitrust alarm."[11]

### A. Category Captain Arrangements Create a Conflict of Interest that Incentivizes Anticompetitive Conduct

CC arrangements create a conflict of interest for CCs between their responsibilities to retailers and their individual business interests.[12] CCs are supposed to pair the authority and information given to them by retailers with their category-specific knowledge to manage categories to maximize performance for the retailer.[13] But CCs have a pervasive interest in improving the performance of their own brands and seeing rivals fail.[14] Therefore, CCs are strongly incentivized to manage categories to maximize profits and market share for themselves at the expense of rivals.[15] This incentive is exacerbated by the money and resources expended to serve as CC because manufacturers are unlikely to make those outlays and then recommend that their own brands be disadvantaged relative to a competitor.[16]

Retailers cannot mitigate this conflict of interest because CC arrangements lack any monitoring or remedial mechanisms to ensure CCs prioritize category performance over their individual business interests. As a result, CCs typically manage categories to improve performance for their own brands and to reduce or eliminate competition from rivals.[17] This harms competition and consumers by reducing choices, lessoning innovation, and increasing prices.[18]

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[11] Thomas B. Leary, *A Second Look at Category Management* at 1 (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-remarks/040519categorymgmt.pdf (last visited on Jul. 12, 2021).
[12] Gundlach and Loff, *supra* note 4 at 41.
[13] *Id.* at 41-42.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 42.
[17] *See* Myongjin Kim, Leilei Shen, Suman Basuroy, and Sri Beldona, *One for All or All for One: Does the Category Captain Play Favorites* (Sept. 15, 2016), available at SSRN: https://ssrn.com/abstract=2869928 or http://dx.doi.org/10.2139/ssrn.2869928 (finding that manufacturers increase market share by 10% on average while serving as CC); *see also* Leary, *supra* note 12 at 5-6 ("[I]t is not plausible to assume that a category captain will give entirely disinterested advice.").
[18] Gundlach and Loff, *supra* note 4 at 93 ("The restriction of competition among rivals may lead to higher prices, less variety and choice, and reduced rates of innovation."); Arto Lindblom and Rami Olkkonen, *An Analysis of Suppliers' Roles in Category Management Collaboration*, 15 Journal of Retailing and

### B. Category Captain Arrangements Bestow Manufacturers with Substantial and Durable Market Power that Enables Unlawful Exclusion

CC arrangements bestow manufacturers with substantial market power by enabling them to both control prices and exclude competition.[19] Under most CC arrangements, manufacturers explicitly or effectively set retail prices for all brands in the category. These arrangements also enable CCs to exclude competition by:

(i) precluding entry by rivals;
(ii) giving rivals unfavorable locations or promotional slots to diminish sales;
(iii) using access to competitively sensitive information to thwart rivals' growth or lessen their incentive to innovate; and
(iv) using store access to engage in tortious conduct against rival products, which includes misplacing, damaging, destroying or other related acts.[20]

CCs' market power is also durable. CCs can erect significant barriers to entry and expansion by dictating product availability, pricing, placement, and promotion. In addition, CC arrangements reinforce existing market structures because only the largest manufacturers possess the funds and resources to serve as CC.[21] Small rivals cannot enjoy the benefits of serving as CC and are perpetually subject to the anticompetitive actions by CCs.

## II. Mondelez Abuses its Position as Category Captain with Anticompetitive Effects

Hydrox is the original sandwich cookie and served as Oreo's chief rival for most of the last century. However, after poor managerial decisions (including changing the recipe), the brand was discontinued in 2008. Seeking to resurrect an iconic product with a loyal customer base, Leaf purchased the Hydrox trademark in 2014 and began manufacturing Hydrox with the original recipe in 2015. Hydrox had immediate success

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Consumer Services 1, 2 (2008) ("The restriction of competition among rivals may lead to higher prices, less variety and choice, and reduced rates of innovation."); Federal Trade Commission, Report of the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry 46, 51 (2001), https://www.ftc.gov/sites/default/files/documents/reports/report-federal-trade-commission-workshop-slotting-allowances-and-other-marketing-practices-grocery/slottingallowancesreportfinal_0.pdf ("FTC Report") ("A captain that is able to control decisions about product placement and promotions could hinder the entry or expansion of other manufacturers, leading to less variety and possibly higher prices.").

[19] Steiner, *supra* note 6 at 79 ("When a manufacturer can influence a large retailer's decisions over the selection of items from its firm and from its competitors' firms, as well as their pricing, shelf positioning, and promotion, it has gained market power horizontally."); ABA Handbook at 37 ("A large market position, together with the power to determine retailers' plans for stocking shelves and ordering from competing suppliers, may grant the captain the power to exclude its competitors' products.").

[20] Gundlach and Loff, *supra* note 4 at 72-73.

[21] *Id.* at 49; FTC Report at 51 ("Retailers typically select as category captain the manufacturer with the greatest or second-greatest sales in the category.").

and was experiencing exponential growth, making it a competitive threat to Mondelez. In response, Mondelez used its position as CC and national stocking network to implement anticompetitive tactics aimed at eliminating competition from Hydrox, which ultimately proved successful.

### A. Mondelez Employs Anticompetitive Tactics to Eliminate Hydrox

As a century-long rival and CC with unparalleled store access, Mondelez had the ability and incentive to harm Hydrox. Mondelez acted on this motivation, employing the anticompetitive dirty tricks discussed below to eliminate Hydrox from several large nationwide retailers. That Mondelez engaged in this coordinated sabotage is corroborated by documentary evidence showing the effects of these tactics and statements from both representatives of retailers and Hydrox customers with direct knowledge of the misconduct.[22]

Mondelez reduced shelf space for Hydrox and moved it to less desirable locations (such as the top shelf), away from other sandwich cookies, or into rival promotional displays to limit consumer visibility.[23] This was corroborated by a store manager from Ralphs (Kroger affiliate) who explained to a Leaf representative that Hydrox was misplaced in an undesirable location because "the Mondelez representatives are screwing with you and moved you to the top shelf." It was also substantiated by numerous statements from aggrieved Hydrox customers.[24] These placement decisions coincided with Hydrox's substantial growth, meaning Mondelez should have given Hydrox better and increasing shelf space were it discharging its duty as CC to maximize category performance.

Mondelez also utilized its access to stores and nationwide delivery and stocking network to sabotage Hydrox products. Mondelez instructed or incentivized its employees and subcontractors to:

(i) push Hydrox to the back of shelves,[25]
(ii) turn Hydrox sideways so the product name and details are not visible,[26]
(iii) place Hydrox behind hanging store tags or other products to reduce visibility by customers,[27] and
(iv) replace Hydrox with Mondelez brands like Oreos or Nutter Butters on shelf space designated for Hydrox.[28]

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[22] *See generally* Evidentiary Appendix.
[23] *Id.,* Exs.C, I-L; *see also* Mumin Kurtulus, Sezer Ulku, Jeffrey P. Dotson and Alper Nakkas, *The Impact of Category Captainship on the Breadth and Appeal of a Retailer's Assortment*, 90 Journal of Retailing 381, 381 (2014) ("Existing research has shown that competitive exclusion can be driven by…smaller shelf allocation to the non-captain manufacturers....").
[24] Evidentiary Appendix, Ex. C.
[25] *Id.,* Exs. C-D.
[26] *Id.*, Exs. C, E.
[27] *Id.*, Exs. C, F-H.

Finally, Mondelez used artificially depressed Hydrox sales figures to justify removing Hydrox from national retailers. In short, Mondelez responded to Hydrox's exponential growth by implementing the anticompetitive tactics discussed above, which significantly curtailed Hydrox sales. Mondelez then used the manipulated sales data as a pretext for eliminating Hydrox from multiple large national retailers.

These allegations were corroborated by the cookie buyer for Walmart. During a meeting with Leaf on October 1, 2016, the buyer warned Hydrox that it would face a major problem: Mondelez would use its access to stores to hide Hydrox, including in the back of shelves or in the back of stores.[29] According to the buyer, Mondelez would do this to make sure Hydrox fails because it is the closest threat to Oreos.[30] The Walmart buyer was unwilling to protect Hydrox against Mondelez and suggested instead that Leaf hire an outside company to monitor all stores, which is cost prohibitive for a small company like Leaf.

The allegations were also confirmed by angry Hydrox customers who witnessed the effects of the misconduct firsthand.[31] One customer reported "when [Walmart and Kroger] did carry Hydrox, they were hard to find. Pushed to back on the shelf, have a display of gadgets hanging in front of them, moved to a different location on the shelf from where they were the last time."[32] Another reported "Hydrox used to be in our Walmart, but every time we went to get some they were way up high on a shelf or you couldn't see them or hidden behind other things." Yet another said "[w]e complained multiple times to management about the hiding of the Hydrox to no avail and now they're gone! Infuriating!"[33] Much of this misconduct is also detailed in the previously referenced YouTube videos.[34]

Mondelez's actions mirror much of the misconduct condemned by the Sixth Circuit in *Conwood Co., L.P. v. U.S. Tobacco Co*. – the seminal case on CC arrangements. In *Conwood*, the Sixth Circuit upheld a $1.02 billion judgment following a jury trial because the defendant-CC unlawfully maintained its monopoly by, *inter alia*: (i) limiting visibility of the plaintiff's products (as Mondelez did here), (ii) reducing shelf space for the plaintiff's products (as Mondelez did here), (iii) directing employees to move the plaintiff's products to less desirable locations (as Mondelez did here), and (iv) attempting to dupe retailers into discontinuing plaintiff's products through misleading sales data (as Mondelez did here).[35]

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[28] *Id.*, Exs. C, J-K.
[29] *Id.*, Ex. B.
[30] *Id*.
[31] *Id.,* Ex. C.
[32] *Id.*
[33] *Id.*
[34] *Id.*, Exs. A-B.
[35] *See Conwood Co., L.P. v. U.S. Tobacco Co*., 290 F.3d 768 (6th Cir. 2002). To be sure, the defendant in *Conwood* engaged in anticompetitive acts beyond those listed; however, as former Commissioner Leary explained, *Conwood* is an "extreme" example that does not present a floor for unlawful conduct by a CC.

### B. Mondelez's Misconduct Harmed Hydrox

Hydrox sales grew quickly and significantly following its relaunch in 2015. In just over a year, Hydrox climbed into the top 12% of all cookies sold nationwide and was on pace for triple digit year-over-year growth though early 2017. Mondelez noticed Hydrox's sales growth and deployed the tactics discussed above. This caused Hydrox sales to drop precipitously in stores in which Mondelez served as CC and ultimately enabled Mondelez to eliminate Hydrox altogether.

Given Mondelez's domination of the sandwich cookie market and retailers' inability and unwillingness to monitor or remedy its misconduct, where Mondelez continues to serve as CC these issues are likely to persist. This strengthens the need for the FTC to investigate Mondelez and CC arrangements in general.

## III. Category Captain Arrangements Deserve Renewed Attention from the FTC

The FTC has not investigated CC arrangements in nearly twenty years, so the Commission lacks current information about the ongoing effects of CC arrangements. It opened an investigation into the practice in the late 1990s with the intent of providing guidance, but shelved it following the 2000 presidential election. The Commission also conducted two loosely related inquiries in the early 2000s; but these failed to produce substantive conclusions, policies, or guidelines concerning CC arrangements. The lack of current information is particularly unfortunate because CC arrangements have exploded in popularity since the early 2000s. They have also become more problematic over the last two decades because CCs are consistently granted more power, limiting the relevance of conclusions gleaned from earlier data.

Further highlighting the need for FTC intervention, economics and marketing literature provides only limited empirical analysis about the competitive effects of CC arrangements.[36] This is largely because retailers and manufacturers typically refuse to share information with researchers due to antitrust concerns.[37] Consequently, there is little data-based evidence about the extent to which CC arrangements harm competition and/or whether any procompetitive benefits outweigh these harms.[38]

Given the prevalence of CC arrangements and their direct impact on Americans' daily lives, policies and guidance based on updated empirical studies of CC arrangements are sorely needed. Retailers should be encouraged to either guard against the

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Leary, *supra* note 12 at 4. Moreover, *Conwood* was decided following a jury trial and appeal, i.e., after the facts were fully researched and developed. *Conwood*, 290 F.3d at 772.

[36] Gundlach and Loff, *supra* note 4 at 106 ("Empirical research that examines the competitive implications of category captain arrangements is scarce."); Alan Yasin, Jeffrey P. Dotson and Mumin Kurtulus, *On the Competitive and Collaborative Implications of Category Captainship*, 81 Journal of Marketing 128, 128 (2017) ("[E]mpirical evidence on the collaborative and competitive implications of CC is scarce, as retailers are reluctant to share CC data because of antitrust concerns.").

[37] Yasin, Dotson and Kurtulus, *supra* note 38 at 128.

[38] Gundlach and Loff, *supra* note 4 at 10-11, 106.

anticompetitive effects of CC arrangements or eliminate them altogether if adequate protections are infeasible.

## IV. Conclusion

Leaf respectfully requests that the Commission investigate Mondelez's conduct in the sandwich cookie market. Such an investigation could restore competition in this market as well as enable the FTC to update its information and develop guidance about CC arrangements.

Leaf welcomes the opportunity to discuss this or related issues with you or your staff at your convenience.

Respectfully,

Daniel J. Mogin
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