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JANUARY 1, 2004 TO JUNE 30, 2004

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 2004 TO JUNE 30, 2004

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Took oath of office June 4, 2001.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*
Took oath of office November 17, 1999.

PAMELA JONES HARBOUR, *Commissioner*
Took oath of office August 4, 2003.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1988.

Complaint

IN THE MATTER OF

KONINKLIJKE DSM N.V., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4098; File No. 0310064
Complaint, September 22, 2003--Decision, January 6, 2004

This consent order addresses the acquisition by Respondent Koninklijke DSM N.V. ("DSM") of the Vitamins and Fine Chemicals division of Respondent Roche Holding AG. The order, among other things, requires the respondents to divest the DSM business that produces and markets phytase – an enzyme added to poultry and swine feed to promote the digestibility of phosphorous and other nutrients vital to efficient livestock production – to BASF AG, DSM's phytase alliance partner, or to another acquirer approved by the Commission. The order also requires Respondent DSM to provide technical assistance with ongoing research projects, at BASF's request, for a period of six months while these projects are being transferred to BASF, and to contract manufacture phytase, at BASF's request, for up to two years. In addition, the order requires Respondent DSM to provide BASF with the opportunity to enter into employment contracts with certain key employees – and to provide certain employees with financial incentives to accept employment with BASF – and for one year prohibits Respondent DSM from hiring any BASF employee with responsibilities related to phytase. An accompanying Order to Hold Separate and Maintain Assets contains a number of provisions designed to ensure that the viability and competitiveness of the divested assets are not diminished prior to divestiture.

Participants

For the Commission: *Michael R. Moiseyev, Jeffrey H. Perry, David von Nirschl, Steven K. Bernstein, Elizabeth A. Piotrowski, Laura Bivins, Charissa P. Wellford,* and *Mary Coleman.*

For the Respondents: *Pieter de Haan; Ronan P. Harty, Davis Polk & Wardwell,* and *David Gelfand, Kerri J. Chase,* and *Sean D. Corey, Cleary, Gottlieb, Steen & Hamilton.*

COMPLAINT

Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Koninklijke DSM N.V. ("DSM"), a corporation, and Roche Holding AG ("Roche"), a corporation, both subject to the jurisdiction of the Commission, have entered into a Share and Asset Purchase Agreement whereby DSM would acquire certain voting securities and assets that together constitute the Roche Vitamins and Fine Chemicals business in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent DSM is a corporation organized, existing and doing business under and by virtue of the laws of The Kingdom of the Netherlands, with its offices and principal place of business located at Het Overloon, 6411 TE, The Netherlands. DSM's principal subsidiary in the United States is located at 1 Columbia Nitrogen Road, Augusta, Georgia 30903.

2. Respondent Roche is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its offices and principal place of business located at Grenzacherstrasse 124, CH-4070, Basel, Switzerland. Roche's principal subsidiary in the United States is located at 1201 North Orange Street, Wilmington, Delaware 19801.

3. Respondent Fritz Gerber is a member and the speaker of the shareholders' group with pooled voting rights, which group owns the majority of the voting shares of Respondent Roche. Mr. Gerber is the ultimate parent entity of Respondent Roche within the meaning of 16 C.F.R. § 801.1, with his office and principal

place of business at Grenzacherstrasse 124, CH-4070, Basel, Switzerland.

4. Repondents DSM and Roche, together with their respective alliance partners, BASF and Novozymes, are engaged in, among other things, the research, development, manufacture and sale of feed enzymes, including, but not limited to, phytase.

5. Respondents DSM and Roche are, and at all times herein have been, engaged in commerce, as "commerce"is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. On or about February 10, 2003, Respondents DSM and Roche entered into a Share and Asset Purchase Agreement ("Agreement"), pursuant to which DSM will acquire certain voting securities and assets that together constitute Roche's Vitamins and Fine Chemicals business (the "Acquisition"). Under the terms of the Agreement, and the amendments thereto, the Acquisition is valued at approximately $1.89 billion.

III. THE RELEVANT MARKET

7. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture and sale of phytase. Phytase is a feed enzyme used in animal feed to improve the digestibility of phytate contained in the feed, thereby releasing phosphorous and other nutrients.

8. For the purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

IV. THE STRUCTURE OF THE MARKET

9. DSM and Roche have each formed an alliance with a partner in their respective phytase businesses. DSM has an ongoing alliance with BASF, and Roche has an ongoing alliance with Novozymes. These two competing phytase alliances are the only two significant suppliers of phytase in the world. Thus, the market for the research, development, manufacture and sale of phytase is highly concentrated, as measured by the Herfindahl-Hirschman Index. The proposed acquisition, if consummated, would link these two, previously independent, alliances.

V. ENTRY CONDITIONS

10. Entry into the research, development, manufacture and sale of phytase is a difficult and time consuming process because of, among other things, the requirement of regulatory approval to sell phytase in the United States and other jurisdictions, the technical expertise required to develop and manufacture phytase, the distribution network required to market and sell phytase, and the patent positions of the current market participants.

11. For the reasons described in Paragraph 10, new entry into the relevant market is not likely to occur in a manner timely and sufficient to deter or counteract the adverse competitive effects of the Acquisition described in Paragraph 12.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between DSM's and Roche's respective alliances in the relevant market;

b. by substantially increasing the likelihood that DSM will unilaterally exercise market power in the relevant market;

c. by increasing the likelihood of coordinated interaction in the relevant market;

d. by reducing current incentives to improve service or product quality, or to pursue further innovation in the relevant market; and

e. by increasing the likelihood that customers of phytase would be forced to pay higher prices.

VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of September, 2003, issues its Complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of the Roche Vitamins and Fine Chemicals business of Respondent Roche Holding AG ("Roche") by Respondent Koninklijke DSM N.V. ("DSM"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent DSM is a corporation organized, existing and doing business under and by virtue of the laws of The Kingdom of the Netherlands, with its offices and principal place of business located at Het Overloon 1, 6411 TE, Heerlen, The Netherlands.

2. Respondent Roche is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its offices and principal place of business located at Grenzacherstrasse 124, CH-4070, Basel, Switzerland.

3. Respondent Fritz Gerber is a member and the speaker of the shareholders' group with pooled voting rights, which group owns the majority of the voting shares of Respondent Roche. Mr. Gerber is the ultimate parent entity of Respondent Roche within the meaning of 16 C.F.R. § 801.1, with his office and principal place of business at Grenzacherstrasse 124, CH-4070, Basel, Switzerland.

4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER
I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "DSM" means Koninklijke DSM N.V., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by DSM N.V. (including, but not limited to, DSM Food Specialties B.V., formerly known as Gist Brocades BSD B.V.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Effective Date, the term "DSM" shall include the businesses that formerly comprised Roche Holding AG's

Vitamins and Fine Chemicals Division, and Roche Vitamins Ltd and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Roche" means Roche Holding AG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Roche (including, but not limited to, F. Hoffmann-La Roche Ltd, and, prior to the Effective Date: 1) Roche Holding AG's Vitamins and Fine Chemicals Division; and 2) Roche Vitamins Ltd), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Fritz Gerber" means Fritz Gerber, an individual, who is a member and the speaker of the shareholders' group with pooled voting rights, which group owns the majority of the voting shares of Respondent Roche.

D. "Respondents" means DSM, Roche, and Fritz Gerber, individually and collectively.

E. "Acquisition" means the acquisition contemplated by the Share and Asset Purchase Agreement dated as of February 10, 2003, between DSM and Roche Holding AG ("Acquisition Agreement") pursuant to which DSM shall acquire certain voting securities and assets that constitute the business of Roche's Vitamins and Fine Chemicals Division.

F. "Commission" means the Federal Trade Commission.

G. "BASF" means BASF Aktiengesellschaft, a corporation organized, existing, and doing business under and by virtue of the laws of the Federal Republic of Germany, with its registered office at 67056 Ludwigshafen, Federal

Republic of Germany.

H. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution or sale of a product.

I. "Business Day" means any day excluding Saturday, Sunday and any United States Federal holiday.

J. "Closing Date" means the date on which Respondent DSM (or a Divestiture Trustee) and a Commission-approved Acquirer close on a transaction to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets pursuant to this Order.

K. "Commission-approved Acquirer" means: 1) an entity that is specifically identified in this Order to acquire particular assets that Respondent DSM is required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final; or 2) an entity approved by the Commission to acquire particular assets that Respondent DSM is required to assign, grant, license, divest, transfer, deliver or otherwise convey pursuant to this Order.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the research, Development, manufacture, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of a product.

M. "Contract Manufacture" means the manufacture of a Feed

Enzymes Product to be supplied by Respondent DSM or a Designee for sale to the Commission-approved Acquirer.

N. "Designee" means any entity other than Respondent DSM that will manufacture Feed Enzymes Product(s) for a Commission-approved Acquirer.

O. "Development" means all development activities including, but not limited to, test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing and sale of a product (including any governmental price or reimbursement approvals), product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

P. "Direct Cost" means, with respect to Respondent DSM providing assistance or services to the Commission-approved Acquirer, the cost of direct labor and direct material used to provide the relevant assistance or service; *provided, however,* that, where Respondent DSM has an hourly rate that is: 1) charged by Respondent DSM for intra-group (*i.e.*, within DSM) assistance or service; 2) verified by the Commission-approved Acquirer or the Interim Monitor as the rate normally charged by Respondent DSM for such intra-group assistance or service; and 3) reasonable and determined in good faith, Respondent DSM may charge the Commission-approved Acquirer that hourly rate as in existence at the time such assistance or service is rendered to the Commission-approved Acquirer.

Q. "Divestiture Agreement" means: 1) any agreement

between Respondent DSM and a Commission-approved Acquirer that is specifically referenced and attached to this Order and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed, and that have been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; or 2) any agreement between Respondent DSM and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed that have been approved by the Commission to accomplish the requirements of this Order.

R. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.

S. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any entity or authority who issues and maintains the domain name registration. "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

T. "DSM/BASF Alliance" means the business alliance created by and existing under the DSM/BASF Alliance Agreements.

U. "DSM/BASF Alliance Agreements" means the following agreements: 1) the "Distribution Agreement" between BASF Aktiengesellschaft and Gist-Brocades BSD B.V. (now known as DSM Food Specialties B.V.) dated August 16, 1994; 2) the "Cooperation Agreement" between BASF Aktiengesellschaft and Gist-Brocades BSD B.V. (now known as DSM Food Specialties B.V.) dated August 16, 1994, and all amendments, exhibits, attachments, agreements, and schedules thereto; 3) the "Toll Formulation Agreement" between BASF Aktiengesellschaft and Gist-Brocades BSD B.V. dated August 16, 1994; 4) "Payment Agreement" between BASF Aktiengesellschaft and Gist-Brocades BSD B.V. dated August 16, 1994; and 5) the "Accounting Method Agreement" between BASF Aktiengesellschaft and Gist-Brocades BSD B.V. dated October 25, 1994.

V. "Effective Date" means the date the Respondents close on the Acquisition Agreement.

W. "Employee Notification" means the "Notice of Divestiture and Requirement for Confidentiality" attached to this Order as public Appendix I and to the Order to Hold Separate and Maintain Assets as public Appendix A.

X. "Feed Enzymes Assets" means all of Respondent DSM's rights, title and interest in and to all assets related to Respondent DSM's worldwide business related to Feed Enzymes Products, to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of the Feed Enzymes Products, including, without limitation, the following:

1. all Product Intellectual Property; *provided however,* that, for fields outside the field of animal nutrition, Respondent DSM may retain worldwide, irrevocable, perpetual, fully paid-up and royalty-free license(s) to the Product Intellectual Property (other than the Product

Trademarks) to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported the following: 1) Phytase products anywhere in the world (on a non-exclusive basis); and, 2) non-starch polysaccharide degrading enzymes products or α-amylase products anywhere in the world, including the right to grant sub-licenses for any such purpose (on an exclusive basis, even as to the Commission-approved Acquirer).

2. license(s) within the field of feed enzymes to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import or export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported or exported any Feed Enzymes Product anywhere in the world; *provided, however*, such license(s) shall be worldwide, irrevocable, perpetual, fully paid-up and royalty-free; *provided further, however*, such license(s) shall be on an exclusive basis (even as to Respondent DSM), subject only to certain pre-existing Third Party rights unrelated to Phytase that may exist in respect to non-starch polysaccharide degrading enzymes or α-amylase, in accordance with the Divestiture Agreement(s);

3. the Feed Enzymes Products and Product Registrations;

4. the Product Trade Dress;

5. a list of all customers and targeted customers for Feed Enzymes Products and the planned or proposed pricing of Feed Enzymes Products for such customers;

6. at the Commission-approved Acquirer's option, each of the Product Assumed Contracts;

7. all Product Marketing Materials;

8. all Website(s) related to the Feed Enzymes Product(s);

9. Product Scientific and Regulatory Material;

10. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two (2) Business Days after the Closing Date);

11. Product Manufacturing Technology, and Feed Enzymes Products' manufacturing processes;

12. at the Commission-approved Acquirer's option, all inventories in existence as of the Closing Date, including, but not limited to, raw materials, goods in process, finished goods, and Feed Enzymes Products' specific packaging and labels;

13. at the Commission-approved Acquirer's option (and, in the case of BASF, to the extent exercised in the Feed Enzymes Severance and Transitional Support Agreement), all manufacturing and other equipment located at the Feed Enzymes Granulation Facility that was used in, or suitable for use in, the research, Development or manufacture of the Feed Enzymes Products including, but not limited to, the machinery used in the granulation of the Feed Enzymes Products; and

14. all Respondent DSM's books, records and files related to the foregoing, including, but not limited to, the following specified documents: the Product Registrations; all data submitted to and all correspondence with Agencies; all validation documents and data; all market studies; all sales histories, including, without limitation, clinical data, and sales force call activity, for the Feed Enzymes Products from January 1, 2000, through the Closing Date, and quality control histories pertaining to the Feed Enzymes Products owned by, or in the possession or

control of, Respondent DSM, or to which Respondent DSM has a right of access, in each case such as is in existence as of the Closing Date;

provided, however, that in cases in which documents or other materials included in the Feed Enzymes Assets contain information that (i) relates both to the Feed Enzymes Product(s) and to other product(s) or businesses of Respondent DSM, and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Feed Enzymes Products, Respondent DSM shall be required only to provide copies of the documents and materials containing this information. In instances where such copies are provided to the Commission-approved Acquirer, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent DSM provides the Commission-approved Acquirer with the above-described information without requiring Respondent DSM completely to divest itself of information that, in content, also relates to product(s) and businesses other than the Feed Enzymes Products;

provided further, however, the term "Feed Enzymes Assets" does not include: 1) any rights, title and interest in or to owned or leased real property or buildings or production facilities (other than the Feed Enzymes Granulation Facility); or 2) any rights, title and interest in or to the Phytaseed Intellectual Property.

Y. "Feed Enzymes Core Employees" means the Product Animal Nutritionist Employees, Product Marketing Employees, Product Manufacturing Employees, Product Patent Attorneys, and Product Research and Development Employees.

Z. "Feed Enzymes Granulation Facility" means Respondent DSM's feed enzyme granulating facility located in Seclin, French Republic.

AA. "Feed Enzymes Products" shall mean the following products that are either marketed, manufactured, or otherwise commercialized by, or are the subject of research or Development by Respondent DSM or the DSM/BASF Alliance: 1) Phytase; 2) non-starch polysaccharide degrading enzymes for use in animal nutrition; and 3) α-amylase for use in animal nutrition. The term "Feed Enzymes Products" includes all other products marketed or in Development by Respondent DSM or the DSM/BASF Alliance that are planned to be marketed for use in animals to enhance the animal's ability to digest phytate (including, but not limited to, the thermostable phytase molecules, designated DSM1 and DSM2), but expressly excludes any products acquired by Respondent DSM pursuant to the Acquisition (including those products acquired by Respondent DSM that are a part of the Novozymes/Roche Alliance).

BB. "Feed Enzymes Severance and Transitional Support Agreement" means the "Severance and Transitional Support Agreement" between BASF Aktiengesellschaft and DSM Food Specialities B.V." dated August 29, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Feed Enzymes Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Feed Enzymes Severance and Transitional Support Agreement is attached to this Order and contained in non-public Appendix II.

CC. "Feed Enzymes Transitional Supply Agreement" means the "Transitional Supply Agreement" between BASF Aktiengesellschaft and DSM Food Specialties B.V. dated August 29, 2003, and all amendments, exhibits,

attachments, agreements, and schedules thereto, related to the Feed Enzymes Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The Feed Enzymes Transitional Supply Agreement is attached to this Order and contained in non-public Appendix II.

DD. "Feed Enzymes Releasee(s)" means the Commission-approved Acquirer or any entity controlled by or under common control with the Commission-approved Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Commission-approved Acquirer, or of such Commission-approved Acquirer-affiliated entities.

EE. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.

FF. "Law" means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law by any Governmental Entity.

GG. "Novozymes" means: 1) Novozymes A/S (a corporation organized and existing under the laws of The Kingdom of Denmark, having its principal place of business at Krogshoejvej 36, DK-2880 Bagvaerd, Denmark), its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Novozymes A/S and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; 2) Novo Nordisk A/S (a corporation organized and existing under the laws of The Kingdom of Denmark, having its principal place of business at Novo Allé, DK-2880 Bagsvaerd, Denmark) its directors, officers, employees, agents, representatives,

predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Novo Nordisk A/S and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; 3) any entity that controls Novozymes A/S and its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by such entity and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

HH. "Novozymes Products" means any product researched, Developed, manufactured, marketed, or sold pursuant to or in connection with the Novozymes/Roche Alliance.

II. "Novozymes/Roche Alliance" means the business alliance created and existing by virtue of the agreement between Novo Nordisk A/S and F. Hoffmann-La Roche Ltd dated June 8, 2000, and its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Novozymes/Roche and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. The term "Novozymes/Roche Alliance" includes any similar arrangement to market products between Novozymes and Respondent DSM.

JJ. "Patents" means all patents, patent applications and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations

thereto in the world, related to any Feed Enzymes Product(s) of or owned by Respondent(s) (or, where specified, Novozymes) as of the Closing Date.

KK. "Phytase" means any product that: 1) is the subject of the research, Development of Respondent DSM or the DSM/BASF Alliance for the purpose of promoting or otherwise enhancing an animal's ability to digest phytate; or 2) any product that is manufactured, marketed or otherwise commercialized by Respondent DSM or the DSM/BASF Alliance that promotes or otherwise enhances an animal's ability to digest phytate;

provided, however, the product "Phytase" includes all uses and applications of this product (including, but not limited to, uses for animal nutrition or human nutrition), but expressly excludes any products acquired by Respondent DSM pursuant to the Acquisition (including those products acquired by Respondent DSM that are a part of the Novozymes/Roche Alliance).

LL. "Phytaseed Intellectual Property" means the patents, trademarks, copyrights, technology, trade secrets, know-how, and proprietary information that Respondent DSM holds jointly with Syngenta relating to the production of feed enzymes in plants or seeds.

MM. "Product Animal Nutritionist Employees" means all employees of Respondent DSM or the DSM/BASF Alliance who directly participated (irrespective of the portion of working time involved) in Feed Enzymes Product trials on animals or provided technical support on matters of animal nutrition related to Feed Enzymes Products to customers within the eighteen (18) month period immediately prior to the Closing Date; *provided however,* the term "Product Animal Nutritionist Employees" does not include those employees that the Commission-approved Acquirer expressly agrees to

exclude. These employees are identified in non-public Appendix III.

NN. "Product Assumed Contracts" means all contracts or agreements:

1. pursuant to which any Third Party purchases the Feed Enzymes Product(s) from Respondent DSM;

2. pursuant to which Respondent DSM purchases any materials from any Third Party for use in connection with the manufacture of the Feed Enzymes Product(s);

3. relating to the marketing of the Feed Enzymes Product(s) or educational matters relating to the Feed Enzymes Product(s);

4. relating to the manufacture of the Feed Enzymes Product(s);

5. constituting confidentiality agreements involving the Feed Enzymes Product(s);

6. involving any royalty, licensing or similar arrangement involving the Feed Enzymes Product(s);

7. pursuant to which any services are provided with respect to the Feed Enzymes Product(s) or the Feed Enzymes Product(s) business, including consultation arrangements; and/or

8. pursuant to which any Third Party collaborates with Respondent DSM in the performance of research or Development of the Feed Enzymes Product(s) or the Feed Enzymes Product(s) business;

provided, however, that where any such contract or agreement also relates to product(s) of Respondent DSM other than the

Feed Enzymes Product(s) required to be divested pursuant to this Order, Respondent DSM shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to the Feed Enzymes Product(s)

required to be divested pursuant to this Order, but concurrently may retain similar rights for the purposes of the other product(s).

OO. "Product Background Technologies" means

1. Patents that both: 1) relate to any element of the manufacturing process used in the manufacture of Feed Enzymes Products; and 2) have been routinely used in the production of commercialized product(s) other than the Feed Enzymes Products prior to the date of the Acquisition Agreement, *i.e.*, February 10, 2003;

2. technology, trade secrets, know-how, and proprietary information that both: 1) relate to the manufacture of Feed Enzymes Products; and 2) have been routinely used in the production of commercialized product(s) other than the Feed Enzymes Products prior to the date of the Acquisition Agreement, *i.e.*, February 10, 2003;

provided, however, "Product Background Technologies" specifically excludes Patents that cover specific Feed Enzymes Product(s) or product formulations of Feed Enzymes Product(s). (Such Patents are a part of the Product Intellectual Property.)

PP. "Product Copyrights" means rights to all original works of authorship of any kind related to any Feed Enzymes Product(s) and any registrations and applications for registrations thereof, including, but not limited to, the following: all promotional materials; all promotional materials for livestock producers; educational materials for the sales force; copyrights in all process development data

and reports relating to the research and Development of Feed Enzymes Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the Feed Enzymes, all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; customer information, promotional and marketing materials, the Feed Enzymes Product(s) sales forecasting models, education materials, sales training materials, Website content and advertising and display materials; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to the Feed Enzymes Product(s) or relating to its biology; all adverse experience reports and files related thereto (including source documentation) and all periodic adverse experience reports and all data contained in electronic data bases relating to adverse experience reports and periodic adverse experience reports; all analytical and quality control data; and all correspondence with the relevant Agencies.

QQ. "Product Employee Information" means the following:

1. a complete and accurate list containing the name of each relevant employee as of the execution date of the related Divestiture Agreement. This list shall be organized by the relevant respective employee categories defined in this Order, (*i.e.*, "Product Animal Nutritionist Employees," "Product Finance Employees," "Product Manufacturing Employees," "Product Marketing

Employees," "Product Patent Attorneys," or "Product Research and Development Employees," as applicable);

2. with respect to each such employee:

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Feed Enzymes Product(s); *provided, however*, in lieu of this description, Respondent DSM may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

   e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

   f. employment status (*i.e.,* active or on leave or disability; full-time or part-time); and

   g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Commission-approved Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

RR. "Product Finance Employees" means all employees of Respondent DSM or the DSM/BASF Alliance who directly participated in the preparation of the profit-and-

loss statements, the cost accounting, or the pricing of Feed Enzymes Product(s), for the purposes of the DSM/BASF Alliance Agreements; *provided, however,* the term "Product Finance Employees" does not include those employees that the Commission-approved Acquirer expressly agrees to exclude. These employees are identified in non-public Appendix III.

SS. "Product Intellectual Property" means all of the following related to the Feed Enzymes Product(s):

1. Patents;

2. Product Copyrights;

3. Product Software;

4. Product Trademarks;

5. trade secrets, know-how, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process and in final Feed Enzymes Products, protocols, 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, other than Product Licensed Intellectual Property;

6. rights to obtain and file for Patents and registrations thereof; and

7. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, the term "Product Intellectual Property" does not include: 1) the Product Licensed Intellectual Property;

or 2) the names "DSM," "Roche," or the names of any other corporations or companies owned by Respondent(s) or related logos to the extent used on other of Respondent DSM's or Respondent Roche's Products.

TT. "Product Licensed Intellectual Property" means:

1. Product Software that both: 1) is used in connection with the analysis of research and development data for the Feed Enzymes Product(s); and 2) has been routinely used, prior to the date of the Acquisition Agreement, *i.e.*, February 10, 2003, by Respondent DSM for product(s) other than the Feed Enzymes Product(s); and

2. Product Background Technologies;

provided, however, that, in order for Respondent DSM to retain any interest in any such intellectual property, it shall demonstrate to the satisfaction of the Commission that such technology has been routinely used in the production of commercialized product(s) other than the Feed Enzymes Products prior to the date of the Acquisition Agreement, *i.e.*, February 10, 2003.

UU. "Product Manufacturing Employees" means all salaried employees of Respondent DSM or the DSM/BASF Alliance who directly participated (irrespective of the portion of working time involved) in the manufacture of the Feed Enzymes Product(s), including, but not limited to, those involved in the quality assurance and quality control of the Feed Enzymes Product(s), within the eighteen (18) month period immediately prior to the Closing Date; *provided, however,* the term "Product Manufacturing Employees" does not include those employees that the Commission-approved Acquirer expressly agrees to exclude. These employees are identified in non-public Appendix III.

VV. "Product Manufacturing Technology" means all technology, trade secrets, know-how, and proprietary information related to the manufacture, validation, packaging, release testing, stability and shelf life of the Feed Enzymes Product(s), including the Feed Enzymes Product(s)' formulation, in existence and in the possession of Respondent DSM or the DSM/BASF Alliance as of the Closing Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

WW. "Product Marketing Employees" means all management level employees of Respondent DSM or the DSM/BASF Alliance who directly participated (irrespective of the portion of working time involved) in the marketing, contracting, or promotion of the Feed Enzymes Product(s) within the eighteen (18) month period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, but excluding administrative assistants; *provided, however,* the term "Product Marketing Employees" does not include those employees that the Commission-approved Acquirer expressly agrees to exclude. These employees are identified in non-public Appendix III.

XX. "Product Marketing Materials" means all marketing materials used anywhere in the world related to the Feed Enzymes Product(s) as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., vendor lists; sales data; reimbursement data), marketing information (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales

research; customer information, including customer sales information; sales forecasting models; educational materials; Website content and advertising and display materials; speaker lists), promotional and marketing materials, artwork for the production of packaging components, television masters and other similar materials related to the Feed Enzymes Product(s).

YY. "Product Patent Attorneys" means all employees of Respondent DSM or the DSM/BASF Alliance who are attorneys and who performed legal work (irrespective of the portion of working time involved) on Patents related to the Feed Enzymes Products; *provided, however,* the term "Product Patent Attorneys" does not include those employees that the Commission-approved Acquirer expressly agrees to exclude. These employees are identified in non-public Appendix III.

ZZ. "Product Registrations" means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing or sale of the Feed Enzymes Product(s) worldwide in existence for the Feed Enzymes Product(s) as of the Closing Date.

AAA. "Product Research and Development Employees" means all employees of Respondent DSM or the DSM/BASF Alliance who directly participated (irrespective of the portion of working time involved) in the research, Development, or regulatory approval process, of the Feed Enzymes Product(s) within the eighteen (18) month period immediately prior to the Closing Date; *provided, however,* the term "Product Research and Development Employees" does not include those employees that the Commission-approved Acquirer expressly agrees to exclude (other

than inventors listed on Patents related to Phytase as further provided herein). "Product Research and Development Employees" also includes any employee of either Respondent DSM or the DSM/BASF Alliance who is listed as an inventor of any Patent related to Phytase regardless of when that Patent was filed or the research, Development, or regulatory work of that employee was performed. These employees are identified in non-public Appendix III.

BBB. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and clinical trial materials and information related to the Feed Enzymes Product(s), and all rights thereto, in any and all jurisdictions.

CCC. "Product Software" means computer programs related to the Feed Enzymes Product(s), including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however,* that "Product Software" does not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

DDD. "Product Trade Dress" means the current trade dress of the Feed Enzymes Product(s), including, but not limited to, product packaging associated with the sale of the Feed Enzymes Product(s) worldwide and the lettering of the Feed Enzymes Product(s)' trade name or brand name.

EEE. "Product Trademark(s)" means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Feed Enzymes Product(s). The term "Product Trademarks" includes the following trademarks: Natuphos®, Natugrain®, and Natustarch®.

FFF. "Proposed Acquirer" means an entity proposed by Respondent DSM (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondent DSM pursuant to this Order.

GGG. "Roche Commitment Agreement" means the "Commitment to the United States Federal Trade Commission" by Roche signed by Dr. Franz B. Humer and Mr. Fritz Gerber and dated August 29, 2003. The Roche Commitment Agreement is attached to this Order and contained in non-public Appendix II.

HHH. "Supply Cost" means Respondent DSM's actual costs, calculated in good faith and in accordance with past practice under the DSM/BASF Alliance, associated with the production of the Feed Enzymes Product(s) for the Commission-approved Acquirer pursuant to the Transitional Supply Agreement. Notwithstanding the preceding, the term "Supply Cost" shall expressly exclude any intra-company business profit transfer and any allocation for capital charges for capital projects initiated after the date of the Acquisition Agreement, *i.e.,* February 10, 2003.

III. "Syngenta" means Syngenta AG, a corporation organized, existing, and doing business under and by

virtue of the laws of the Swiss Confederation, with its registered office at Schwarzwaldalle 215, 4058 Basel, Switzerland.

JJJ. ”Third Party(ies)” means any private entity other than: (1) the Respondents, or (2) the Commission-approved Acquirer for the relevant assets to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed, related to a particular Feed Enzymes Product(s).

KKK. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondent DSM. “Website” shall not include (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent DSM that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that Respondent DSM can convey its rights, if any, therein; or (2) content unrelated to the Feed Enzymes Product(s).

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Effective Date, Respondent DSM shall divest the Feed Enzymes Assets (to the extent that such assets are not already owned, controlled or in the possession of BASF), absolutely and in good faith, to BASF pursuant to and in accordance with the Feed Enzymes Severance and Transitional Support Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of BASF or to reduce any obligations of

Respondent DSM under such agreement), and such agreement, if it becomes one of the Divestiture Agreements for the Feed Enzymes Assets, is incorporated by reference into this Order and made a part hereof. If Respondent DSM does not divest the Feed Enzymes Assets to BASF within ten (10) Business Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Feed Enzymes Assets;

provided however, that if Respondent DSM has divested the Feed Enzymes Assets to BASF prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent DSM that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent DSM, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Feed Enzymes Assets to BASF (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. On or before the date on which Respondent DSM closes on a transaction to divest the Feed Enzymes Assets, Respondent DSM shall terminate, absolutely and in good faith, the DSM/BASF Alliance pursuant to and in accordance with the Feed Enzymes Severance and Transitional Support Agreement and in a manner that preserves the full economic viability, marketability and competitiveness of the business associated with the Feed Enzymes Assets.

C. On or before the date on which Respondent DSM closes on a transaction to divest the Feed Enzymes Assets, Respondent DSM shall waive all rights it may have to object to, limit or otherwise prohibit the licensing of the Phytaseed Intellectual Property by Syngenta to the Commission-approved Acquirer.

D. Respondent DSM shall not seek to influence, participate in, or interfere with any negotiations or discussions between the Commission-approved Acquirer and Syngenta that relate to the licensing of the Phytaseed Intellectual Property and shall consent to the license of any of the Phytaseed Intellectual Property by Syngenta to the Commission-approved Acquirer.

E. Any Divestiture Agreement that has been approved by the Commission between Respondent DSM (or a Divestiture Trustee) and a Commission-approved Acquirer of the Feed Enzymes Assets shall be deemed incorporated into this Order, and any failure by Respondent DSM to comply with any term of such Divestiture Agreement related to the Feed Enzymes Assets shall constitute a failure to comply with this Order.

F. Respondent DSM shall include in any Divestiture Agreement related to the Feed Enzymes Assets the following provisions:

1. Respondent DSM shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of the Feed Enzymes Products, at Respondent DSM's Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture the Feed Enzymes Products independently of Respondent DSM.

2. After Respondent DSM commences delivery of the Feed Enzymes Products to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to the Feed Enzymes Products, Respondent DSM will make inventory of the Feed Enzymes Products available for sale or resale only to the Commission-approved Acquirer.

3. Respondent DSM shall make representations and warranties to the Commission-approved Acquirer that the Feed Enzymes Products supplied through Contract Manufacture pursuant to the Divestiture Agreement meet the specifications provided in the Feed Enzymes Transitional Supply Agreement. Respondent DSM shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Feed Enzymes Products supplied to the Commission-approved Acquirer pursuant to the Divestiture Agreement by Respondent DSM to meet such specifications. This obligation shall be contingent upon the Commission-approved Acquirer giving Respondent DSM prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondent DSM under this Order; *provided, however*, Respondent DSM may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondent DSM's responsibilities to supply the Feed Enzymes Products in the manner required by this Order; *provided further, however*, this obligation shall not require Respondent DSM to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by Respondent DSM to the Commission-approved Acquirer.

4. Respondent DSM shall make representations and warranties to the Commission-approved Acquirer that Respondent DSM will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondent DSM to deliver the Feed Enzymes Products in a timely manner

as required by the Divestiture Agreement unless Respondent DSM can demonstrate that its failure was entirely beyond the control of Respondent DSM and in no part the result of negligence or willful misconduct by Respondent DSM.

5. During the term of the Contract Manufacture between Respondent DSM and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondent DSM shall make available to the Commission-approved Acquirer or the Interim Monitor all records that relate to the manufacture of the Feed Enzymes Products that are generated or created after the Closing Date.

6. Upon reasonable notice and request from the Commission-approved Acquirer to Respondent DSM, Respondent DSM shall provide in a timely manner at no greater than Direct Cost:

   a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell the Feed Enzymes Products;

   b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture the Feed Enzymes Products in substantially the same manner and quality employed or achieved by Respondent DSM; and,

   c. consultation with knowledgeable employees of Respondent DSM and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee

of the Commission-approved Acquirer) obtains all Agency approvals necessary to manufacture the Feed Enzymes Products independently of Respondent DSM and sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Feed Enzymes Products.

7. Upon reasonable notice and request from the Commission-approved Acquirer to either Respondent DSM or Respondent Roche, as appropriate, Respondent DSM or Respondent Roche shall provide in a timely manner, at no greater than Direct Cost, assistance with knowledgeable employees of the relevant Respondent to assist the Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property.

8. Respondent DSM shall covenant to the Commission-approved Acquirer that Respondent DSM shall not join, or file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under Patents that: 1) are owned or licensed by Respondent DSM as of the Effective Date, or 2) may be assigned, granted, licensed, or otherwise conveyed to DSM after the Effective Date, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the Feed Enzymes Products (but only as to those products that are commercialized or in Development as of the Closing Date) in the field of animal nutrition.

9. Respondent DSM shall covenant to the Commission-approved Acquirer that: 1) any Third Party assignee, transferee or licensee of the above-described Patents shall agree to provide a covenant not to sue the Feed Enzymes Releasees, at least as protective as those extended

pursuant to the preceding Paragraph II.F.8, as a condition of such assignment, transfer or license; and 2) with respect to any Third Party rights licensed to Respondent DSM as of or after the Effective Date, and as to which Respondent DSM does not control the right of prosecution of any suit, legal or other action, Respondent DSM shall not actively induce, assist or participate in any suit, legal or other action or proceeding relating to the Feed Enzymes Products (but only as to those products that are commercialized or in Development as of the Closing Date) against the Feed Enzymes Releasees, unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

G. Respondent DSM shall submit to the Commission-approved Acquirer, at Respondent DSM's expense, all Confidential Business Information related to the Feed Enzymes Products.

H. Respondent DSM shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order or the related Order to Hold Separate and Maintain Assets) related to the research, Development, manufacturing, marketing, or sale of the Feed Enzymes Products, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except to the Commission-approved Acquirer.

I. For a period of five (5) years after the Closing Date, Respondent DSM shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Patent Attorneys and Product Research and Development Employees. For a period of two (2) years after the Closing Date, Respondent DSM shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the

Product Animal Nutritionist Employees and Product Marketing Employees. For a period extending from the Closing Date until one (1) year after the date on which the last delivery of Feed Enzymes Products to the Commission-approved Acquirer occurs (pursuant to the Divestiture Agreement to Contract Manufacture Feed Enzymes Products between Respondent DSM and the Commission-approved Acquirer), Respondent DSM shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Product Manufacturing Employees. These periods are hereinafter referred to as the "Employee Access Periods."

J. Respondent DSM shall provide any Proposed Acquirer with the opportunity to enter into employment contracts with the Feed Enzymes Core Employees in connection with the divestiture of the Feed Enzymes Assets; *provided, however*, that any such employment contracts entered into prior to the Closing Date shall be contingent upon approval by the Commission of the agreements relating to the Feed Enzymes Assets (*i.e.,* those agreements proposed by Respondent DSM (or the Divestiture Trustee) to the Commission) as the Divestiture Agreements for the Feed Enzymes Assets.

K. Not later than twenty-five (25) Business Days after the execution date of any proposed Divestiture Agreement related to Feed Enzymes Assets, Respondent DSM shall provide the Commission-approved Acquirer or the Proposed Acquirer the Product Employee Information related to the Feed Enzymes Core Employees. Failure by Respondent DSM to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the Employee Access Periods with respect to that employee in an amount equal to the delay.

L. During the Employee Access Period, Respondent DSM shall not interfere with the hiring or employing by the Commission-approved Acquirer of Feed Enzymes Core Employees, and shall remove any impediments within the control of Respondent DSM that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent DSM that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent DSM shall not make any counteroffer to a Feed Enzymes Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

provided, however, that these requirements shall not prohibit Respondent DSM from making offers of employment to or employing any Feed Enzymes Core Employee during the Employee Access Periods where the Commission-approved Acquirer has notified Respondent DSM in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

provided further, that if Respondent DSM notifies the Commission-approved Acquirer in writing of its desire to make an offer of employment to a particular Feed Enzymes Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Business Days of the date the Commission-approved Acquirer receives such notice, Respondent DSM may make an offer of employment to that employee.

M. Respondent DSM shall provide all Feed Enzymes Core Employees employed by Respondent DSM with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondent DSM until the Closing Date for the divestiture

of the Feed Enzymes Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law). In addition to the foregoing, Respondent DSM shall provide to each Feed Enzymes Core Employee employed by Respondent DSM who accepts employment with the Commission-approved Acquirer, an incentive equal to forty (40) percent of such

employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer;

provided, however, that nothing in these requirements or in this Order requires or shall be construed to require Respondent DSM to terminate the employment of any employee.

N. For a period of one (1) year after the Closing Date, Respondent DSM shall not:

1. directly or indirectly, solicit or otherwise attempt to induce any employee of the Commission-approved Acquirer with any amount of responsibility related to Feed Enzymes Product(s) ("Feed Enzymes Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; *provided*, *however*, this provision shall not prohibit: (i) Respondent DSM from advertising for employees in newspapers, trade publications or other media not targeted specifically at the Feed Enzymes Employees, or (ii) a Feed Enzymes Employee from contacting Respondent DSM on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent DSM; or

2. hire any Feed Enzymes Employee; *provided, however*, Respondent DSM may hire any former Feed Enzymes Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with Respondent DSM, as long

as such employee was not solicited in violation of the non-solicitation requirements contained herein.

O. For a period of two (2) years after the Closing Date, Respondent DSM shall not market or promote Novozymes Products using the services of any Product Marketing Employee related to the Feed Enzymes Products.

P. For a period of five (5) years after the Closing Date, Respondent DSM shall not use any Product Finance Employee, Product Research and Development Employee, or Product Patent Attorney for any purpose related to the Novozymes/Roche Alliance or any Novozymes Product, and such employees shall not have access to any Confidential Business Information related to the Novozymes/Roche Alliance or Novozymes Products.

Q. Prior to the Closing Date, Respondent DSM shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Feed Enzymes Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of the Feed Enzymes Products by the Commission-approved Acquirer.

R. Respondent DSM shall require, as a condition of continued employment post-divestiture, that each Feed Enzymes Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Feed Enzymes Products strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent DSM (other than as necessary to comply with the requirements of this Order or the related Order to Hold Separate and Maintain Assets); *provided, however,* the requirements of this Paragraph II.R. may be extended to include employees (other than the Feed Enzymes Core Employees) of

Respondent DSM that the Interim Monitor may determine are necessary to be included in order to ensure the proper maintenance of the confidentiality of the Confidential Business Information.

S. Respondent DSM shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Feed Enzymes Products by Respondent DSM's personnel to all of Respondent DSM's employees who (i) are or were involved in the research, Development, manufacturing, distribution, sale or marketing of the Feed Enzymes Products, (ii) are involved in the research, Development, manufacturing, distribution, sale or marketing of the Novozymes Products and/or (iii) may have Confidential Business Information related to the Feed Enzymes Products. Such notification shall be in substantially the form set forth in the Employee Notification. Respondent DSM shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent DSM shall provide a copy of such notification to the Commission-approved Acquirer. Respondent DSM shall maintain complete records of all such notifications at Respondent DSM's corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondent DSM shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondent DSM's personnel.

T. Respondent DSM shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Feed Enzymes Products by Respondent DSM's personnel to all of Novozymes employees who are or were involved in the research,

Development, manufacturing, distribution, sale or marketing of the Novozymes Products.

U. Upon reasonable notice and request by the Commission-approved Acquirer, Respondent DSM shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Feed Enzymes Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully qualified and able to manufacture the Feed Enzymes Products independently of Respondent DSM.

V. Pending divestiture of the Feed Enzymes Assets, Respondent DSM shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the business associated with the Feed Enzymes Assets, to minimize any risk of loss of competitive potential for the business associated with the Feed Enzymes Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Feed Enzymes Assets except for ordinary wear and tear.

W. Counsel for Respondent DSM (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer in order to:

1. assure Respondent DSM's compliance with any Divestiture Agreement, this Order, any Law (including,

without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Feed Enzymes Assets or the business related to the Feed Enzymes Products; *provided*, *however*, that Respondent DSM may disclose such information as necessary for the purposes set forth in this paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*:

1. Respondent DSM shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission–approved Acquirer; *provided, however,* that Respondent DSM shall not be deemed to have violated this requirement if the Commission-approved Acquirer withholds such agreement unreasonably; and

2. Respondent DSM shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

X. Respondent DSM shall maintain manufacturing facilities for the production of the Feed Enzymes Products that are ready, qualified and fully capable of producing the Feed Enzymes Products until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully able to manufacture the Feed Enzymes Products independently of Respondent DSM; *provided, however*, the Commission may eliminate, or limit the

duration of, Respondent DSM's obligation under this provision should the Commission determine that the Commission-approved Acquirer is not using commercially reasonable best efforts to manufacture the Feed Enzymes Products independently of Respondent DSM.

Y. Respondent DSM shall not join, or file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer or the Feed Enzymes Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Feed Enzymes Products (but only as to those products that are commercialized or in Development as of the Closing Date) under:

1. any Patents owned or licensed by Respondent DSM as of the Effective Date or acquired after the Effective Date that claim the use of such Feed Enzymes Products to enhance or otherwise facilitate the digestion of phytate in animals;

2. any Patents that are used in the business of the Novozymes/Roche Alliance that claim the use of such Feed Enzymes Products to enhance or otherwise facilitate the digestion of phytate in animals;

3. any Patents owned or licensed at any time after the Effective Date by Respondent DSM that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of such Feed Enzymes Products in the field of animal nutrition other than such Patents that claim inventions conceived by and reduced to practice by Respondent DSM's employees or the employees of the Novozymes/Roche Alliance after the Effective Date; or

4. any Patents that are used in the business of the Novozymes/Roche Alliance that are owned or licensed by Novozymes at any time after the Effective Date that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of such Feed Enzymes Products in the field of animal nutrition other than such Patents that claim inventions conceived by and reduced to practice by Respondent DSM's employees or the employees of the Novozymes/Roche Alliance after the Effective Date.

Z. Respondent DSM shall not, in any jurisdiction throughout the world: 1) use the Product Trademarks or any mark confusingly similar to the Product Trademarks, as a trademark, tradename, or service mark in connection with feed enzymes; 2) attempt to register the Product Trademarks; 3) or attempt to register any mark confusingly similar to the Product Trademarks in connection with feed enzymes; 4) challenge or interfere with the Commission-approved Acquirer's use and registration of the Product Trademarks; or 5) challenge or interfere with the Commission-approved Acquirer's efforts to enforce its trademark registrations for and trademark rights in the Product Trademarks against Third Parties.

AA. Respondent Roche agrees to abide by the applicable terms of the Feed Enzymes Severance and Transitional Support Agreement and by all terms of the Roche Commitment Agreement. Such commitment, if approved by the Commission in connection with the Commission's determination to make this Order final, shall be deemed incorporated into this Order, and any failure by Respondent Roche to comply with any term of the Roche Commitment Agreement shall constitute a failure to comply with this Order.

BB. The purpose of the divestiture of the Feed Enzymes Assets is to ensure the continued use of the Feed

Enzymes Assets in the same business in which the Feed Enzymes Assets were engaged at the time of the announcement of the Acquisition, fully independent of Respondent DSM, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Order to Hold Separate and Maintain Assets (collectively "the Orders"), and the Divestiture Agreements. The Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Divestiture Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent DSM, which consent shall not be unreasonably withheld. If Respondent DSM has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent DSM of the identity of any proposed Interim Monitor, Respondent DSM shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent DSM shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to

monitor Respondent DSM's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this paragraph or pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets in this matter, Respondent DSM shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent DSM's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

   a. the completion by Respondent DSM of the divestiture of all relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to this Order in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is both: 1) fully capable of manufacturing the relevant Feed Enzymes Products independently of Respondent DSM; and 2) fully capable of continuing all research and Development of the Feed Enzymes Products acquired pursuant to a

Divestiture Agreement independently of Respondent DSM; or

b. the completion by Respondent DSM of the last obligation under the Orders pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent DSM's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent DSM's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent DSM shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent DSM on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent DSM, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent DSM shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses,

claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent DSM shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent DSM, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent DSM's obligations under the Orders or the Divestiture Agreement. Within one (1) month after the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent DSM of its obligations under the Orders.

8. Respondent DSM may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information

received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Order to Hold Separate and Maintain Assets in this matter.

G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of the Orders.

H. The Interim Monitor appointed pursuant to this Order or the relevant provisions of the Order to Hold Separate and Maintain Assets in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent DSM has not fully complied with its obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to Paragraph II.A. in a manner that satisfies the requirements of Paragraph II.A. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent DSM shall consent to the appointment of a Divestiture

Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent DSM to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent DSM, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent DSM has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent DSM of the identity of any proposed Divestiture Trustee, Respondent DSM shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent DSM shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent DSM shall consent to the following terms and conditions regarding

the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described in herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent DSM shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent DSM shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent DSM shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as

determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent DSM's absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent DSM from among those approved by the Commission; *provided further, however*, that Respondent DSM shall select such entity within five (5) Business Days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent DSM, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent DSM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent DSM, and the Divestiture

Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent DSM 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 for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, and viability and competitiveness and ensures their continued use in the research, Development, manufacture, distribution, marketing, promotion, sale, or after-sales support of the relevant Feed Enzymes Products, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondent DSM and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.

9. The Divestiture Trustee shall report in writing to Respondent DSM and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondent DSM may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the relevant provisions of the Order to Hold Separate and Maintain Assets in this matter.

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent DSM has fully complied with Paragraphs II.A. (*i.e.* has assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed all relevant assets to the

Commission-approved Acquirer in a manner that fully satisfies the requirements of the Order), II.B., and all its responsibilities to render transitional services to the Commission-approved Acquirer as provided in the Divestiture Agreements, Respondent DSM shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent DSM shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent DSM shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent DSM shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent DSM shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent DSM shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent DSM such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the

creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any demonstrated legally recognized privilege, and upon written request with reasonable notice to Respondent DSM made to its principal United States offices, Respondent DSM shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent DSM and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent DSM related to compliance with this Order; and

B. Upon five (5) days' notice to Respondent DSM and without restraint or interference from Respondent DSM, to interview officers, directors, or employees of Respondent DSM, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order will terminate on January 6, 2014.

APPENDIX I
TO THE DECISION AND ORDER

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On September 5, 2003, DSM N.V. ("DSM") and Roche Holding AG ("Roche"), hereinafter referred to collectively as "Respondents," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Hold Separate and Maintain Assets.

The Decision and Order requires DSM to divest to BASF Aktiengesellschaft ("BASF") the assets relating to an alliance between DSM and BASF that was formed in 1994 ("DSM/BASF Alliance") for the purposes of researching, developing, producing, and marketing certain feed enzymes used in animal nutrition. These feed enzymes include those marketed under the following names: Natuphos®, Natugrain®, and Natustarch®. These assets are hereinafter referred to as the "DSM/BASF Alliance Assets." Both the Decision and Order and the Order to Hold Separate and Maintain Assets require Respondents to commit that no Confidential Business Information relating to the DSM/BASF Alliance Assets will be disclosed to or used by any employee of the combined entity formed by the acquisition of Roche's Vitamins and Fine Chemicals division ("Combined Entity"). In particular, this is to protect such information from being used <u>in any way</u> for the research, development, formulation, marketing, distribution, sale or manufacture of any product that competes or may compete with any product that is marketed by BASF after the proposed merger. In particular, those products marketed pursuant to the alliance between Novozymes A/S and Roche (specifically, the alliance formed in 2000 by agreement between Novo Nordisk A/S and F.Hoffmann-La Roche Ltd). The Novozymes/Roche alliance also markets and produces various feed enzymes that compete directly with those marketed by the DSM/BASF

Alliance. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the DSM/BASF Alliance to BASF. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondents are required to divest the DSM/BASF Alliance Assets to BASF. Until a complete divestiture of all of the DSM/BASF Alliance Assets occurs, the requirements of the second order – the Order to Hold Separate and Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the DSM/BASF Alliance Assets. This includes preserving the work force that performs functions related to the DSM/BASF Alliance Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the DSM/BASF Alliance Assets, (ii) an employee for Novo Nordisk, Novozymes, Roche or the Novozymes/Roche Alliance who has work responsibilities in some way related to products that compete or may compete with the

DSM/BASF Alliance Assets, or (iii) an employee or former employee of DSM or Roche who might have Confidential Business Information in your possession related to the DSM/BASF Alliance Assets.

All Confidential Business Information related to DSM/BASF Alliance Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the DSM/BASF Alliance Assets (such as persons with job responsibilities related to DSM or Novozymes/Roche products that compete or may compete with the DSM/BASF Alliance Assets). In addition, any person who possesses such Confidential

Business Information related to the DSM/BASF Alliance Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the DSM/BASF Alliance Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any DSM, Roche, or former DSM or Roche employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the DSM/BASF Alliance Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

Furthermore, the Decision and Order places restrictions upon the functions that certain employees of DSM or Roche can perform for the Combined Entity. These restrictions will last for two (2) years for the Product Animal Nutritionist Employees and Product Marketing Employees, for five (5) years for the Product Patent Attorneys and Product Research and Development Employees, and for one (1) year following the end of the Contract Manufacture period for Product Manufacturing Employees.

Any violation of the Decision and Order, or the Order to Hold Separate and Maintain Assets may subject DSM, Roche, or the Combined Entity to civil penalties and other relief as provided by law.

NON-PUBLIC APPENDIX II

[REDACTED FROM PUBLIC RECORD VERSION]

NON-PUBLIC APPENDIX III

[REDACTED FROM PUBLIC RECORD VERSION]

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of the Roche Vitamins and Fine Chemicals business of Respondent Roche Holding AG ("Roche") by Respondent Koninklijke DSM N.V. ("DSM"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets:

1. Respondent DSM is a corporation organized, existing and doing business under and by virtue of the laws of The Kingdom of

the Netherlands, with its offices and principal place of business located at Het Overloon 1, 6411 TE, Heerlen, The Netherlands.

2. Respondent Roche is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its offices and principal place of business located at Grenzacherstrasse 124, CH-4070, Basel, Switzerland.

3. Respondent Fritz Gerber is a member and the speaker of the shareholders' group with pooled voting rights, which group owns the majority of the voting shares of Respondent Roche. Mr. Gerber is the ultimate parent entity of Respondent Roche within the meaning of 16 C.F.R. § 801.1, with his office and principal place of business at Grenzacherstrasse 124, CH-4070, Basel, Switzerland.

4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER
I.

IT IS ORDERED that, as used in this Order to Hold Separate and Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the final Decision and Order), which are attached hereto as Appendix B and incorporated herein by reference and made a part hereof, shall apply:

A. "DSM Firewalled Senior Executives" means Respondent DSM's: 1) Chief Executive Officer; 2) Chief Financial Officer; 3) the executive responsible for the Acquisition; 4) the respective staffs of the preceding persons; and 5) any other management-level employee of DSM who, due to his or her job responsibilities, must have access to both Novozymes/Roche Alliance Confidential Business

Information and Feed Enzymes Confidential Business Information.

B. "DSM Feed Enzymes Employees" means all employees of Respondent DSM that have job responsibilities related to the Feed Enzymes Business.

C. "Feed Enzymes Business" means Respondent DSM's worldwide business related to the Feed Enzymes Products.

D. "Feed Enzymes Confidential Business Information" means the Confidential Business Information related to the Feed Enzymes Business.

E. "Novozymes/Roche Alliance Employees" means all employees of either Respondent DSM, Respondent Roche or the Novozymes/Roche Alliance that have any job responsibilities directly related to the Novozymes/Roche Alliance.

F. "Novozymes/Roche Alliance Confidential Business Information" means the Confidential Business Information related to the business of the Novozymes/Roche Alliance.

II.

IT IS FURTHER ORDERED that:

A. Pending divestiture of the Feed Enzymes Assets, Respondent DSM shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Feed Enzymes Business, to minimize any risk of loss of competitive potential for the Feed Enzymes Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Feed Enzymes Assets except for ordinary wear and tear.

B. Respondent DSM shall maintain the operations of the Feed Enzymes Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Feed Enzymes Assets) and shall use its best efforts to preserve the existing relationships with suppliers, vendors, customers, employees, and others having business relations with the Feed Enzymes Business. Such responsibilities include, but are not limited to:

1. providing the Feed Enzymes Business with sufficient working capital to operate the Feed Enzymes Assets at least at current rates of operation, to meet all capital calls with respect to the Feed Enzymes Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Feed Enzymes Business;

2. continuing, at least at their scheduled pace, any additional expenditures for the Feed Enzymes Business authorized prior to the date the Consent Agreement was signed by Respondents;

3. making available for use by the Feed Enzymes Business funds sufficient to perform all necessary routine maintenance to, and replacements of, the Feed Enzymes Assets;

4. providing the Feed Enzymes Assets with such funds as are necessary to maintain the viability, competitive vigor, and marketability of the Feed Enzymes Assets; and

5. providing such support services to the Feed Enzymes Business as are being provided to this business by Respondent DSM as of the date the Consent Agreement was signed by Respondents; *provided, however*, Respondent DSM's personnel providing such support

services shall retain and maintain all Feed Enzymes Confidential Business Information on a confidential basis, and, except as is permitted by the Decision and Order in this matter and by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves the Novozymes/Roche Alliance.

C. Respondent DSM shall maintain a work force of equivalent size, training, and expertise as has been associated with the Feed Enzymes Business.

D. Respondent DSM shall provide all DSM Feed Enzyme Employees with reasonable and appropriate financial incentives to continue in their employment positions related to the Feed Enzymes Business pending divestiture of the Feed Enzymes Assets, including providing them with the same employee benefits offered by Respondent DSM to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Feed Enzymes Assets is completed.

E. Respondent DSM shall provide the Feed Enzymes Core Employees with the following;

1. reasonable and appropriate incentives to continue their employment with Respondent DSM in the Feed Enzymes Business until the divestiture of the Feed Enzymes Assets is completed;

2. the Feed Enzymes Core Employees who accept employment with the Commission-approved Acquirer shall be offered the following incentives:

a. a payment equal to forty (40) percent of such employee's base annual salary to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and

b. a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved Acquirer, the Commission-approved Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent DSM and been terminated at such time, less any severance payment actually paid by the Commission-approved Acquirer.

F. Respondent DSM shall not interfere with the employment by the Commission-approved Acquirer of any Feed Enzymes Core Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent DSM, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to the Feed Enzymes Business or any non-compete or confidentiality provisions of employment or other contracts with Respondent DSM that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

III.

IT IS FURTHER ORDERED that:

A. Respondent DSM shall, as of the Effective Date, hold the Feed Enzymes Business as a separate and independent

business apart from the business related to the Novozymes/Roche Alliance and from the Novozymes/Roche Alliance Employees, except to the extent that Respondent DSM must exercise direction and control over the Feed Enzymes Business to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order in this matter, and except as otherwise provided in this Order to Hold Separate and Maintain Assets.

B. Respondent DSM:

1. shall not provide, disclose or otherwise make available, directly or indirectly, any Feed Enzymes Confidential Business Information to the Novozymes/Roche Alliance or to any Novozymes/Roche Alliance Employee;

2. shall prevent all Novozymes/Roche Alliance Employees from soliciting, accessing, or using, directly or indirectly, any Feed Enzymes Confidential Business Information for any reason or purpose;

3. shall institute procedures and requirements to ensure that the DSM Feed Enzyme Employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Feed Enzymes Confidential Business Information to the Novozymes/Roche Alliance or to any Novozymes/Roche Alliance Employee; and

   b. do not solicit, access or use any Novozymes/Roche Alliance Confidential Business Information for any reason or purpose;

4. shall institute procedures and requirements to ensure that all DSM Firewalled Senior Executives:

a. do not provide, disclose or otherwise make available, directly or indirectly, any Novozymes/Roche Alliance Confidential Business Information to the Feed Enzymes Business or to any DSM Feed Enzymes Employee; and

b. do not provide, disclose or otherwise make available, directly or indirectly, any Feed Enzymes Confidential Business Information to the Novozymes/Roche Alliance or to any Novozymes/Roche Alliance Employee,

and shall, prior to the Effective Date, require each DSM Firewalled Senior Executive to sign a non-disclosure agreement pursuant to which each such individual agrees to comply with the terms of this Paragraph; and

5. shall enforce the terms of this Paragraph III.B. as to:

a. the Novozymes/Roche Alliance;

b. all Novozymes/Roche Alliance Employees;

c. the Feed Enzymes Business; and

d. the DSM Feed Enzymes Employees,

and shall take such action to the extent necessary to cause each such individual or entity to comply with the terms of this Paragraph III.B., including all actions that Respondent DSM would take to protect its own trade secrets, commercial information, or other information of a proprietary or confidential nature.

C. Within ten (10) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, Respondent DSM shall require each DSM Feed Enzymes Employee to sign a non-disclosure/confidentiality

agreement pursuant to which such individual(s) will be required to comply with the provisions of Paragraph III of this Order to Hold Separate and Maintain Assets. The DSM Feed Enzymes Employees must maintain all Feed Enzymes Confidential Business Information on a confidential basis and they shall be prohibited from:

1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing Feed Enzymes Confidential Business Information to or with any individual whose employment involves the Novozymes/Roche Alliance; or

2. soliciting, accessing, or using, directly or indirectly, any Novozymes/Roche Alliance Confidential Business Information for any reason or purpose.

These individuals shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products of the Novozymes/Roche Alliance.

D. Within ten (10) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, Respondent DSM or Respondent Roche shall require each Novozymes/Roche Alliance Employee that is either an employee of Respondent DSM or Respondent Roche to sign a non-disclosure/confidentiality agreement pursuant to which such individual(s) will be required to comply with the provisions of Paragraph III of this Order to Hold Separate and Maintain Assets; *provided, however,* that the Respondents are not required to obtain signatures on the non-disclosure/confidentiality agreements for those Novozymes/Roche Alliance Employees whose only job responsibilities related to the Novozymes/Roche Alliance is as a non-management level field sales representative. The Novozymes/Roche Alliance Employees must maintain

all Novozymes/Roche Alliance Confidential Business Information on a confidential basis and they shall be prohibited from:

1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any Novozymes/Roche Alliance Confidential Business Information to or with any DSM Feed Enzymes Employee; or

2. soliciting, accessing, or using, directly or indirectly, any Feed Enzymes Confidential Business Information for any reason or purpose.

The Novozymes/Roche Alliance Employees shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of the Feed Enzymes Business.

E. Within ten (10) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, Respondent DSM and/or Respondent Roche shall circulate to all DSM Feed Enzymes Employees, all DSM Firewalled Senior Executives, and all Novozymes/Roche Alliance Employees a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Appendix A to this Order to Hold Separate and Maintain Assets.

F. Within twenty (20) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, Respondent DSM shall establish written procedures, to be submitted for approval to any Interim Monitor the Commission may appoint, covering the management, maintenance, and independence of the Feed Enzymes Business consistent with the provisions of this Order to Hold Separate and Maintain Assets.

G. *Provided, however,* this Order to Hold Separate and Maintain Assets does not prohibit Respondent DSM from:

1. providing to (or procuring for) the Feed Enzymes Business corporate or administrative services;

2. engaging in activities designed to achieve efficiencies resulting from the Acquisition, *provided that* any such activity: (i) does not reveal any Feed Enzymes Confidential Business Information to any Novozymes/Roche Alliance Employee, (ii) does not include any DSM Feed Enzymes Employees, and (iii) is conducted by employees who have no direct role in the research, Development, manufacture, distribution, marketing or sale of Feed Enzymes Products or the Novozymes/Roche Alliance and who have signed a non-disclosure/confidentiality agreement pursuant to which such individual(s) have agreed to disclose such information only to other individuals or entities who have signed the non-disclosure/confidentiality agreement pursuant to this Paragraph III.

H. The purpose of this Paragraph III is:

1. to ensure that, pending divestiture of the Feed Enzymes Assets and except as otherwise provided in this Order to Hold Separate and Maintain Assets: (a) no Novozymes/Roche Alliance Confidential Business Information is exchanged between the Novozymes/Roche Alliance and the Feed Enzymes Business or the Feed Enzymes Employees; and (b) no Feed Enzymes Confidential Business Information is exchanged between the Feed Enzymes Business and the Novozymes/Roche Alliance or the Novozymes Roche Alliance Employees;

2. to prevent interim harm to competition pending divestiture of the Feed Enzymes Assets; and

3. to help remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order to Hold Separate and Maintain Assets and the related Decision and Order (collectively "the Orders"), and the Divestiture Agreements. The Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Divestiture Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent DSM, which consent shall not be unreasonably withheld. If Respondent DSM has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent DSM of the identity of any proposed Interim Monitor, Respondent DSM shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent DSM shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondent DSM shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

a. the completion by Respondent DSM of the divestiture of all relevant assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is both: 1) fully capable of manufacturing the relevant Feed Enzymes Products independently of Respondent DSM; and 2) fully capable of continuing all research and Development of the Feed Enzymes Products acquired pursuant to a Divestiture Agreement independently of Respondent DSM; or

b. the completion by Respondent DSM of the last obligation under the Orders pertaining to the Interim Monitor's service;

provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent DSM's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent DSM's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondent DSM shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent DSM on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent DSM, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent DSM shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence,

willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent DSM shall report to the Interim Monitor in accordance with the requirements of this Order to Hold Separate and Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent DSM, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Divestiture Agreement. Within one (1) month after the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent DSM of its obligations under the Orders.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as

provided in this Paragraph or the relevant provisions of the Decision and Order in this matter.

G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to ensure compliance with the requirements of the Orders.

H. The Interim Monitor appointed pursuant to this Order to Hold Separate and Maintain Assets or the relevant provisions of the attached Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order to Hold Separate and Maintain Assets.

V.

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

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution,

assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance

obligations arising out of this Order to Hold Separate and Maintain Assets.

VII.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Hold Separate and Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent DSM made to its principal United States office, Respondent DSM shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondent DSM and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent DSM relating to compliance with this Order to Hold Separate and Maintain Assets; and

B. Upon five (5) days' notice to Respondent DSM and without restraint or interference from Respondent DSM, to interview officers, directors, or employees of Respondent DSM, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Hold Separate and Maintain Assets shall terminate on the earlier of:

A. Three (3) Business Days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The day after the divestiture of all of the Feed Enzymes Assets, as described in and required by the attached Decision and Order, is completed.

APPENDIX A

TO THE ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On September 5, 2003, DSM N.V. ("DSM") and Roche Holding AG ("Roche"), hereinafter referred to collectively as "Respondents," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Hold Separate and Maintain Assets.

The Decision and Order requires DSM to divest to BASF Aktiengesellschaft ("BASF") the assets relating to an alliance between DSM and BASF that was formed in 1994 ("DSM/BASF Alliance") for the purposes of researching, developing, producing, and marketing certain feed enzymes used in animal nutrition. These feed enzymes include those marketed under the following names: Natuphos®, Natugrain®, and Natustarch®. These assets are hereinafter referred to as the "DSM/BASF Alliance Assets." Both the Decision and Order and the Order to Hold Separate and Maintain Assets require Respondents to commit that no Confidential Business Information relating to the DSM/BASF Alliance Assets will be disclosed to or used by any employee of the combined entity formed by the acquisition of Roche's Vitamins and Fine Chemicals division ("Combined Entity"). In particular, this is to protect such information from being used <u>in any way</u> for the research, development, formulation, marketing, distribution, sale or manufacture of any product that competes or may compete with any product that is marketed by BASF after the proposed merger. In particular, those products marketed pursuant to the alliance between Novozymes A/S and Roche (specifically, the alliance formed in 2000 by agreement between Novo Nordisk A/S and F.Hoffmann-La Roche Ltd). The Novozymes/Roche alliance also markets and produces various feed enzymes that compete directly with those marketed by the DSM/BASF

Alliance. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the DSM/BASF Alliance to BASF. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondents are required to divest the DSM/BASF Alliance Assets to BASF. Until a complete divestiture of all of the DSM/BASF Alliance Assets occurs, the requirements of the second order – the Order to Hold Separate and Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the DSM/BASF Alliance Assets. This includes preserving the work force that performs functions related to the DSM/BASF Alliance Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the DSM/BASF Alliance Assets, (ii) an employee for Novo Nordisk, Novozymes, Roche or the Novozymes/Roche Alliance who has work responsibilities in some way related to products that compete or may compete with the DSM/BASF Alliance Assets, or (iii) an employee or former employee of DSM or Roche who might have Confidential Business Information in your possession related to the DSM/BASF Alliance Assets.

All Confidential Business Information related to DSM/BASF Alliance Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the DSM/BASF Alliance Assets (such as persons with job responsibilities related to DSM or Novozymes/Roche products that compete or may compete with the DSM/BASF Alliance Assets). In addition, any person who possesses such Confidential Business Information related to the DSM/BASF Alliance Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the

DSM/BASF Alliance Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any DSM, Roche, or former DSM or Roche employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the DSM/BASF Alliance Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

Furthermore, the Decision and Order places restrictions upon the functions that certain employees of DSM or Roche can perform for the Combined Entity. These restrictions will last for two (2) years for the Product Animal Nutritionist Employees and Product Marketing Employees, for five (5) years for the Product Patent Attorneys and Product Research and Development Employees, and for one (1) year following the end of the Contract Manufacture period for Product Manufacturing Employees.

Any violation of the Decision and Order, or the Order to Hold Separate and Maintain Assets may subject DSM, Roche, or the Combined Entity to civil penalties and other relief as provided by law.

APPENDIX B
AGREEMENT CONTAINING CONSENT ORDER AND PROPOSED DECISION AND ORDER

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from DSM N.V. ("DSM") and Roche Holding AG (and its ultimate parent entity) ("Roche") which is designed to remedy the anticompetitive effects of the acquisition of Roche's Vitamins and Fine Chemicals division ("RV&FC") by DSM. Under the terms of the Consent Agreement, the companies would be required to divest DSM's phytase business to BASF AG ("BASF"). The divestiture will take place no later than ten business days from the date on which DSM closes its proposed acquisition of RV&FC.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order ("Order").

Pursuant to a Share and Asset Purchase Agreement dated February 10, 2003, and amendments thereto, DSM proposes to acquire certain voting securities and assets from Roche Holding AG that together constitute Roche's Vitamins and Fine Chemicals division in a transaction valued at approximately $1.9 billion. The Commission's Complaint alleges that the proposed acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the worldwide market for the research, development, manufacture, and sale of the feed enzyme phytase. The proposed Consent Agreement will remedy the alleged violations by replacing the competition in the phytase market that would otherwise have been eliminated by the proposed acquisition.

Analysis

Phytase is an enzyme added to poultry and swine feed to promote the digestibility of phosphorous and other nutrients that are vital to efficient livestock production. Without the addition of phytase, monogastric (i.e. single-stomach) animals like pigs and chickens lack the ability to digest much of the phosphorous contained in animal feed. The phosphorous that is unavailable for digestion simply passes through the livestock undigested and is ultimately excreted in the manure. By "unlocking" this phosphorous for digestion, phytase has the dual benefit of ensuring that the animals receive the benefit of these vital nutrients, while at the same time reducing the environmental impact caused by runoff from livestock production. Given its unique advantages, as well as the significant cost savings associated with using phytase, it is highly unlikely that phytase customers would switch to any other method of supplementing phosphorous in animal feed, even if the prices of phytase were to increase significantly.

The worldwide market for phytase is highly concentrated. DSM, together with its alliance partner, BASF, pioneered the phytase market in 1996, and today remains the largest supplier of phytase in the world, with 2002 sales of approximately $80 million. Roche, with its alliance partner Novozymes, is the only significant competitor to the DSM/BASF alliance, with 2002 phytase sales of approximately $59 million. Together, these two competing alliances dominate the phytase market, controlling over 90% of the $150 million worldwide market for phytase.

The proposed acquisition would have a significant adverse effect on competition in the worldwide market for phytase. Prior to this acquisition, the DSM/BASF and Novozymes/Roche alliances competed vigorously for sales in the growing phytase market, resulting in substantial price discounting for phytase customers. Each alliance also invested significant resources in research and development efforts designed to improve its own products, in order to keep pace with similar investments being made by the other alliance. The proposed acquisition would link these two, previously independent, alliances, enabling them to

coordinate their actions and eliminate the head-to-head competition between the only two significant competitors in the worldwide phytase market. In doing so, the proposed acquisition would allow DSM to exercise market power, thereby increasing the likelihood that phytase customers would be forced to pay higher prices and that innovation and product quality in this market would suffer.

Entry into the phytase market is difficult, time consuming, and ultimately unlikely to deter or counteract the competitive effects likely to result from the acquisition. Any company attempting to enter the phytase market faces serious obstacles in developing a phytase enzyme that does not infringe the various patents held by the market incumbents. This development process alone generally takes three to ten years, even for an experienced enzyme producer. In addition, the FDA approval process in the United States can take at least one to two years, and regulatory approval in Europe generally takes even longer. There are significant economies of scale associated with phytase production, and because sales in the United States and Europe each account for a significant portion of the total phytase market, it is difficult, or impossible, for a potential entrant to achieve viable scale until approvals are obtained in those two jurisdictions. Finally, the process of convincing customers to switch to a new, untested, phytase enzyme is a difficult and lengthy one, often requiring customer validation testing that can take up to two additional years.

The proposed Consent Agreement effectively remedies the acquisition's anticompetitive effects in the worldwide market for phytase by requiring DSM to divest its phytase business to BASF no later than ten business days after DSM closes its proposed acquisition of RV&FC. This business consists of, among other things, phytase related intellectual property, phytase scientific and regulatory material, phytase manufacturing technology, books and records, and other assets used in the research, development, manufacturing, marketing and sale of phytase. BASF is well-positioned to take over these assets and become an independent competitor in the phytase market. As DSM's phytase alliance

partner, BASF already has primary responsibility for marketing and selling the phytase enzyme produced by DSM, and customers already associate this product with BASF, not DSM. Further, BASF already has intimate knowledge of DSM's research, development, and manufacturing efforts related to phytase, and is well-positioned to take over these responsibilities. Finally, BASF poses no separate competitive concern as an acquirer of the phytase assets. For these reasons, the Commission is satisfied that BASF is a well-qualified purchaser of the divested assets.

The proposed Consent Agreement contains several provisions designed to ensure that the divestiture is successful. In order to reduce or eliminate any delay in pending research projects, the Consent Agreement requires that DSM provide technical assistance with ongoing research projects at BASF's request for a period of six months while these projects are being transferred to BASF. The Consent Agreement further requires DSM to contract manufacture phytase, at BASF's request, for up to two years. This provision is designed to eliminate any delay or interruption in BASF's ability to serve customers in the phytase market. In addition, the Consent Agreement requires DSM to provide BASF with the opportunity to enter into employment contracts with certain key employees, and requires DSM to provide certain employees with financial incentives to accept employment with BASF. For a period of one year, the Consent Agreement also prohibits DSM from hiring any BASF employee with responsibilities related to phytase. Finally, the Consent Agreement establishes firewalls designed to prevent information relating to the DSM/BASF phytase business from flowing to the Novozymes/Roche alliance.

To preserve the full economic viability, marketability, and independence of the phytase assets pending divestiture, the Consent Agreement includes an Order to Hold Separate and Maintain Assets. This Order contains a number of provisions designed to ensure that the viability and competitiveness of the divested assets are not diminished prior to divestiture. Pursuant to this Order, the Commission has appointed KPMG, LLP as

Interim Monitor to oversee the asset transfer and to ensure that DSM is expeditiously complying with its obligations under the Consent Agreement. The KPMG team is headed by John Ellison, who has over 30 years of experience in auditing and investigative work, and has acted as Monitor in several other divestitures for the European Commission. Mr. Ellison is supported by knowledgeable personnel, including a leading technical expert in the field of enzymes.

In order to ensure that the Commission remains informed about the status of the pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires DSM to submit a status report to the Commission within thirty days after the Order becomes final, and every thirty days thereafter until DSM has fully complied with the Commission's Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

MEMORIAL HERMANN HEALTH NETWORK PROVIDERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4104; File No. 0310001
Complaint, January 8, 2004--Decision, January 8, 2004

This consent order addresses practices used by Respondent Memorial Hermann Health Network Providers, a nonprofit corporation that contracts with third-party payors for the provision of medical services on behalf of its approximately 3,000 participating physicians, who are licensed to practice medicine in the State of Texas, and who are engaged in the business of providing medical services to patients in the Houston metropolitan area. The order, among other things, prohibits the respondent from entering into or facilitating agreements among physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than the respondent. The order also prohibits the respondent from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal. In addition, the order prohibits the Respondent from attempting to engage in – or encouraging, pressuring, inducing, or attempting to induce any person to engage in - any action prohibited by the order. The order also requires the respondent, for three years, to notify the Commission at least 60 days prior to entering into any arrangement under which the respondent will act as a messenger or agent on behalf of physicians with payors regarding contracts. In addition, the order requires the respondent to terminate, without penalty, any payor contracts that it had entered into during the period at issue, at any such payor's request.

Participants

For the Commission: *Alan Loughnan, Barbara Anthony, Anne R. Schenof, Daniel P. Ducore, D. Bruce Hoffman, Thomas R. Iosso,* and *Louis Silvia, Jr.*

For the Respondent: *Daniel L. Wellington, Fulbright & Jaworski L.L.P.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Memorial Hermann Health Network Providers (hereinafter "MHHNP") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns MHHNP's actions to orchestrate and implement agreements among competing physicians on the prices they would accept from health plans and other third-party payors ("payors") in the greater Houston, Texas area. The challenged actions of MHHNP had the purpose and effect of increasing prices paid for physician services in the greater Houston area.

RESPONDENT

2. MHHNP is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal address at 9401 Southwest Freeway, Houston, Texas 77074.

3. MHHNP has approximately 3000 participating physician members (hereinafter "physician"members") who are licensed to practice medicine in the State of Texas and engaged in the business of providing medical services to patients in the Houston metropolitan area (hereinafter "Houston area").

4. Except to the extent that competition has been restrained as alleged herein, the physician members of MHHNP have been, and are now, in competition with each other for the provision of physician services.

JURISDICTION

5. MHHNP's general business activities and those of the physician members who utilize MHHNP's services, including the acts and practices herein alleged, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. MHHNP is a corporation within the meaning of Section 4 of the FTC Act. Although MHHNP's articles of incorporation and by-laws designate Memorial Hermann Healthcare System, a non-profit corporation, as its "sole member" for purposes of Texas corporation law, the physician members of MHHNP are members of the corporation within the meaning of Section 4 of the FTC Act. MHHNP engages in substantial activities for the pecuniary benefit of its for-profit physician members.

7. MHHNP is governed by its Board of Directors, which includes 16 "Voting Directors," all of whom are physician members. These Board members are elected by MHHNP's physician members, subject to the ultimate approval of its sole member.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

8. MHHNP regularly and in the ordinary course of business classifies its physicians as "physician members," and conducts its business affairs in a manner that demonstrates that the physician members are "members" of MHHNP. To participate in MHHNP's network and utilize MHHNP's contract negotiation and other services, a physician member must complete a MHHNP "Membership Application" and sign a "Network Participation Agreement." MHHNP's "Membership

and Credentialing Committee," a 13-member panel of board members and appointees, evaluates the physician's credentials and recommends to the board the physician's eligibility for membership.

9. Physician members, through their elected representatives on the board, actively participate in MHHNP's management and business operations. Among other things, the board develops guidelines for negotiating, reviewing, approving, rejecting, terminating, and renewing payor contracts; approves price terms for dealing with payors; establishes procedures for credentialing MHHNP's physician members; and establishes certain billing and payment procedures for physician members.

10. MHHNP's activities substantially advance its physician members' economic interests. These activities include negotiating payor contracts, including price and price-related terms; group purchasing; continuing medical education; and engaging in marketing on behalf of its physician members.

11. Physicians often contract with payors to establish the terms and conditions, including price terms, under which the physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation in order to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce third-party payors' costs, enable them to lower the price of insurance, and reduce out-of-pocket medical expenditures by subscribers to the payors' health insurance plans.

12. Absent agreements among competing physicians on the terms, including price, on which they will provide services to enrollees in payors' health care plans, competing physicians decide individually whether to enter into payor

contracts to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

13. Medicare's Resource Based Relative Value System (hereinafter "RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Houston area contract with individual physicians or groups at a price level specified in the RBRVS, plus a markup or a discount based on some percentage of that price (*e.g.*, "110% or 95% of 2001 RBRVS").

14. To be competitively marketable in the Houston area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Houston area. Many of the primary care physicians and specialists who practice in the Houston area are physician members of MHHNP.

15. Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on fees and other competitively significant terms. Such an arrangement, however, will not avoid constituting or facilitating a horizontal agreement if the "messenger" or an agent negotiates fees and other competitively significant terms on behalf of the participating physicians, or facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or collectively the participants', opinion on the appropriateness, or lack thereof, of the offer.

FORMATION AND OPERATION OF MHHNP

16. MHHNP was incorporated in 1982 under the name Memorial Healthnet Providers, Inc. In 2000, its name was changed to MHHNP. Before 1999, MHHNP engaged in risk contracting with some payors. In 1999 or 2000, MHHNP terminated all existing risk contracts with payors on behalf of its physician members, and renegotiated such contracts to be non-risk contracts–*i.e.*, contracts that do not involve financial risk sharing by physicians through arrangements such as fee withholds or capitation. MHHNP has not subsequently entered into any risk contracts with any payors. In negotiating non-risk contracts with payors for its physician members, MHHNP has sought, and has often obtained, higher fees and other more advantageous terms than those physician members, negotiating unilaterally, could have obtained.

17. To participate in MHHNP's payor contracts, a physician member enters into a "Network Participation Agreement" with MHHNP, granting MHHNP the authority to arrange for his or her services to be provided to persons covered by payors pursuant to agreements between MHHNP and the payors. Individual physician members may opt into or out of any particular contract negotiated between MHHNP and a particular payor, but each physician member agrees to participate in a reasonable number of payor plans as a condition of continued participation in MHHNP.

MHHNP'S ILLEGAL ACTS AND PRACTICES

18. MHHNP has regularly negotiated with payors the fees and other terms relating to the medical care its physician members offer to persons covered by the payors. At the direction of its Board, MHHNP has actively bargained with payors, often proposing and counter-proposing applicable fee schedules, among other terms.

19. MHHNP periodically has polled its physician members, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for providing medical services pursuant to future MHHNP-payor agreements. The Board then has calculated minimum acceptable fees for use in payor negotiations, based in part on the information received from physician members concerning their future pricing intentions. The Board has generally set minimum fees at levels which at least 40% of the physician members have indicated would be acceptable to them. Often, MHHNP has begun discussions with a payor regarding a possible contract for physician services by informing the payor that its physician members have minimum fees, which MHHNP provides. MHHNP has then stated that it will not enter into or otherwise forward to its physician members any payor offer that does not satisfy those fee minimums. In some instances, payors have reformulated or revised their planned or proposed fee schedules to satisfy MHHNP's stated fee minimums, thereby resulting in payor fee offers that exceed the fees that would have been offered absent the participating physicians' agreement and MHHNP negotiations with payors on behalf of its physician members.

20. In other instances, MHHNP has responded to payor proposals that included fee schedules that did not meet MHHNP physician members' minimum fees for services to be provided, by advising the payors of the established fee minimums and instructing them to resubmit the proposals with fee schedules satisfying those minimums. At other times, MHHNP has rejected the payors' proposed offers, and counter-proposed fee schedules at prices at or above its physician members' agreed-to minimums, and otherwise actively bargained with payors as to fees to be paid MHHNP's physician members. As a result, payors

sometimes have either submitted new offers with higher fees or accepted the higher fees counter-proposed by MHHNP on behalf of its physician members.

21. In at least one instance, at the direction of its Board, MHHNP solicited from its physician members the response they wanted MHHNP to give a payor, who had approached MHHNP with an offer. The physician members were told that the Board already had rejected the payor's offer because it was below the minimum threshold level previously set pursuant to physician member surveys. Although the payor had asked MHHNP to messenger its latest offer to MHHNP's physician members for individual opt-in/opt-out decisions, MHHNP instead polled each of its physician members to determine whether or not the Board should accept the latest payor offer. A large majority of physician members voted to agree with the Board's decision to reject the offer. MHHNP then rejected the payor's offer and explicitly refused to forward the offer to any of its physician members, whether or not the proposed fees were above any given physician's stated minimum acceptable fees. Following that refusal and numerous communications between MHHNP, its physician members, and others attacking the payor's fee proposal as "below market," the payor increased proposed fees to the MHHNP fee minimums. Only then did MHHNP enter into a contract and forward the agreement to its physician members, affording them the option to participate (or not) in the payor's offer.

22. In addition, while seeking to negotiate fees on behalf of its physician members, MHHNP has discouraged and prevented payors and participating physicians from negotiating directly with one another. In at least one instance, after MHHNP fee negotiations with a payor broke down, MHHNP discouraged individual physician members from signing individual participation agreements with the payor. This increased the pressure on the payor to contract

for the services of MHHNP's physician members through MHHNP, at higher proposed fees. The payor ultimately yielded to that pressure and contracted with MHHNP and its physician members at increased fee levels.

23. MHHNP has on occasion prior to 2000 entered into contracts with payors for physician services that contain a term prohibiting the payor from negotiating individual contracts with MHHNP physician members for a period of several months after either MHHNP or the payor terminates the contract that provided for reimbursement for the services of MHHNP physician members. On other occasions, MHHNP has sought the agreement of other payors to a contract term of this sort. Such a contract term interferes with the ability of a payor to terminate a contract with MHHNP and seek individual agreements with its physician members at lower fee levels.

RESTRAINT OF TRADE

24. The conduct of MHHNP constitutes combined or concerted action by its physician members. MHHNP, acting as a combination of competing physicians, has acted to restrain competition by, among other things:

A. facilitating, negotiating, entering into, and implementing agreements among its physician members on price and other competitively significant terms;

B. refusing to deal with payors except on collectively agreed-upon terms;

C. seeking or entering into contracts with third-party payors that restrict the payors' freedom to enter into contracts with individual physicians following termination of a group contract with MHHNP; and

D. negotiating prices and other competitively significant terms in payor contracts for MHHNP's physician members, and refusing to submit payor offers to its physician members that do not conform to MHHNP's standards for contracts.

LACK OF SIGNIFICANT EFFICIENCIES

25. The acts and practices described in Paragraphs 18 through 23, including MHHNP's negotiation of fees and other competitively significant terms of contracts, have not been and are not, reasonably related to any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

26. Respondent MHHNP's actions as described in Paragraphs 18 through 23 of this Complaint have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Houston area in the following ways, among others:

A. price and other forms of competition among Respondent MHHNP's physician members were unreasonably restrained;

B. prices for physician services were increased; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

27. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and

will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of January, 2004, issues its Complaint against Respondent MHHNP.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Memorial Hermann Health Network Providers ("MHHNP"), hereinafter referred to as Respondent, and Respondent having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. Respondent Memorial Hermann Health Network Providers is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal address at 9401 Southwest Freeway, Houston, Texas 77074.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" means Memorial Hermann Health Network Providers, its officers, directors, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

B. "Medical group practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

C. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

D. "Payor" means any person that pays, or arranges for payment, for all or any part of any physician or hospital services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians or hospitals.

E. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

F. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

G. "Preexisting contract" means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by a Respondent, pursuant to Paragraph IV.B. of this Order, of such payor's right to terminate such contract.

H. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

J. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate to jointly control costs and improve quality by managing the provision of physician services such as risk-sharing involving:

   a. the provision of physician services to payors at a capitated rate;

   b. the provision of physician services for a predetermined percentage of premium or revenue from payors;

   c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or

   d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection

with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:

1. To negotiate on behalf of any physician with any payor;

2. To deal, refuse to deal, or threaten to refuse to deal with any payor;

3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or

4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent's arrangements;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal with a payor;

C. Attempting to engage in any action prohibited by Paragraphs II.A. or II.B. above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C. above.

PROVIDED HOWEVER, that nothing in this Paragraph II shall prohibit any agreement involving, or conduct by,

Respondent, that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically integrated joint arrangement, or that solely involves physicians in the same medical group practice.

III.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, Respondent shall notify the Secretary of the Commission in writing ("Notification") at least sixty (60) days prior to entering into any arrangement with any physicians that provides the terms or conditions pursuant to which the Respondent is to act as a messenger, or as an agent on behalf of any physicians with any payor regarding contracts. The Notification shall include the identity of each proposed physician participant; the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed physician participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Notification is not required for Respondent's subsequent acts as a messenger pursuant to an arrangement for which such Notification has been given. Notification also is not required for changes in the number or identity of the physicians participating in an arrangement for which such Notification has been given. Receipt by the Commission from Respondent of any Notification, pursuant to this Paragraph III, is not to be construed as a determination by the Commission that any action described in such Notification does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to:

1. each physician who participates, or has participated at any time since January 1, 1999, in Respondent, and

2. each officer, director, manager, and employee of Respondent;

B. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, with delivery confirmation, copies of this Order, the Complaint, and the notice specified in Appendix A to this Order, to the chief executive officer of each payor that Respondent has been in contact with since January 1, 1999, regarding contracting for the provision of physician services;

C. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, upon receipt by Respondent of a written request to terminate such contract from any payor that is a party to the contract or that pays for the physician services provided through the contract. Provided, however, that nothing contained herein shall affect the operation of any preexisting contract provision pertaining to continuation of patient care for patients undergoing a course of treatment, or payment therefor, following termination of the preexisting contract.

D. For a period of three (3) years after the date this Order becomes final:

1. Distribute by first class mail, with delivery confirmation, a copy of this Order and the Complaint to:

   a. each physician who begins participating in Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;

   b. each payor that contracts with Respondent for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such payor enters into such contract; and

   c. each person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she assumes such responsibility;

2. Annually publish in an official annual report or newsletter sent to all physicians who participate in Respondent, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.

3. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation or the creation or dissolution of subsidiaries or any other change in Respondent that may affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other

times as the Commission may by written notice require, setting forth:

A. In detail, the manner and form in which Respondent has complied and is complying with this Order;

B. The name, address, and telephone number of each physician, medical group practice, and other group of physicians that Respondent has represented or advised with respect to their dealings with any payor in connection with the provision of physician services;

C. The name, address, and telephone number of each payor with which Respondent has a contract.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and

B. Upon five (5) days' notice to Respondent, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on January 8, 2024.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Memorial Hermann Health Network Providers ("Respondent" or "MHHNP"). The agreement settles charges that Respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among MHHNP members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating uniform fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Respondent's standards for contracts.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true. The allegations in the Commission's proposed complaint are summarized below.

The Complaint

Respondent MHHNP is a nonprofit corporation that contracts with third-party payors for the provision of medical services on behalf of its approximately 3,000 participating physicians. MHHNP is organized and operated to further the pecuniary

interests of those physicians, who are licensed to practice medicine in the State of Texas and who are engaged in the business of providing medical services to patients in the Houston metropolitan area (hereinafter "Houston area").

Physicians often contract with third-party payors, such as insurance companies and preferred provider organizations. The contracts typically establish the price and other terms under which the physicians will render services to the payors' subscribers. Contracting physicians often agree to accept lower-than-customary compensation from these third-party payors to gain access to additional patients through the payor. Thus, these contracts may reduce payor costs, and may result in lower medical care costs to the payor's subscribers.

Absent agreements among competing physicians, each competing physician decides for him or herself whether, and on what price and other terms, the physician will contract with third-party payors to provide medical services to the payors' subscribers. To be competitively marketable in the Houston area, a payor must include in its physician network a large number of primary care physicians (PCPs) and specialists who practice in the Houston area. Many of the PCPs and specialists who practice in the Houston area are members of MHHNP. Accordingly, many payors concluded that they could not establish a viable physician network in areas in which MHHNP physicians are concentrated without including a large number of MHHNP physicians in that network.

Sometimes a network of competing physicians uses an agent to convey to payors information, obtained from each of its participating physicians individually, about fees and other significant contract terms that the physicians are willing to accept. In other instances, the agent may convey all payor contract offers to network physicians, with each physician then unilaterally deciding whether to accept or reject each offer. These "messenger model" arrangements, which are described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by

the Federal Trade Commission and U.S. Department of Justice (see http://www.ftc.gov/reports/hlth3s.htm), can facilitate contracting between physicians and payors and minimize the costs of providing medical care, without fostering agreements among competing physicians on fees and other competitively sensitive terms. The messenger may not, consistent with the competitive model, negotiate fees and other competitively significant terms on behalf of the participating physicians, nor facilitate the physicians' coordinated responses to contract offers, for example, by electing not to convey a payor's offer to the physicians based on the messenger's opinion of the acceptability or appropriateness of the offer.

Rather than acting simply as a "messenger," MHHNP engaged in collective negotiations on its members' behalf with third party payors. MHHNP's improper collective negotiations included actively bargaining with third-party payors by proposing and counter-proposing fee schedules (among other terms), gathering fee information from its members and using that information to negotiate prices, refusing to messenger proposals it deemed unacceptable on price and other terms, and, to maintain its bargaining power, on occasion discouraging its participating physicians from entering into unilateral agreements with third-party payors. For example, MHHNP periodically polled its physician members, asking each to disclose the minimum fee that he or she would accept in return for providing medical services pursuant to future MHHNP-payor agreements. MHHNP would then calculate minimum acceptable fees for use in payor negotiations, based in part on the information received from physician members concerning their future pricing intentions, and would often begin discussions regarding a possible contract for physician services by informing the payor of these minimum fees, and stating that it would not enter into or otherwise forward to its physician members any payor offer that did not satisfy those fee minimums.

In the course of its collective price negotiations with payors, MHHNP in fact often did not convey to its physician members

payor offers that provided for fees that did not satisfy MHHNP's Board of Directors. MHHNP instead demanded, and often received, more favorable fee and other contract terms–terms that third-party payors would not have offered to MHHNP's participating physicians had those physicians engaged in unilateral, rather than collective, negotiations with the payors. Only after the third-party payor acceded to fee and other contract terms acceptable to MHHNP, would MHHNP convey the payor's proposed contract to MHHNP's participating physicians for their consideration. For example, in one instance MHHNP refused a payor's request to messenger an offer MHHNP's Board deemed unacceptable. Instead, MHHNP notified its members that it had rejected the offer because it was below the minimum acceptable fee level previously set pursuant to physician member surveys, and then "polled" its members to determine whether or not they agreed with the Board's decision to reject the offer. A majority of physician members voted to agree with the Board's decision, and MHHNP then again rejected the payor's offer and explicitly refused to forward the offer to any of its physician members. Subsequently, the payor increased its proposed fees to the MHHNP fee minimums, and MHHNP then entered into a contract with the payor and messengered the agreement to its physician members, affording them the option to participate (or not) in the payor's offer.

Since the end of 2000, MHHNP and its members have entered only into fee-for-service agreements with payors, pursuant to which MHHNP and its members did not undertake financial risk-sharing. Further, MHHNP members have not integrated their practices to create significant potential efficiencies. MHHNP's joint negotiation of fees and other competitively significant terms has not been, and is not, reasonably related to any efficiency-enhancing integration. Instead, MHHNP's acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in the Houston area in the following ways, among others: price and other forms of competition among MHHNP's members were unreasonably restrained; prices for physician services were increased; and health

plans, employers, and individual consumers were deprived of the benefits of competition among physicians. Thus, MHHNP's conduct has harmed patients and other purchasers of medical services by restricting choice of providers and increasing the price of medical services.

The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint while allowing Respondent and its members to engage in legitimate joint conduct.

Paragraph II.A prohibits Respondent from entering into or facilitating agreements among physicians: (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any physicians deal, or are willing to deal, with any payor; and (4) not to deal individually with any payor or through any arrangement other than MHHNP.

Paragraph II.B prohibits Respondent from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

Paragraph II.C prohibits Respondent from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondent from encouraging, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C. Paragraph II contains a proviso that allows Respondent to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," or that solely involves physicians in the same medical group practice.

Analysis

Paragraph III requires MHHNP, for a period of three years after the order becomes final, to notify the Commission at least 60 days prior to entering into any arrangement under which MHHNP will act as a messenger or agent on behalf of physicians with payors regarding contracts. This provision will allow the Commission to review any future MHHNP policy or practice that MHHNP plans to implement with payors before such a policy or practice is implemented with respect to any particular payor.

Paragraphs IV.A and IV. B require MHHNP to distribute the complaint and order to its members, payors with which it previously contracted, and specified others. Paragraph IV.C requires MHHNP to terminate, without penalty, any payor contracts that it had entered into during the collusive period, at any such payor's request. This provision is intended to eliminate the effects of Respondent's joint price setting. Paragraph IV.C also contains a proviso to preserve payor contract provisions defining post-termination obligations relating to continuity of care during a previously begun course of treatment.

The remaining provisions of the proposed order impose complaint and order distribution, reporting, and other compliance-related provisions. For example, Paragraph IV. D requires MHHNP to distribute copies of the Complaint and Order to incoming MHHNP members, payors that contract with MHHNP for the provision of physician services, and incoming MHHNP officers, directors, and employees. Further, Paragraph V requires MHHNP to file periodic reports with the Commission detailing how MHHNP has complied with the Order. Paragraph VII authorizes Commission staff to obtain access to Respondent's records and officers, directors, and employees for the purpose of determining or securing compliance with the Order. The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

AMERICA ONLINE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4105; File No. 0023000
Complaint, January 28, 2004--Decision, January 28, 2004

This consent order addresses the manner in which Respondents America Online, Inc. ("AOL") – and its wholly owned subsidiary, CompuServe Interactive Services, Inc. – handled requests from subscribers to AOL's Internet access service who wanted to cancel their Internet access service, and operated the "CompuServe $400 Rebate program," under which consumers received a $400 cash rebate toward the purchase of an eligible computer if they contracted for three years of CompuServe Internet service. The order, among other things, requires the respondents to establish and maintain appropriate measures for ensuring that consumer requests to cancel any such online service or continuity program are promptly processed, and that billing will cease prior to the next billing cycle. The order also prohibits the respondents from continuing to charge any subscriber who has requested cancellation of any covered service or continuity program, unless respondents first obtain the subscriber's express informed consent, preceded by clear and conspicuous disclosure of certain specified information, including the pricing plan to which the subscriber is agreeing. In addition, the order requires the respondents to mail confirmation notices and cancellation request forms to subscribers who request the cancellation of any internet or online service and who are then recorded as having agreed to continue their subscriptions. The order also prohibits the respondents from making any representation about the time in which certain rebates will be mailed, or otherwise provided to purchasers – unless they have a reasonable basis for the representation at the time it is made – and from failing to provide any such rebate within the time specified or, if no time is specified, within thirty days.

Participants

For the Commission: *Michael Ostheimer, Laura Sullivan, Sydney Knight, Heather Hippsley, Mary Koelbel Engle, Louis Silversin, Gerard R. Butters* and *Paul A. Pautler.*

For the Respondents: *William C. MacLeod* and *John E. Villafranco, Collier Shannon Scott, PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that America Online, Inc. ("respondent AOL"), and CompuServe Interactive Services, Inc. ("respondent CompuServe"), corporations (collectively, "respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent America Online, Inc. is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia 20166.

2. Respondent CompuServe Interactive Services, Inc. is a Delaware corporation and a wholly owned subsidiary of America Online, Inc., with its principal office or place of business at 5000 Arlington Centre Boulevard, Columbus, Ohio 43220. America Online, Inc. controls the acts and practices of its subsidiary CompuServe Interactive Services, Inc.

3. Respondents have developed, advertised, promoted, offered for sale, sold, and distributed to the public Internet access services, including America Online Internet service ("AOL Internet Service") and CompuServe Internet service ("CompuServe Internet Service").

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondent AOL has offered various subscription plans for its AOL Internet Service, including, but not limited to, month-to-month subscription plans that entail automatically charging consumers monthly subscription fees until the consumers cancel their Internet service accounts.

6. During the AOL Internet Service registration process, a series of screens are displayed to consumers, including a screen that contains the America Online Member Agreement ("Agreement"). The Agreement, portions of which are attached hereto as Exhibit A, includes the following statements:

Exhibit A: America Online Member Agreement

> The America Online Member Agreement is a legal document that details your rights and obligations as an AOL member. You cannot become an AOL member until you have accepted the terms of the Member Agreement.
> . . . .
>
> You can cancel your membership by delivering notice to AOL's Customer Service Department at 1-888-265-8008, by sending your cancellation request via US mail to: AOL, PO Box 1600, Ogden UT 84401, or by fax at 1-801-622-7969. Cancellation will take effect within 72 hours of receipt of your request, and AOL will send you written confirmation.

7. Most AOL subscribers who wanted to cancel their Internet service called AOL's customer service department. The responsibilities of AOL's customer service representatives included trying to retain subscribers who requested cancellation of their Internet service. AOL failed to implement appropriate measures to ensure that all customers' requests for cancellation were properly executed. As a result, in numerous instances, subscribers who requested cancellation were not cancelled and continued to be charged monthly service fees.

8. Respondent AOL's practice described in Paragraph 7 has caused substantial injury to consumers, which was not outweighed by any countervailing benefits to consumers or competition and was not reasonably avoidable by consumers.

9. Respondents AOL and CompuServe developed the "CompuServe $400 Rebate program" whereby consumers

received a $400 cash rebate toward the purchase of any eligible computer, if they contracted for three years of CompuServe Internet Service at a cost of $21.95 per month, or for a total cost of $790.20. In connection with the CompuServe $400 rebate program, respondents promised to provide rebate checks within 8-10 weeks, and in some cases, 45 days.

10. After receiving rebate requests in conformance with Paragraph 9, respondents failed to deliver the rebates to consumers within the promised time period. Respondents extended the time period in which they would deliver the rebates to consumers without consumers agreeing to this extension of time.

11. Respondents' practice described in Paragraphs 9 and 10 has caused substantial injury to consumers, which was not outweighed by any countervailing benefits to consumers or competition and was not reasonably avoidable by consumers.

12. The acts and practices of respondents as alleged in this complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-eighth day of January, 2004, has issued this complaint against respondents.

To review any section of the Member Agreement, click on the blue, underlined text. You may then print, save or search that section. To review, print, save or search the full text of the Member Agreement, click here.

The America Online Member Agreement

The America Online Member Agreement is a legal document that details your rights and obligations as an AOL member. You cannot become an AOL Member until you have accepted the terms of the Member Agreement. The Member Agreement provides very important information about your AOL membership, so you should take the time to

Termination and Cancellation

AOL Terms of Service MAIN Member Agreement

Termination and Cancellation

You can cancel your membership by delivering notice to AOL's Customer Service Department at 1-888-265-8008, by sending your cancellation request via US Mail to: AOL, PO Box 1600, Ogden UT 84401, or by fax at 1-801-622-7969. **Cancellation will take effect within 72 hours of receipt of your request, and AOL will send you written confirmation. If you cancel near the end of your billing period and are inadvertently charged for the next month's fee contact AOL at the toll free number above to have the charges reversed.** AOL reserves the right to collect fees, surcharges or costs incurred before you cancel your

Print Save Search 7 of 8

Exhibit A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to § 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent America Online is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia 20166.

CompuServe is a Delaware corporation with its principal office or place of business at 5000 Arlington Centre Boulevard, Columbus, Ohio 43220. It is a wholly owned subsidiary of respondent America Online.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. "Continuity Program" shall mean any plan, arrangement, or system pursuant to which a consumer receives periodic provisions of services or shipments of products without prior notification by the seller before each service period or shipment, regardless of any trial or approval period allowing the consumer to be reimbursed for or return the service or product.

2. "Significant period of time," with regard to usage of any Internet service or online service, shall mean a period of time that exceeds thirty (30) minutes.

3. "Rebate" shall mean cash, instant savings, instant credit, or credit towards future purchases, offered to consumers who purchase products or services from respondents, which is provided at the time of purchase, or subsequent to the purchase.

4. "Online service" shall mean any service which enables a consumer to connect, via modem or otherwise, to a computer network or other electronic network that provides access to content or features available only to that service's members.

5. "Receiving a properly completed request" shall mean the time at which the respondents receive from the rebate applicant all the information and materials required by the express terms of the rebate offer.

6. Unless otherwise specified, "respondents" shall mean America Online and CompuServe, their successors and assigns, and their officers, agents, representatives, and employees.

7. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Internet or online service, or any other product or service that is sold by means of a continuity program, shall establish and maintain appropriate measures for ensuring that consumers' requests for cancellation of such service or continuity program are promptly processed and that billing for such product or service will cease prior to the next billing cycle.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Internet or online service, or any other product or service that is sold by means of a continuity program, shall not continue to charge any subscriber for such service or continuity program who:

1. has requested cancellation of such service or continuity program; and

2. is recorded as having agreed to continue to be a subscriber to such service or continuity program,

unless respondents:

A. First obtain the express informed consent of each such subscriber to continue to subscribe to such service or continuity program.

Provided, that a subscriber's consent will be deemed to be informed for the purpose of this Part II only if the respondents clearly and conspicuously disclose, before the subscriber consents to continued billing, the following:

i. a description of the pricing plan of the service or continuity program to which the subscriber is agreeing, including periodic charges and any additional usage charges that may apply;
ii. if the subscriber is being given a period of free service or continuity program shipments, the date on which the subscriber will be next billed for the service or continuity program, if he or she does not take further steps to cancel;

iii. that the subscriber will be sent a confirmation notice within five (5) business days.

Provided further, that a subscriber's consent will be deemed to be express for the purpose of this Part II only if the respondents obtain the informed consent in a manner which clearly evidences that the subscriber is consenting to continued billing for the service or continuity program.

B. In the case of an Internet or online service, send the Confirmation Notice and Cancellation Request Form, attached hereto as Attachment A, to each such subscriber, according to the following instructions:

1. An exact copy of Attachment A shall be sent by first class mail, within five (5) business days from the date on which each such subscriber is recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such service to the last known address of each such subscriber.

2. The front of the envelope transmitting Attachment A shall be in the form set forth in Attachment B to this order. The phrase "IMPORTANT: Confirmation of continued service,"shall appear on the front of the envelope in typeface equal or larger in size to 16 point. The words "Forward & Address Correction Requested" shall appear in the upper left-hand corner of each envelope, one-quarter of an inch beneath the name and logo of the service and the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith.

3. Respondents also shall mail the appropriate Confirmation Notice and Cancellation Request Form to any such subscriber whose mailing is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address via the National Change of Address ("NCOA") registry. Respondents shall retain a NCOA licensee to update the addresses of such subscribers under this subpart by processing the subscribers through the NCOA database. The mailing required by this subpart shall be made within five (5) business days of respondent's receipt of a corrected address or information identifying each such subscriber.

C. Respondents shall cancel the Internet or online service of subscribers who are notified pursuant to subpart B of this Part and who submit via U.S. mail or facsimile the Cancellation Request Form set forth in Attachment A with

a valid account validator and signature. Cancellations would occur within 72 hours of respondents' receipt of the cancellation request.

D. In the case of an Internet or online service, reimburse all fees for such service that any subscriber incurred subsequent to the date on which he or she was recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such service, if such subscriber:

1. requests a cancellation of such service within thirty (30) days of the date of the mailing of the confirmation notice that is required by subpart B of this Part; and

2. the subscriber did not use such service for a significant period of time after he or she was recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such service.

E. In the case of a continuity program other than Internet or online service, send the Confirmation Notice attached hereto as Attachment C, to each such subscriber, according to the following instructions:

1. If the subscriber has an active Internet or online service account with respondents, an exact copy of Attachment C shall be sent by e-mail to such subscriber's primary or master e-mail account within five (5) business days from the date on which such subscriber is recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such continuity program. The subject line of the e-mail transmitting Attachment C shall read "IMPORTANT: Confirmation of continued [name of continuity program]." The identification of the sender of the e-mail will be identical to that used on other e-mails sent by respondents to subscribers.

2. If the continuity program subscriber does not have an active Internet or online service account with respondents, an exact copy of Attachment C shall be sent by first class mail, within five (5) business days from the date on which each such subscriber is recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such continuity program service to the last known address of each such subscriber. The front of the envelope transmitting Attachment C shall be in the form set forth in Attachment D to this order. The phrase "IMPORTANT: Confirmation of continued [Name of continuity program],"shall appear on the front of the envelope in typeface equal or larger in size to 16 point. The words "Forward & Address Correction Requested" shall appear in the upper left-hand corner of each envelope, one-quarter of an inch beneath the return address.

Provided, however, respondents need not send a separate Confirmation Notice pursuant to this subpart with respect to a continuity program if: a) the subscriber to such continuity program requested cancellation of Internet or online service at the same time the subscriber requested cancellation of such continuity program, b) respondents send the subscriber a Confirmation Notice pursuant subpart B of this part, and c) respondents cancel such continuity program when Internet or online service subscribers submit Cancellation Request Forms pursuant to subpart C of this part.

F. Provide a method through which subscribers who are notified pursuant to subpart E of this Part are able to cancel such continuity program via telephone or U.S. mail. Cancellations would occur within 72 hours of respondents' receipt of the cancellation request.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Internet or online service and the offering of a rebate, shall not:

A. make any representation, in any manner, expressly or by implication, about the time in which any rebate will be mailed, or otherwise provided to purchasers unless, at the time the representation is made, respondents have a reasonable basis for such representation; or

B. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request for such rebate.

IV.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall maintain and upon request make available for copying:

A. For five (5) years after the last date of dissemination of any representation covered by this order:

1. All advertisements and promotional materials containing the representation;

2. All materials that were relied upon in disseminating the representation; and

3. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the

representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;

B. For each request for cancellation of any Internet service or online service, or continuity program, made by subscribers through the means provided for in Part II.C of the order, a record of the name and identification number of the employee who recorded the subscriber as having agreed to continue to be charged for, or continue to be a subscriber to, such service or continuity program, and the date on which such subscriber was recorded as having agreed to continue to be charged for, or continue to be a subscriber to, such service or continuity program;

C. A record of the number of reimbursements issued each month to former subscribers pursuant to Part II.D of the order; and

D. All consumer complaints received by respondents directly or indirectly through a third party in the prior three (3) year period, whether written, written memorializations of oral communications, or electronic mail, that relate or refer to:

1. respondents' failure to cancel or delay in cancelling any Internet or online service, or any other product or service that is sold by means of a continuity program; or

2. any dispute about charges for any such product or service; and

respondents' responses to such complaints, including information related to any reimbursements issued by respondents. For any such complaint or response that is communicated orally, respondents shall maintain a written memorialization of such complaint or response.

V.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade

Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on January 28, 2024, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

ATTACHMENT A — FRONT

[To be printed on Company letterhead]

[DATE]

[NAME AND ADDRESS OF RECIPIENT]
[E-MAIL ADDRESS/USER NAME, IF APPLICABLE]

Re: [UNIQUE ACCOUNT IDENTIFIER]

Dear [RECIPIENT'S NAME]:

On behalf of [AMERICA ONLINE, INC. OR COMPUSERVE INTERACTIVE SERVICES, INC.], thank you for agreeing to continue your subscription to [NAME OF INTERNET OR ONLINE SERVICE]. We look forward to providing you with the highest quality of service.

This letter confirms that on [DATE] you agreed to continue your [NAME OF SERVICE]. Your service will be continued and you will be charged [PRICING PLAN] per [TIME PERIOD] as agreed. [IF ADDITIONAL HOURLY OR OTHER USAGE CHARGES APPLY TO THIS PRICING PLAN, DESCRIBE THOSE CHARGES]. [IF SUBSCRIBER ACCEPTED AN OFFER OF A CERTAIN PERIOD OF FREE SERVICE INSERT THE FOLLOWING SENTENCE: These charges will resume after your [PERIOD OF TIME] of free service expire(s) on [DATE], unless you contact us to cancel your subscription before this date.] [IF SUBSCRIBER ACCEPTED REDEEMABLE AOL SERVICE CREDITS INSERT THE FOLLOWING SENTENCES: As discussed, we will provide [NUMBER OF CREDITS] Service Awards to your Award Center account. To redeem: Go to AOL Keyword: "Award Center" and click the "Redeem Service Award Now" button. Remember to redeem your Service Award before [NEXT BILLING DATE] to avoid membership fees and that your Service Awards expire on [DATE], 6 months from date of issuance.] If you subscribe to any premium services, you will continue to enjoy them and will be billed accordingly. [IF SUBSCRIBER ACCEPTED REDEEMABLE AOL SERVICE CREDITS INSERT THE FOLLOWING SENTENCE: The Service Awards you will receive only apply to your monthly membership fees and not to premium services.] If you need further assistance or have any questions about your current services, please call our Billing Department at [TELEPHONE NUMBER].

If our records are incorrect and you wish to cancel your [NAME OF SERVICE] membership, you can fully complete and send the cancellation form on the reverse side of this letter to us at [COMPANY ADDRESS] or fax it to us at [TELEPHONE NUMBER].

Within [NUMBER] days of receipt of your request, we will mail you confirmation of your cancellation.

Thank you for choosing to stay with [NAME OF SERVICE] and giving us the opportunity to show you how the [NAME OF SERVICE] experience is now better than ever.

Sincerely,

[SIGNATURE]

[NAME PRINTED]

ATTACHMENT A — BACK

CANCELLATION REQUEST	
[UNIQUE ACCOUNT IDENTIFIER]	
DATE:	
BILLING CONTACT'S NAME:	
BILLING CONTACT'S ADDRESS:	

For security purposes, please provide <u>one</u> of the following three account validators: (1) the primary or master screen name, (2) the last 4 digits of the credit card, checking account, or telephone number to which the account is billed, <u>or</u> (3) the answer to your Account Security Question.	
I called to cancel my [NAME OF SERVICE]. I did not wish to continue my [NAME OF SERVICE]. Please cancel my account upon receipt of this request.	
SIGNATURE:	

Note: to ensure cancellation of your [NAME OF SERVICE] account you must provide an account validator and sign your name.

ATTACHMENT B

NOTICE LETTER ENVELOPE

[Name and logo of service]
[Company address]

Forward & Address Correction Requested

Window Envelope

[The following statement is to appear in a box, on the front of the envelope in black with a white background, in extra large typeface equal or larger in size to 16 point, bold type face]

IMPORTANT: Confirmation of continued service

ATTACHMENT C

Dear [Recipient's name]:

Our records indicate that on [date] you agreed to continue your [name continuity program]. Your subscription will be continued and you will be charged [description of pricing plan].

If our records are incorrect and you wish to cancel your [name of continuity program] membership, you may call us at ((xxx) xxx-xxxx) or write us at [address].

Within [number] days of receipt of your request, we will e-mail you confirmation of your cancellation.

Thank you for choosing to continue your [name of service].

Sincerely,

[Name printed]

ATTACHMENT D

NOTICE LETTER ENVELOPE

[Company Name]
[Company address]

Forward & Address Correction Requested

Window Envelope

[The following statement is to appear in a box, on the front of the envelope in black with a white background, in extra large typeface equal or larger in size to 16 point, bold type face]

IMPORTANT: Confirmation of continued [name of service or continuity program]

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from America Online, Inc. ("AOL") and its wholly owned subsidiary, CompuServe Interactive Services, Inc. ("CompuServe").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns the respondents' Internet access services. According to the FTC complaint, most subscribers to AOL's Internet service who wanted to cancel their service called AOL's customer service department. The responsibilities of AOL's customer service representatives included trying to retain subscribers who requested cancellation of their Internet service. The complaint alleges that AOL failed to implement appropriate measures to ensure that all customers' requests for cancellation were properly executed and that as a result, in numerous instances, subscribers who requested cancellation were not cancelled and continued to be charged monthly service fees. According to the complaint, this constituted an unfair business practice.

The complaint further alleges that AOL and CompuServe developed the "CompuServe $400 Rebate program" whereby consumers received a $400 cash rebate toward the purchase of an eligible computer, if they contracted for three years of CompuServe Internet service. In connection with the rebate program, respondents promised to provide rebate checks within 8-10 weeks, and in some cases, 45 days. According to the complaint, after receiving rebate requests in conformance with the offer, respondents extended the time period in which they would deliver the rebates without consumers agreeing to this extension

of time and failed to deliver the rebates to consumers within the promised time period. According to the complaint, this constituted an unfair business practice.

The proposed consent order contains provisions designed to prevent AOL and CompuServe from engaging in similar acts and practices in the future. Specifically, Parts I and II address the cancellation of any Internet or online service, or any other product or service sold by means of a continuity program. Part I of the proposed order requires respondents to establish and maintain appropriate measures for ensuring that consumers' requests for cancellation of any such service or continuity program are promptly processed and that billing will cease prior to the next billing cycle.

Part II.A. of the proposed order prohibits respondents from continuing to charge any subscriber who has requested cancellation of any covered service or continuity program, even if the subscriber is recorded as having agreed to continue to be a subscriber, unless respondents first obtain the subscriber's express informed consent. For the subscriber's consent to be deemed "informed," the respondents must clearly and conspicuously disclose, before the subscriber consents, certain specified information, including a description of the pricing plan to which the subscriber is agreeing.

Part II.B. requires that respondents send a confirmation notice to any subscriber who has requested cancellation of any Internet or online service and who is recorded as having agreed to continue to be a subscriber. The notices are to be sent by first class mail in envelopes with "IMPORTANT: Confirmation of continued service" printed on the front. The notices confirm that consumers have agreed to continue their service, inform them of the terms of their continued service, and give them the opportunity to send back a cancellation request form, if they do not wish to continue their service. Part II.C. requires that respondents cancel the service of any subscriber who returns the cancellation request form.

Part II.D. provides that respondents refund fees to certain subscribers who return the cancellation request form. Subscribers are to be given refunds if they return the form within thirty days of the mailing of the confirmation notice and do not use the service for any significant period of time after they were recorded as having agreed to continue as subscribers.

Part II.E. requires that respondents send a confirmation notice to any subscriber who has requested cancellation of any continuity program other than Internet or online service and who is recorded as having agreed to continue to be a subscriber. If the subscriber has an active Internet or online service account with respondents, the notice can be sent by e-mail. Otherwise, it is to be sent by first class mail. Part II.F. requires that respondents provide a method through which subscribers who are notified pursuant to Part II.E. are able to cancel via telephone or U.S. mail.

Part III addresses the delayed rebates allegation and applies to respondents' offering of a rebate in connection with Internet or online service. Part III.A. prohibits the respondents from making any representation about the time in which any such rebate will be mailed, or otherwise provided to purchasers, unless they have a reasonable basis for the representation at the time it is made. Part III.B. prohibits respondents from failing to provide any such rebate within the time specified or, if no time is specified, within thirty days.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part VIII is a provision "sunsetting" the order after twenty years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

GENERAL ELECTRIC COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4103; File No. 0310097
Complaint, December 18, 2003--Decision, January 28, 2004

This consent order addresses the acquisition by Respondent General Electric Company, through its subsidiary, GE Aircraft Engines – the world's leading manufacturer of jet engines for military and civil aircraft – of the nondestructive testing business group of Agfa-Gevaert N.V. The order requires the respondent to divest its worldwide Panametrics ultrasonic nondestructive testing products business – including products such as portable flaw detectors, corrosion thickness gauges, and precision thickness gauges, which are used to inspect the structure and tolerance of materials without damaging the materials or impairing their future usefulness – to R/D Tech, Inc., or to another acquirer approved by the Commission. The order also prohibits the respondent, for a period of one year, from soliciting or inducing any employees or agents of the ultrasonic NDT equipment business involved in the divestiture to terminate their employment with R/D Tech. An accompanying Order to Maintain Assets requires General Electric to preserve the Panametrics ultrasonic NDT business as a viable, competitive and ongoing operation until the divestiture is achieved.

Participants

For the Commission: *Joanne C. Lewers, Randall A. Long, Stephanie C. Bovee, Stephanie A. Parks, Sylvia M. Brooks, Steven K. Bernstein, Anne R. Schenof, Elizabeth Piotrowski, John Yun, Jeffrey H. Fischer* and *Mary T. Coleman.*

For the Respondent: *Michael N. Sohn* and *Jonathan I. Gleklen, Arnold & Porter.*

COMPLAINT

Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent General Electric Company ("GE"), a

corporation subject to the jurisdiction of the Commission, has agreed to acquire certain assets of Agfa-Gevaert N.V. ("Agfa"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent GE is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06431.

2. Respondent GE is engaged in, among other things, the research, development, manufacture, and sale of ultrasonic non-destructive testing equipment, including portable flaw detectors, corrosion thickness gages and precision thickness gages. Non-destructive testing equipment is used in a wide range of industries to inspect the structure and tolerance of materials without damaging the materials or impairing their future usefulness.

3. Respondent GE is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. Agfa is a corporation organized, existing and doing business under and by virtue of the laws of Belgium, with its offices and principal place of business located at Septestraat 27, B-2640

Mortsel, Belgium. Agfa's principal subsidiary in the United States is located at 100 Challenger Road, Ridgefield Park, New Jersey 07660.

5. Agfa is engaged in, among other things, the research, development, manufacture, and sale of ultrasonic non-destructive testing equipment, including portable flaw detectors, corrosion thickness gages and precision thickness gages.

6. Agfa is, and at all times herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

7. GE and Agfa entered into a stock and asset purchase agreement dated as of January 17, 2003 and amended as of September 19, 2003 (the "Purchase Agreement") whereby GE agreed to acquire certain assets of Agfa's non-destructive testing equipment business for approximately $437 million in cash (the "Acquisition").

IV. THE RELEVANT MARKETS

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

a. the research, development, manufacture, and sale of portable flaw detectors, a type of ultrasonic non-destructive testing equipment used to detect and characterize internal defects and anomalies in materials;

b. the research, development, manufacture, and sale of corrosion thickness gages, a type of ultrasonic non-

destructive testing equipment used to measure the remaining wall thickness of parts that are subject to corrosion or erosion; and

c. the research, development, manufacture, and sale of precision thickness gages, a type of ultrasonic non-destructive testing equipment used to determine the thickness of smooth, thin materials.

9. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition on the relevant lines of commerce for portable flaw detectors, corrosion thickness gages, and precision thickness gages. Foreign suppliers of these products that have not established the necessary service and support networks, brand reputation and customer acceptance in the U.S., are not effective competitors for U.S. customers.

V. THE STRUCTURE OF THE MARKETS

10. The U.S. market for the research, development, manufacture, and sale of portable flaw detectors is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). GE and Agfa are the two leading suppliers by far of portable flaw detectors in the U.S. The Acquisition would significantly increase concentration in the U.S. market for the research, development, manufacture, and sale of portable flaw detectors. After the Acquisition, GE would have a market share of over 70% in this market.

11. The U.S. market for the research, development, manufacture, and sale of corrosion thickness gages is highly concentrated as measured by the HHI. GE and Agfa are the two leading suppliers by far of corrosion thickness gages in the U.S. The Acquisition would significantly increase concentration in the

U.S. market for the research, development, manufacture, and sale of corrosion thickness gages. After the Acquisition, GE would have a market share of over 70% in this market.

12. The U.S. market for the research, development, manufacture, and sale of precision thickness gages is highly concentrated as measured by the HHI. GE and Agfa are the two leading suppliers by far of precision thickness gages in the U.S. The Acquisition would significantly increase concentration in the U.S. market for the research, development, manufacture, and sale of precision thickness gages. After the Acquisition, GE would have a market share of over 70% in this market.

VI. ENTRY CONDITIONS

13. Entry into each of the relevant markets is a difficult process because of, among other things, the time and cost associated with (a) researching and developing portable flaw detectors, corrosion thickness gages and precision thickness gages; (b) establishing a service and support network; and (c) developing the necessary brand reputation and customer acceptance in each of these markets.

14. New entry into any of the relevant markets sufficient to deter or counteract the anticompetitive effects described in Paragraph 17 is unlikely to occur because the costs of entering each of the relevant markets are high relative to the potential sales opportunities available to an entrant.

15. New entry into any of the relevant markets sufficient to deter or counteract the anticompetitive effects described in Paragraph 17 would not occur in a timely manner because it would take over two years for an entrant to accomplish the steps required for entry and to achieve a significant market impact.

16. Expansion by smaller competitors in any of the relevant markets sufficient to deter or counteract the anticompetitive

effects described in Paragraph 17 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with (a) establishing an effective service and support network; and (b) developing the necessary brand reputation and customer acceptance in each of these markets.

VII. EFFECTS OF THE ACQUISITION

17. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between GE and Agfa in the U.S. market for the research, development, manufacture, and sale of portable flaw detectors, thereby: (i) increasing the likelihood that GE would unilaterally exercise market power in this market; (ii) reducing GE's incentive to pursue further innovation in this market; and (iii) increasing the likelihood that portable flaw detector customers would be forced to pay higher prices;

b. by eliminating actual, direct, and substantial competition between GE and Agfa in the U.S. market for the research, development, manufacture, and sale of corrosion thickness gages, thereby: (i) increasing the likelihood that GE would unilaterally exercise market power in this market; (ii) reducing GE's incentive to pursue further innovation in this market; and (iii) increasing the likelihood that corrosion thickness gage customers would be forced to pay higher prices; and

c. by eliminating actual, direct, and substantial competition between GE and Agfa in the U.S. market for the research,

development, manufacture, and sale of precision thickness gages, thereby: (i) increasing the likelihood that GE would unilaterally exercise market power in this market; (ii) reducing GE's incentive to pursue further innovation in this market; and (iii) increasing the likelihood that precision thickness gage customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

18. The Purchase Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of December, 2003, issues its Complaint against said Respondent.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed Acquisition by Respondent General Electric Company ("GE"), hereinafter referred to as "Respondent," of certain assets of Agfa-Gevaert N.V. ("Agfa"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets (attached to this Order as Appendix I), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent GE is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06431.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER
I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "GE" or "Respondent" means General Electric Company, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by General Electric Company (including, but not limited to, the GE Power Systems business of General Electric Company, General Electric Inspection Services, Inc., and Panametrics, Inc.), and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

B. "Agfa" means Agfa-Gevaert N.V., a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its offices and principal place of business located at Septestraat 27, B-2640 Morstel, Belgium; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agfa.

C. "R/D Tech" means R/D Tech, Inc., a corporation organized and existing under the laws of the Province of Quebec, with its offices and principal place of business located at 505,

boul. du Pare-technologique, Quebec, Quebec, Canada G1P 4S9.

D. "Commission" means the Federal Trade Commission.

E. "Acquisition" means the proposed Acquisition by Respondent of certain assets of Agfa by means of a Stock and Asset Purchase Agreement dated as of January 17, 2003, and the amendment to the Stock and Asset Purchase Agreement dated September 19, 2003, by and between Agfa and Respondent.

F. "R/D Tech Asset Purchase Agreement" means the Asset Purchase Agreement by and between Panametrics as Seller, GE as the parent of Seller, and R/D Tech as Purchaser, dated as of October 27, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Panametrics Ultrasonic NDT Assets to be divested to accomplish the requirements of this Order. The R/D Tech Asset Purchase Agreement is attached to this Order as non-public Appendix II.

G. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, development, manufacture, marketing, distribution or sale of Ultrasonic NDT equipment.

H. "Closing Date" means the date on which Respondent (or a Divestiture Trustee) divests to the Commission-approved Acquirer the Panametrics Ultrasonic NDT Assets completely and as required by Paragraph II of this Order.

I. "Commission-approved Acquirer" means either R/D Tech or any other entity that receives the prior approval of the

Commission to acquire the Panametrics Ultrasonic NDT

Assets, pursuant to Paragraph II of this Order.

J. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain related to the research, development, engineering, manufacture, use, distribution, cost, pricing, supply, marketing, sale, or after-sale servicing of Ultrasonic NDT.

K. "Costs" means all direct and indirect costs, including, but not limited to, labor, materials, and appropriately allocated overhead expenses and depreciation of capital equipment, but "Costs" does not include general administrative expenses.

L. "Divestiture Agreement" means either the R/D Tech Asset Purchase Agreement or any other agreement that receives the prior approval of the Commission between Respondent and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph IV of this Order and a Commission-approved Acquirer) related to the Panametrics Ultrasonic NDT Assets required to be divested pursuant to Paragraph II of this Order.

M. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

N. "Effective Date" means the date the Acquisition is consummated.

O. "Employee Notification" means the "Notice of Divestiture and Requirement for Confidentiality" attached to this Order as Appendix III and to the Order to Maintain Assets as Appendix B.

P. "Flaw Detector" means an Ultrasonic NDT Product used to detect and characterize internal defects and anomalies in materials.

Q. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental Agency or governmental commission or any judicial or regulatory authority of any government.

R. "Indirect Sales Representatives and Distributors" means the individuals directly or indirectly employed by or under contract with Respondent who sell or distribute Panametrics Ultrasonic NDT Products (irrespective of the portion of working time involved) listed in this Order at Schedule 3.12 (a) of non-public Appendix II.

S. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the Order to Maintain Assets.

T. "NDT" or "NDT Product" means any nondestructive testing equipment or system, excluding GE medical and process control products, used for the examination of materials and components without damaging or destroying them.

U. "Non-NDT Product" means any product, other than NDT Products, including, but not limited to, GE medical and process control products, researched, developed, manufactured, used or sold by Respondent, before the Effective Date.

V. "Non-Ultrasonic NDT Product" means any NDT Product, other than Ultrasonic NDT Products, researched, developed, manufactured, used or sold by Respondent, before the Effective Date.

W. "Panametrics" means Panametrics, Inc., an affiliate of the GE Power Systems business of General Electric Company,

and its subsidiaries Panametrics Japan Co. Ltd., Panametrics Pty., Ltd., IGE Energy Services (UK) Ltd., Panametrics BV, Panametrics GmbH, Panametrics Srl, Panametrics AB, and Panametrics Instrumentacion SL.

X. "Panametrics Shared Intellectual Property" means all of the intellectual property that Respondent can demonstrate to the Commission has been routinely used, prior to the Effective Date, in the research, development, manufacture, distribution, marketing, servicing, or sale of Ultrasonic NDT Products and in the manufacture, distribution, marketing, servicing, or sale of Non-NDT Products.

Y. "Panametrics Ultrasonic NDT Assets" means all of Respondent's rights, title and interest held before the Effective Date, in and to all assets related to the Panametrics Ultrasonic NDT Business, to the extent legally transferable, including the research, development, manufacture, use, distribution, marketing, servicing or sale of Ultrasonic NDT including, without limitation, the following:

1. all the product lines and related brands identified in Appendix IV;

2. all Ultrasonic NDT Intellectual Property;

3. an exclusive, perpetual, royalty-free worldwide license to make, use, sell, practice any process or method, import, export, or otherwise dispose of the Ultrasonic NDT Licensed Intellectual Property; *provided, however*, that, if R/D Tech is the Commission-approved Acquirer, then the required term of the license shall be that provided for in the R/D Tech Asset Purchase Agreement;

4. all Ultrasonic NDT Manufacturing Equipment;

5. all Ultrasonic NDT Software;

6. the identity of all customers of Ultrasonic NDT during the period from January 1, 1998, to the Effective Date and detailed information as to the pricing, product mix, and other terms (including, but not limited to, supply or rebate agreements) of Ultrasonic NDT for such customers;

7. at the Commission-approved Acquirer's option, each of the Ultrasonic NDT Assumed Contracts;

8. all unfilled customer orders for Ultrasonic NDT existing before the Effective Date (Respondent shall provide a list of such orders to the Commission-approved Acquirer within two (2) days after the Closing Date);

9. at the Commission-approved Acquirer's option, all inventories of Ultrasonic NDT in existence before the Effective Date, including, but not limited to, raw materials, work in process, and finished goods; and

10. all documents (including, but not limited to, computer files, electronic mail, and written, recorded, and graphic materials) related to the Panametrics Ultrasonic NDT Assets, including, but not limited to, the following specified documents: reports relating to the research and development of Ultrasonic NDT or of any materials used in the research, development, manufacture, marketing or sale of Ultrasonic NDT; all market research data and market intelligence reports; customer information; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, manufacturing records, manufacturing processes, and supplier lists;

all data contained in laboratory notebooks relating to Ultrasonic NDT; all diagrams and schematics relating to Ultrasonic NDT; all analytical and quality control data; and all correspondence with Agencies relating to Ultrasonic NDT, but excluding (i) all tax returns, financial statements, and working papers of Panametrics relating to Non-NDT Products and Non-Ultrasonic NDT Products; and (ii) documents and other information subject to attorney-client privilege relating to Non-NDT Products and Non-Ultrasonic NDT Products;

Provided, however, that, if a document required to be produced pursuant to Paragraph I.Y.10 of this Order also contains information that is not related to the Panametrics Ultrasonic NDT Assets, Respondent need not produce that information to the extent it is contained within a discrete segment of the document that otherwise must be produced.

Provided further, that the Commission-approved Acquirer shall be allowed access to redacted copies of such documents otherwise excluded by Paragraph I.Y.10(i and ii) of this Order to the extent they relate to Ultrasonic NDT.

Z. "Panametrics Ultrasonic NDT Business" means Panametrics' entire business relating to Ultrasonic NDT.

AA. "Panametrics Ultrasonic NDT Employees" means:

1. if R/D Tech is the Commission-approved Acquirer of the Panametrics Ultrasonic NDT Assets, all of those individuals listed in this Order at Schedule 3.12 (a) of non-public Appendix II; or

2. if R/D Tech is not the Commission-approved Acquirer of the Panametrics Ultrasonic NDT Assets, all of those individuals employed by Respondent (irrespective of the portion of working time involved) with any responsibility

for the research, design, development, engineering, manufacturing, distributing, marketing, sales, or after-sales service and support of Panametrics Ultrasonic NDT Products worldwide within the eighteen (18) month period immediately prior to the Closing Date.

BB. "Patents" means all Patents, patent applications and statutory invention registrations, in each case possessed or owned by Panametrics prior to the Effective Date, including all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for Patents and registrations thereto in the world, related to the manufacture, use, sale, service research or development of Ultrasonic NDT.

CC. "Phased Array NDT" means Ultrasonic NDT technology that uses an array of transducers combined on a single probe to emit sound waves at different angles and intervals capable of creating a three-dimensional image of scanned material to inspect the structure and tolerance of materials without damaging or deforming them.

DD. "Stationary Scanning System" means an Ultrasonic NDT Product that is a large mechanical device for the inspection of industrial parts and is capable of automated or manual use as a Thickness Gage and/or a Flaw Detector.

EE. "Thickness Gage" means an Ultrasonic NDT Product used to measure the thickness of a material or structure.

FF. "Transducer" means an Ultrasonic NDT Product that imparts sound energy to the test material and receives sound energy reflected from the test material.

GG. "Ultrasonic NDT" or "Ultrasonic NDT Product" means NDT that uses ultrasound as the inspection modality, including, but not limited to, Flaw Detectors, Thickness Gages, Transducers, Phased Array NDT and Stationary Scanning Systems.

HH. "Ultrasonic NDT Assumed Contracts" means all contracts or agreements to which Respondent is a party to the extent related to Ultrasonic NDT and that existed before the Effective Date, as follows:

1. if R/D Tech is the Commission-approved Acquirer, Ultrasonic NDT Assumed Contracts include, but are not limited to, contracts listed in this Order at Schedule 3.11(b) of non-public Appendix II;

2. if R/D Tech is not the Commission-approved Acquirer, Ultrasonic NDT Assumed Contracts include, but are not limited to:

   a. third party purchase contracts or agreements for the purchase of Ultrasonic NDT from Panametrics;

   b. contracts or agreements for Panametrics' purchases of any materials from any third party for use related to the manufacture, use, sale, service, research or development of Ultrasonic NDT;

   c. contracts or agreements related to the manufacture of Panametrics Ultrasonic NDT;

   d. confidentiality agreements related to Ultrasonic NDT; and

   e. royalty, licensing or similar arrangements related to Ultrasonic NDT.

II. "Ultrasonic NDT Intellectual Property" means all of the following possessed or owned by Respondent before the Effective Date and related to Ultrasonic NDT:

1. Patents;

2. Ultrasonic NDT Manufacturing Technology;

3. Ultrasonic NDT Scientific and Regulatory Material;

4. Ultrasonic NDT Research, Design and Development; and

5. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, that "Ultrasonic NDT Intellectual Property" does not include the Ultrasonic NDT Licensed Intellectual Property.

JJ. "Ultrasonic NDT Licensed Intellectual Property" means rights within the field of use of Ultrasonic NDT to:

1. the fourteen (14) patents or patent applications used by Respondents for Non-NDT Products or Non-Ultrasonic NDT Products that are identified in Appendix V of this Order;

2. Ultrasonic NDT Trademarks, including the goodwill of the business symbolized thereby and associated therewith that are identified in Appendix VI of this Order;

3. Ultrasonic NDT Trade Dress; and

4. the know-how related to Ultrasonic NDT Manufacturing Technology and Ultrasonic NDT Research, Design, and Development that is Panametrics Shared Intellectual Property.

Provided, however, that "Ultrasonic NDT Licensed Intellectual Property" does not include the "General Electric" or "GE" names or logos in any form.

KK. "Ultrasonic NDT Manufacturing Equipment" means all of Panametrics' rights and ownership in equipment, machines, and computers, and all parts, information, files, diagrams, schematics, instructions, software, and hardware related thereto, used in the manufacture, quality assurance and quality control, and packaging of Ultrasonic NDT.

LL. "Ultrasonic NDT Manufacturing Technology" means all technology, trade secrets, know-how, diagrams, schematics, software, calibrations, inventions, practices, proprietary algorithms, testing techniques, methods and other confidential or proprietary information related to the manufacture, quality assurance and quality control, and packaging of Ultrasonic NDT owned or used by Panametrics before the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

MM. "Ultrasonic NDT Research, Design and Development" means intellectual property, materials and documents related to the research, design and development of Ultrasonic NDT, owned or used by Panametrics before the Effective Date, including, but not limited to, research materials, technical information, inventions, and other confidential or proprietary information related to research, design and development.

NN. "Ultrasonic NDT Scientific and Regulatory Material" means all technological, scientific, chemical, and electrical materials and information related to Ultrasonic NDT owned or used by Panametrics before the Effective Date, and all rights thereto, in any and all jurisdictions.

OO. "Ultrasonic NDT Software" means computer programs, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any Panametrics Ultrasonic NDT Product; *provided, however*, that "Ultrasonic NDT Software" does not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

PP. "Ultrasonic NDT Trade Dress" means all trade dress of Ultrasonic NDT distributed, marketed, or sold by or on behalf of Panametrics before the Effective Date, including, but not limited to, product packaging associated with the sale of such Ultrasonic NDT worldwide and the lettering of such Ultrasonic NDT trade names or brand names; *provided, however*, that Ultrasonic NDT Trade Dress does not include the "General Electric" or "GE" name or logo in any form.

QQ. "Ultrasonic NDT Trademarks" means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for Ultrasonic NDT researched, developed, distributed, marketed, or sold by or on behalf of Respondent before the Effective Date; *provided, however*, that Ultrasonic NDT Trademarks do not include the "General Electric" or "GE" name or logo in any form.

II.

IT IS FURTHER ORDERED that:

A. If R/D Tech is the Commission-approved Acquirer and if the R/D Tech Asset Purchase Agreement is approved by the Commission, then not later than twenty (20) days after the Effective Date, Respondent shall divest the Panametrics Ultrasonic NDT Assets as an ongoing business to R/D Tech pursuant to and in accordance with the R/D Tech Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of R/D Tech or to reduce any obligations of Respondent under such agreement), and such agreement is incorporated by reference into this Order and made part hereof as non-public Appendix II.

Provided, however, *that*:

1. to the extent Respondent is required by this Order to assign Ultrasonic NDT Assumed Contracts to the Commission-approved Acquirer, where any such Ultrasonic NDT Assumed Contract also relates to Non-NDT Product(s) or Non-Ultrasonic NDT Product(s), Respondent shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to Ultrasonic NDT, but concurrently may retain similar rights as are related to the Non-NDT Product(s) and Non-Ultrasonic NDT Product(s);

2. in cases in which documents or other materials included in the Panametrics Ultrasonic NDT Assets contain information that (i) relates both to Ultrasonic NDT and to Non-NDT Products or Non-Ultrasonic NDT Product(s), and (ii) cannot be segregated in a manner that preserves the usefulness of the information as it relates to Ultrasonic NDT, Respondent shall be required only to

provide copies of the documents and materials containing this information; *provided, however,* that Respondent shall, (a) wherever possible, redact the information contained in such documents or other materials retained pursuant to Paragraph II.A.2 of this Order and relating to Ultrasonic NDT Products; and (b) notify its employees that may have copies of documents described in Paragraph II.A.2 of this Order of the redactions Respondent has made to such documents; *provided further,* that Respondent may also redact information contained in the copies of documents or other materials relating to Non-NDT Products or Non-Ultrasonic NDT Products that it is required to provide to the Commission-approved Acquirer. In instances where such copies are provided to the Commission-approved Acquirer, and within thirty (30) days of giving notice to Respondent, the Commission-approved Acquirer shall have access to original documents under circumstances where copies of documents are insufficient, for example, for evidentiary or regulatory purposes; and

3. if Respondent has divested the Panametrics Ultrasonic NDT Assets to R/D Tech prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that R/D Tech is not an acceptable acquirer of the Panametrics Ultrasonic NDT Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondent shall immediately rescind the transaction with R/D Tech and shall divest the Panametrics Ultrasonic NDT Assets, absolutely and in good faith, within ninety (90) days of rescission to a Commission-approved Acquirer in a manner that satisfies the requirements of Paragraph II of this Order.

B. Any failure to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this

Order. Any Divestiture Agreement shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in any Divestiture Agreement related to the Panametrics Ultrasonic NDT Assets the following provisions, and Respondent shall commit that, within ten (10) days of receiving a request from the Commission-approved Acquirer, the Respondent shall:

1. provide assistance and advice to enable the Commission-approved Acquirer to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Ultrasonic NDT;

2. provide such personnel, assistance, and training at a facility chosen by the Commission-approved Acquirer to manufacture Ultrasonic NDT, including, but not limited to, technical assistance relating to process technology, quality assurance, and quality control, and shall continue providing such assistance and training until the Commission-approved Acquirer is reasonably satisfied that it can manufacture Ultrasonic NDT in substantially the same manner and quality employed or achieved by or on behalf of Respondent, but no longer than eighteen (18) months following the Closing Date; and

3. divest any additional, incidental assets of Respondent and make any further arrangements for transitional services to the Commission-approved Acquirer within the first eighteen (18) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Panametrics Ultrasonic NDT Assets.

Provided, however, that for the services listed in Paragraph II.C.1-3 of this Order, Respondent shall charge the Commission-approved Acquirer a rate no greater than the Costs incurred by Respondent in rendering such services. Moreover, to the extent Respondent outsources any of the services listed in Paragraph II.C.1-3 of this Order to a third party, Respondent shall charge the Commission-approved Acquirer a rate no greater than the cost incurred by Respondent for the outsourced services, but in no case shall such charge exceed the Costs Respondent would have incurred had Respondent provided such services directly.

Provided further, that Paragraph II.C.1-3 of this Order shall not apply if R/D Tech is the Commission-approved Acquirer, if R/D Tech acquires the Panametrics Ultrasonic NDT Assets pursuant to the R/D Tech Asset Purchase Agreement, and if Respondent does not retain any Panametrics Ultrasonic NDT Employees qualified to provide such assistance and advice.

D. Respondent shall:

1. for a period of six (6) months from the date Respondent and the Commission-approved Acquirer execute the Divestiture Agreement ("the access period"), provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Panametrics Ultrasonic NDT Employees, provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement;

2. provide the Commission-approved Acquirer an opportunity to inspect the personnel files and other documentation related to the Panametrics Ultrasonic NDT Employees to the extent permissible under applicable laws and with the consent of the Panametrics Ultrasonic NDT Employees, which consent Respondent shall promptly and in good faith seek to obtain, upon the Commission-approved Acquirer's request, at any time

after execution of the Divestiture Agreement until the end of the access period;

3. not, during the access period, interfere with the hiring or employing by the Commission-approved Acquirer of Panametrics Ultrasonic NDT Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to a Panametrics Ultrasonic NDT Employee who receives a written offer of employment from the Commission-approved Acquirer.

Provided, however, that Paragraph II.D.1-3 of the Order does not prohibit Respondent from making offers of employment to or employing any Panametrics Ultrasonic NDT Employee during the Access Period where the Commission-approved Acquirer has notified Respondent in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

4. provide all Panametrics Ultrasonic NDT Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation of all employee benefits, including regularly scheduled raises and bonuses and a vesting of all pension benefits (as permitted by law), offered by Respondent until the Closing Date.

Provided further, that Paragraph II.D.1-4 of this Order shall not apply after the date the Order becomes final if the Commission-approved Acquirer enters into an

employment contract with the Panametrics Ultrasonic NDT Employees of its choice before the Commission accepts the Consent Agreement, Respondent divests the Panametrics Ultrasonic NDT Assets to the Commission-approved Acquirer pursuant to Paragraph II, and Respondent is not required to rescind the transaction with the Commission-approved Acquirer pursuant to Paragraph II.A; and

5. not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any employees of the Commission-approved Acquirer having any responsibility related to Ultrasonic NDT to terminate their employment relationship with the Commission-approved Acquirer;

Provided, *however*, that Respondent may:

a. advertise for employees in newspapers, trade publications or other media not targeted specifically at Panametrics Ultrasonic NDT Employees, or

b. hire employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this Paragraph II.D.

E. For a period of six (6) months from the Closing Date, Respondent shall not manufacture, develop, distribute, market, service or sell Agfa Ultrasonic NDT Products in the United States using the services of any Panametrics Ultrasonic NDT Employees.

F. Respondent shall transfer to the Commission-approved Acquirer all marketing agreements and all distribution agreements with all Indirect Sales Representatives and Distributors. If R/D Tech is the Commission-approved Acquirer, the Indirect Sales Representatives and Distributors

are listed in this Order at Schedule 3.12(a) of non-public Appendix II.

G. Respondent shall secure, prior to the Closing Date, all consents and waivers from all private entities that are necessary for the divestiture of the Panametrics Ultrasonic NDT Assets to the Commission-approved Acquirer, or for the continued research, development, manufacture, sale, service, marketing or distribution of Ultrasonic NDT by the Commission-approved Acquirer.

H. Respondent shall not use, directly or indirectly, any Confidential Business Information (other than as necessary to comply with requirements of this Order) related to the research, development, engineering, manufacture, use, distribution, cost, pricing, supply marketing, sale or after-sale servicing of Ultrasonic NDT, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer; *provided, however*, this provision shall not apply to any Confidential Business Information related to Ultrasonic NDT that Respondent can demonstrate to the Commission that Agfa obtained without the assistance of GE prior to the Effective Date, or to Panametrics Shared Intellectual Property, which Respondent shall be permitted to use after the Effective Date only in connection with Non-NDT Products.

I. Respondent shall to the extent permissible under applicable laws require, as a condition of continued employment post-divestiture, that each employee with access to any Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including the Panametrics Shared Intellectual Property, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all such Confidential Business Information strictly confidential, including the nondisclosure of such information to all other employees,

executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

Provided, however, that:

i. Respondent may use such information only to the extent necessary to defend or prosecute claims relating to assets or liabilities that are retained by Respondent after the Effective Date.

ii. Paragraph II.I of this Order shall not apply to any Confidential Business Information related to Ultrasonic NDT that Respondent can demonstrate to the Commission that Agfa obtained without the assistance of GE prior to the Effective Date, or to Panametrics Shared Intellectual Property, which Respondent shall be permitted to use after the Effective Date only in connection with Non-NDT Products.

J. Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including Panametrics Shared Intellectual Property, by Respondent's personnel to all of Respondent's employees who (i) were involved in the research, development, manufacturing, sale, service, marketing or distribution of Ultrasonic NDT Products, and/or (ii) may have Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including Panametrics Shared Intellectual Property. Such notification shall be in substantially the form set forth in the Employee Notification. Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent shall provide a copy of such notification to the Commission-approved Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's corporate headquarters and

shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

K. Pending divestiture of the Panametrics Ultrasonic NDT Assets, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Panametrics Ultrasonic NDT Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Panametrics Ultrasonic NDT Assets except for ordinary wear and tear.

L. Counsel for Respondent (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to the Commission-approved Acquirer only in order to:

1. comply with any Divestiture Agreement, this Order, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements; or

2. defend against, respond to, or otherwise participate in any pending litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or licensing of any other aspect of the Panametrics Ultrasonic NDT Assets or Panametrics Ultrasonic NDT Business;

Provided, *however*, that Respondent may disclose such information only as necessary for the purposes set forth in Paragraph II of this Order pursuant to an appropriate confidentiality order, agreement or arrangement.

Provided further that:

a. Respondent shall require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer; *provided, however,* that Respondent shall not be deemed to have violated Paragraph II.H of this Order if the Commission-approved Acquirer withholds such agreement unreasonably; and

b. Respondent shall use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

M. The purpose of the divestiture of the Panametrics Ultrasonic NDT Assets is to ensure the continued use of the Panametrics Ultrasonic NDT Assets in the same business in which the Panametrics Ultrasonic NDT Assets were engaged from the date the Consent Agreement is signed until the date Respondent divests the Panametrics Ultrasonic NDT Assets to a Commission-approved Acquirer, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondent expeditiously complies with all of its obligations and

perform all of its responsibilities as required by this Order and the Order to Maintain Assets ("Orders") and the Divestiture Agreement.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this Paragraph III or pursuant to the relevant provisions of the Order to Maintain Assets in this matter, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

   a. the completion by Respondent of the divestiture of all relevant assets required to be divested pursuant to this Order in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the Ultrasonic NDT Product(s) acquired pursuant to a Divestiture Agreement independently of Respondent; or

   b. the completion by Respondent of the last obligation under the Orders pertaining to the Interim Monitor's service; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the divestiture of the Panametrics Ultrasonic NDT Assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the

Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.

8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,*

that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require each Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph III of this Order or the relevant provisions of the Order to Maintain Assets in this matter.

G. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. An Interim Monitor appointed pursuant to Paragraph III of this Order or the relevant provisions of the Order to Maintain Assets in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations to divest the Panametrics Ultrasonic NDT Assets as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee(s) to divest the Panametrics Ultrasonic NDT Assets in a manner that satisfies the requirements of Paragraph II. In the event that

the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the Panametrics Ultrasonic NDT Assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph IV, Respondent shall

consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Panametrics Ultrasonic NDT Assets.

2. The Divestiture Trustee shall have one (1) year after the date the Commission, or a court, approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission;

Provided further, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation

of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent 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 for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. In the event that the Divestiture Trustee determines that he or she is unable to divest the Panametrics Ultrasonic NDT Assets in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, development, manufacture, distribution, marketing, promotion, sale, or after-sales support of the Ultrasonic NDT Product(s), the Divestiture Trustee may divest such additional assets of Respondent and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

9. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may a appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IV.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The Divestiture Trustee appointed pursuant to Paragraph IV of this Order may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order or the relevant provisions of the Order to Maintain Assets in this matter.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A through II.J, III, and IV of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a

full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent shall include in its reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

A. access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

Appendix I
TO THE DECISION AND ORDER

[Order to Maintain Assets]

APPENDIX II
TO THE DECISION AND ORDER

[Redacted From Public Record Version]

APPENDIX III
TO THE DECISION AND ORDER

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On December__, 2003, General Electric Company ("GE"), hereinafter referred to as "Respondent," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Maintain Assets.

The Decision and Order requires the divestiture of assets relating to the Panametrics Ultrasonic NDT Business. These assets are hereinafter referred to as the "Panametrics Divested Assets." Both the Decision and Order and the Order to Maintain Assets require Respondent to commit that no Confidential Business Information relating to the Panametrics Divested Assets will be disclosed to or used by any employee of the entity formed by the merger of GE and of certain assets of Agfa-Gevaert N.V. ("Agfa") ("Combined Entity"). In particular, this is to protect such information from being used in any way by the Combined Entity for the research, development, sale or manufacture of any product that competes, or may compete, with any product that is marketed by the acquirer of the Panametrics Divested Assets after the proposed acquisition. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the Panametrics Divested Assets. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondent is required to divest the Panametrics Divested Assets to an acquirer that must be approved by the FTC. R/D Tech, Inc. has been proposed to the FTC as the acquirer for these assets. Until a complete divestiture

of all of the Panametrics Divested Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the Panametrics Divested Assets. This includes preserving the work force that performs functions related to the Panametrics Divested Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the Panametrics Divested Assets, (ii) an employee for GE or the Combined Entity who has work responsibilities in some way related to products that compete or may compete with the Panametrics Divested Assets, or (iii) an employee or former employee of GE or Agfa who might have Confidential Business Information in your possession related to the Panametrics Divested Assets.

All Confidential Business Information related to the Panametrics Divested Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the Panametrics Divested Assets (such as persons with job responsibilities related to products that compete or may compete with the Panametrics Divested Assets). In addition, any person who possesses such Confidential Business Information related to the Panametrics Divested Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the Panametrics Divested Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any GE or former GE or Agfa employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the Panametrics Divested Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

No employee for GE or the Combined Entity who has work responsibilities in any way related to products that compete or may compete with the Panametrics Divested Assets shall have access to any facility containing Panametrics Divested Assets; provided, however, that such employees may have access with the consent of the owner of the Panametrics Divested Assets.

Furthermore, the Decision and Order restricts any employees of Panametrics who were involved in the marketing or manufacturing of the Panametrics Divested Assets from performing a similar function for the Combined Entity relating to ultrasonic nondestructive testing for six (6) months from the closing of the GE/Agfa transaction.

Any violation of the Decision and Order or the Order to Maintain Assets may subject GE or the Combined Entity to civil penalties and other relief as provided by law.

CONTACT PERSON

If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Order to Maintain Assets, you should contact

_____.

ACKNOWLEDGMENT

I, _____ (print name),

hereby acknowledge that I have read the above notification and

agree to abide by its provisions.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed Acquisition by Respondent General Electric Company ("GE"), hereinafter referred to as "Respondent," of certain assets of Agfa-Gevaert N.V. ("Agfa"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent GE is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06431.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER
I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the final Decision and Order), which are attached hereto as Appendix A and incorporated herein by reference and made a part hereof, shall apply:

A. "GE" or "Respondent" means General Electric Company, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by General Electric Company (including, but not limited to, the GE Power Systems business of General Electric Company, General Electric Inspection Services, Inc., and Panametrics, Inc.), and the respective directors, officers, employees, attorneys, agents, representatives, predecessors, successors, and assigns of each.

B. "Agfa" means Agfa-Gevaert N.V., a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its offices and principal place of business located at Septestraat 27, B-2640 Morstel, Belgium; and joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agfa.

C. "R/D Tech" means R/D Tech, Inc., a corporation organized

and existing under the laws of the Province of Quebec, with its offices and principal place of business located at 505, boul. du Pare-technologique, Quebec, Quebec, Canada G1P 4S9.

D. "Commission" means the Federal Trade Commission.

E. "Acquisition" means the proposed Acquisition by Respondent of certain assets of Agfa by means of a Stock and Asset Purchase Agreement dated as of January 17, 2003, and the amendment to the Stock and Asset Purchase Agreement dated September 19, 2003, by and between Agfa and Respondent.

F. "R/D Tech Asset Purchase Agreement" means the Asset Purchase Agreement by and between Panametrics as Seller, GE as the parent of Seller, and R/D Tech as Purchaser, dated as of October 27, 2003, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Panametrics Ultrasonic NDT Assets to be divested to accomplish the requirements of this Order. The R/D Tech Asset Purchase Agreement is attached to the Decision and Order as non-public Appendix II.

G. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, development, manufacture, marketing, distribution or sale of Ultrasonic NDT equipment.

H. "Closing Date" means the date on which Respondent (or a Divestiture Trustee) divests to the Commission-approved Acquirer the Panametrics Ultrasonic NDT Assets completely and as required by Paragraph II of the Decision and Order.

I. "Commission-approved Acquirer" means either R/D Tech

or any other entity that receives the prior approval of the Commission to acquire the Panametrics Ultrasonic NDT Assets, pursuant to Paragraph II of the Decision and Order.

J. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain related to the research, development, engineering, manufacture, use, distribution, cost, pricing, supply, marketing, sale, or after-sale servicing of Ultrasonic NDT.

K. "Divestiture Agreement" means either the R/D Tech Asset Purchase Agreement or any other agreement that receives the prior approval of the Commission between Respondent and a Commission-approved Acquirer (or between a trustee appointed pursuant to Paragraph IV of the Decision and Order and a Commission-approved Acquirer) related to the Panametrics Ultrasonic NDT Assets required to be divested pursuant to Paragraph II of the Decision and Order.

L. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of the Decision and Order.

M. "Effective Date" means the date the Acquisition is consummated.

N. "Employee Notification" means the "Notice of Divestiture and Requirement for Confidentiality" attached to the Decision and Order as Appendix III and to this Order to Maintain Assets as Appendix B.

O. "Flaw Detector" means an Ultrasonic NDT Product used to detect and characterize internal defects and anomalies in materials.

P. "Governmental Entity" means any Federal, state, local or

non-U.S. government or any court, legislature, governmental Agency or governmental commission or any judicial or regulatory authority of any government.

Q. "Indirect Sales Representatives and Distributors" means the individuals directly or indirectly employed by or under contract with Respondent who sell or distribute Panametrics Ultrasonic NDT Products (irrespective of the portion of working time involved), listed in the Decision and Order at Schedule 3.12(a) of non-public Appendix II.

R. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of the Decision and Order or Paragraph III of this Order to Maintain Assets.

S. "Orders" means the Decision and Order and this Order to Maintain Assets.

T. "NDT" or "NDT Product" means any nondestructive testing equipment or system, excluding GE medical and process control products, used for the examination of materials and components without damaging or destroying them.

U. "Non-NDT Product" means any product, other than NDT Products, including, but not limited to, GE medical and process control products, researched, developed, manufactured, used or sold by Respondent, before the Effective Date.

V. "Non-Ultrasonic NDT Product" means any NDT Product, other than Ultrasonic NDT Products, researched, developed, manufactured, used or sold by Respondent, before the Effective Date.

W. "Panametrics" means Panametrics, Inc., an affiliate of the GE Power Systems business of General Electric Company, and its subsidiaries Panametrics Japan Co. Ltd., Panametrics Pty., Ltd., IGE Energy Services (UK) Ltd.,

Panametrics BV, Panametrics GmbH, Panametrics Srl, Panametrics AB, and Panametrics Instrumentacion SL.

X. "Panametrics Shared Intellectual Property" means all of the intellectual property that Respondent can demonstrate to the Commission has been routinely used, prior to the Effective Date, in the research, development, manufacture, distribution, marketing, servicing, or sale of Ultrasonic NDT Products and in the manufacture, distribution, marketing, servicing, or sale of Non-NDT Products.

Y. "Panametrics Ultrasonic NDT Assets" means all of Respondent's rights, title and interest held before the Effective Date, in and to all assets related to the Panametrics Ultrasonic NDT Business, to the extent legally transferable, including the research, development, manufacture, use, distribution, marketing, servicing or sale of Ultrasonic NDT including, without limitation, the following:

1. all the product lines and related brands identified in Appendix IV of the Decision and Order;

2. all Ultrasonic NDT Intellectual Property;

3. an exclusive royalty free worldwide license to make, use, sell, practice any process or method, import, export, or otherwise dispose of the Ultrasonic NDT Licensed Intellectual Property; *provided, however*, that, if R/D Tech is the Commission-approved acquirer, then the required term of the license shall be that provided for in the R/D Tech Asset Purchase Agreement;

4. all Ultrasonic NDT Manufacturing Equipment;

5. all Ultrasonic NDT Software;

6. the identity of all customers of Ultrasonic NDT during the

period from January 1, 1998, to the Effective Date and detailed information as to the pricing, product mix, and other terms (including, but not limited to, supply or rebate agreements) of Ultrasonic NDT for such customers;

7. at the Commission-approved Acquirer's option, each of the Ultrasonic NDT Assumed Contracts;

8. all unfilled customer orders for Ultrasonic NDT existing before the Effective Date (Respondent shall provide a list of such orders to the Commission-approved Acquirer within two (2) days after the Closing Date);

9. at the Commission-approved Acquirer's option, all inventories of Ultrasonic NDT in existence before the Effective Date, including, but not limited to, raw materials, work in process, and finished goods; and

10. all documents (including, but not limited to, computer files, electronic mail, and written, recorded, and graphic materials) related to the Panametrics Ultrasonic NDT Assets, including, but not limited to, the following specified documents: reports relating to the research and development of Ultrasonic NDT or of any materials used in the research, development, manufacture, marketing or sale of Ultrasonic NDT; all market research data and market intelligence reports; customer information; all records relating to employees that accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of which is prohibited by applicable law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to Ultrasonic NDT; all diagrams and schematics relating to Ultrasonic NDT; all analytical and quality control data; and all correspondence with Agencies relating to Ultrasonic

NDT, but excluding (i) all tax returns, financial statements, and working papers of Panametrics relating to Non-NDT Products and Non-Ultrasonic NDT Products; and (ii) documents and other information subject to attorney-client privilege relating to Non-NDT Products and Non-Ultrasonic NDT Products;

Provided, however, that, if a document required to be produced pursuant to Paragraph I.Y.10 of this Order also contains information that is not related to the Panametrics Ultrasonic NDT Assets, Respondent need not produce that information to the extent it is contained within a discrete segment of the document that otherwise must be produced.

Provided further, that the Commission-approved Acquirer shall be allowed access to redacted copies of such documents otherwise excluded by Paragraph I.Y.10(i and ii) of this Order to the extent they relate to Ultrasonic NDT.

Z. "Panametrics Ultrasonic NDT Business" means Panametrics' entire business relating to Ultrasonic NDT.

AA. "Panametrics Ultrasonic NDT Employees" means:

1. if R/D Tech is the Commission-approved Acquirer of the Panametrics Ultrasonic NDT Assets, all of those individuals listed in the Decision and Order at Schedule 3.12 (a) non-public Appendix II; or

2. if R/D Tech is not the Commission-approved Acquirer of the Panametrics Ultrasonic NDT Assets, all of those individuals employed by Respondent (irrespective of the portion of working time involved) with any responsibility for the research, design, development, engineering, manufacturing, distributing, marketing, sales, or after-sales service and support of Panametrics Ultrasonic NDT Products worldwide within the eighteen (18) month period immediately prior to the Closing Date.

BB. "Patents" means all Patents, patent applications and statutory invention registrations, in each case possessed or owned by Panametrics prior to the Effective Date, including all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for Patents and registrations thereto in the world, related to the manufacture, use, sale, service research or development of Ultrasonic NDT.

CC. "Phased Array NDT" means Ultrasonic NDT technology that uses an array of transducers combined on a single probe to emit sound waves at different angles and intervals capable of creating a three-dimensional image of scanned material to inspect the structure and tolerance of materials without damaging or deforming them.

DD. "Stationary Scanning System" means an Ultrasonic NDT Product that is a large mechanical device for the inspection of industrial parts and is capable of automated or manual use as a Thickness Gage and/or a Flaw Detector.

EE. "Thickness Gage" means an Ultrasonic NDT Product used to measure the thickness of a material or structure.

FF. "Transducer" means an Ultrasonic NDT Product that imparts sound energy to the test material and receives sound energy reflected from the test material.

GG. "Ultrasonic NDT" or "Ultrasonic NDT Product" means NDT that uses ultrasound as the inspection modality, including, but not limited to, Flaw Detectors, Thickness

Gages, Transducers, Phased Array NDT and Stationary Scanning Systems.

HH. "Ultrasonic NDT Assumed Contracts" means all contracts or agreements to which Respondent is a party to the extent related to Ultrasonic NDT and that existed before the Effective Date, as follows:

1. if R/D Tech is the Commission-approved Acquirer, Ultrasonic NDT Assumed Contracts include, but are not limited to, contracts listed in the Decision and Order at Schedule 3.11(b) of non-public Appendix II; or

2. if R/D Tech is not the Commission-approved Acquirer, Ultrasonic NDT Assumed Contracts include, but are not limited to:

   a. third party purchase contracts or agreements for the purchase of Ultrasonic NDT from Panametrics;

   b. contracts or agreements for Panametrics' purchases of any materials from any third party for use related to the manufacture, use, sale, service, research or development of Ultrasonic NDT;

   c. contracts or agreements related to the manufacture of Panametrics Ultrasonic NDT;

   d. confidentiality agreements related to Ultrasonic NDT; and

   e. royalty, licensing or similar arrangements related to Ultrasonic NDT.

II. "Ultrasonic NDT Intellectual Property" means all of the following possessed or owned by Respondent before the Effective Date and related to Ultrasonic NDT:

1. Patents;

2. Ultrasonic NDT Manufacturing Technology;

3. Ultrasonic NDT Scientific and Regulatory Material;

4. Ultrasonic NDT Research, Design and Development; and

5. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Provided, however, that "Ultrasonic NDT Intellectual Property" does not include the Ultrasonic NDT Licensed Intellectual Property.

JJ. "Ultrasonic NDT Licensed Intellectual Property" means rights within the field of use of Ultrasonic NDT to:

1. the fourteen (14) patents or patent applications used by Respondents for Non-NDT Products or Non-Ultrasonic NDT Products that are identified in Appendix V of the Decision and Order;

2. Ultrasonic NDT Trademarks, including the goodwill of the business symbolized thereby and associated therewith that are identified in Appendix VI of the Decision and Order;

3. Ultrasonic NDT Trade Dress; and

4. the know-how related to Ultrasonic NDT Manufacturing Technology and Ultrasonic NDT Research, Design, and Development that is Panametrics Shared Intellectual Property.

Provided however, that "Ultrasonic NDT Licensed Intellectual Property" does not include the "General Electric" or "GE" names or logos in any form.

KK. "Ultrasonic NDT Manufacturing Equipment" means all of Panametrics' rights and ownership in equipment, machines, and computers, and all parts, information, files, diagrams, schematics, instructions, software, and hardware related thereto, used in the manufacture, quality assurance and quality control, and packaging of Ultrasonic NDT.

LL. "Ultrasonic NDT Manufacturing Technology" means all technology, trade secrets, know-how, diagrams, schematics, software, calibrations, inventions, practices, proprietary algorithms, testing techniques, methods and other confidential or proprietary information related to the manufacture, quality assurance and quality control, and packaging of Ultrasonic NDT owned or used by Panametrics before the Effective Date, including, but not limited to, manufacturing records, sampling records, standard operating procedures and batch records related to the manufacturing process, and supplier lists.

MM. "Ultrasonic NDT Research, Design and Development" means intellectual property, materials and documents related to the research, design and development of Ultrasonic NDT, owned or used by Panametrics before the Effective Date, including, but not limited to, research materials, technical information, inventions, and other confidential or proprietary information related to research, design and development.

NN. "Ultrasonic NDT Scientific and Regulatory Material" means all technological, scientific, chemical, and electrical materials and information related to Ultrasonic NDT owned or used by Panametrics before the Effective Date, and all rights thereto, in any and all jurisdictions.

OO. "Ultrasonic NDT Software" means computer programs, including all software implementations of algorithms, models, and methodologies whether in source code or

object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any Panametrics Ultrasonic NDT Product; *provided, however*, that "Ultrasonic NDT Software" does not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

PP. "Ultrasonic NDT Trade Dress" means all trade dress of Ultrasonic NDT distributed, marketed, or sold by or on behalf of Panametrics before the Effective Date, including, but not limited to, product packaging associated with the sale of such Ultrasonic NDT worldwide and the lettering of such Ultrasonic NDT trade names or brand names; *provided, however*, that Ultrasonic NDT Trade Dress does not include the "General Electric" or "GE" name or logo in any form.

QQ. "Ultrasonic NDT Trademarks" means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for Ultrasonic NDT researched, developed, distributed, marketed, or sold by or on behalf of Respondent before the Effective Date; *provided, however*, that Ultrasonic NDT Trademarks do not include the "General Electric" or "GE" name or logo in any form

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

A. Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Panametrics Ultrasonic NDT Business, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of the Panametrics Ultrasonic NDT Business, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business.

B. Respondent shall maintain the operations of the Panametrics Ultrasonic NDT Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Panametrics Ultrasonic NDT Business) and shall use its best efforts to preserve the existing relationships with suppliers, vendors, customers, Agencies, employees, and others having business relations with the Panametrics Ultrasonic NDT Business. Respondent's responsibilities shall include, but are not limited to:

1. providing the Panametrics Ultrasonic NDT Business with sufficient working capital to operate the Panametrics Ultrasonic NDT Business at least at current rates of operation, to meet all capital calls with respect to the Panametrics Ultrasonic NDT Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Panametrics Ultrasonic NDT Business;

2. continuing, at least at their scheduled pace, any additional expenditures for the Panametrics Ultrasonic NDT Business authorized prior to the date the Consent Agreement was signed by Respondent;

3. making available for use by the Panametrics Ultrasonic NDT Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary, and all replacements as may be necessary;

4. providing the Panametrics Ultrasonic NDT Business with such funds as are necessary to maintain the viability, marketability and competitiveness of the Panametrics Ultrasonic NDT Business;

5. providing such support services to the Panametrics Ultrasonic NDT Business as were being provided to this business by Respondent as of the date the Consent Agreement was signed by Respondent;

6. maintaining a work force equivalent in size, training, and expertise to what has been associated with the Panametrics Ultrasonic NDT Business;

7. cooperating with the Interim Monitor in the performance of the Interim Monitor's obligations pursuant to the Orders;

8. providing all employees of the Panametrics Ultrasonic NDT Business with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondent until the Closing Date for the divestiture of the Panametrics Ultrasonic NDT Business has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law).

Provided, however, Paragraph II.B.8 of this Order shall not be construed to require the Respondent to terminate the employment of any employee.

C. Prior to the Closing Date, and consistent with the provisions of the Decision and Order, Respondent shall not interfere with the hiring or employing of any employees by any Commission-approved Acquirer of any of the Panametrics Ultrasonic NDT Business, shall not offer any incentive to such employees to decline employment with the

Commission-approved Acquirer or to accept other employment with Respondent in lieu of accepting employment with the Commission-approved Acquirer, and shall remove any other impediments within the control of Respondent that may deter these employees from accepting employment related to the Panametrics Ultrasonic NDT Business with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to the Panametrics Ultrasonic NDT Business or any non-compete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to an employee of the Panametrics Ultrasonic NDT Business who receives a written offer of employment from the Commission-approved Acquirer.

Provided, however, that Paragraph II.C of this Order does not prohibit the Respondent from making offers to any employee where the Commission-approved Acquirer has notified the Respondent in writing that it does not intend to make an offer of employment to that employee.

D. Respondent shall to the extent permissible under applicable laws require, as a condition of continued employment post-divestiture, that each employee with access to any Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including the Panametrics Shared Intellectual Property, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

Provided, however, that:

i. Respondent may use such information only to the extent necessary to defend or prosecute claims relating to assets or liabilities that are retained by Respondent after the Effective Date.

ii. Paragraph II.D of this Order shall not apply to any Confidential Business Information related to Ultrasonic NDT that Respondent can demonstrate to the Commission that Agfa obtained without the assistance of GE prior to the Effective Date, or to Panametrics Shared Intellectual Property, which Respondent shall be permitted to use after the Effective Date only in connection with Non-NDT Products.

E. Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including Panametrics Shared Intellectual Property, by Respondent's personnel to all of Respondent's employees who (i) were involved in the research, development, manufacturing, sale, service, marketing or distribution of Ultrasonic NDT Products, and/or (ii) may have Confidential Business Information related to the Panametrics Ultrasonic NDT Assets, including the Panametrics Shared Intellectual Property. Such notification shall be in substantially the form set forth in the Employee Notification. Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent shall provide a copy of such notification to the Commission-approved Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide the Commission-approved Acquirer with copies of

all certifications, notifications and reminders sent to Respondent's personnel.

F. Respondent shall adhere to and abide by the Divestiture Agreement, which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondent under such agreement, which is incorporated by reference into this Order to Maintain Assets and made a part hereof.

G. The purpose of this Order to Maintain Assets is to ensure the continued viability, marketability, and competitiveness of the Panametrics Ultrasonic NDT Assets in the same businesses in which the Panametrics Ultrasonic NDT Assets were engaged from the date the Consent Agreement is signed until the date Respondent divests the Panametrics Ultrasonic NDT Assets to a Commission-approved Acquirer, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Panametrics Ultrasonic NDT Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Orders and the Divestiture Agreement.

B. The Commission shall select each Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice

by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of an Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

a. the completion by Respondent of the divestiture of all relevant assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the

requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the Ultrasonic NDT Product(s) acquired pursuant to a Divestiture Agreement independently of Respondent; or

b. the completion by Respondent of the last obligation under the Orders pertaining to the Interim Monitor's service; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the Panametrics Ultrasonic NDT Assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Orders.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent shall report to the Interim Monitor in accordance with the requirements of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondent's obligations under the Orders or the Divestiture Agreement(s). Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning Respondent's performance of its obligations under the Orders.

8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require each Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality

agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph or the relevant provisions of the Decision and Order in this matter.

G. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

H. An Interim Monitor appointed pursuant to this Order to Maintain Assets or the relevant provisions of the Decision and Order in this matter may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that, for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent

shall permit any duly authorized representative of the Commission:

A. access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to compliance with this Order to Maintain Assets; and

B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VI.

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

A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the divestiture of all relevant assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Orders and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the Ultrasonic NDT Product(s) acquired pursuant to a Divestiture Agreement independently of Respondent, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS

[Decision and Order]

APPENDIX B
TO THE ORDER TO MAINTAIN ASSETS

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On December __, 2003, General Electric Company ("GE"), hereinafter referred to as "Respondent," entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("FTC") relating to the divestiture of certain assets. That Consent Agreement includes two orders: The Decision and Order and the Order to Maintain Assets.

The Decision and Order requires the divestiture of assets relating to the Panametrics Ultrasonic NDT Business. These assets are hereinafter referred to as the "Panametrics Divested Assets." Both the Decision and Order and the Order to Maintain Assets require Respondent to commit that no Confidential Business Information relating to the Panametrics Divested Assets will be disclosed to or used by any employee of the entity formed by the merger of GE and of certain assets of Agfa-Gevaert N.V. ("Agfa") ("Combined Entity"). In particular, this is to protect such information from being used <u>in</u> <u>any</u> <u>way</u> by the Combined Entity for the research, development, sale or manufacture of any product that competes, or may compete, with any product that is marketed by the acquirer of the Panametrics Divested Assets after the proposed acquisition. The Decision and Order also requires the complete divestiture of ALL documents (including electronically stored material) that contain Confidential Business Information related to the Panametrics Divested Assets. Accordingly, no employee of the Combined Entity may maintain copies of documents containing such information.

Under the Decision and Order, the Respondent is required to divest the Panametrics Divested Assets to an acquirer that must be approved by the FTC. R/D Tech, Inc. has been proposed to the FTC as the acquirer for these assets. Until a complete divestiture

of all of the Panametrics Divested Assets occurs, the requirements of the second order – the Order to Maintain Assets – are in place to insure the continued marketability, viability and competitive vigor of the Panametrics Divested Assets. This includes preserving the work force that performs functions related to the Panametrics Divested Assets. You are receiving this notice because you are either (i) an employee with work responsibilities related to the Panametrics Divested Assets, (ii) an employee for GE or the Combined Entity who has work responsibilities in some way related to products that compete or may compete with the Panametrics Divested Assets, or (iii) an employee or former employee of GE or Agfa who might have Confidential Business Information in your possession related to the Panametrics Divested Assets.

All Confidential Business Information related to the Panametrics Divested Assets must be retained and maintained by the persons involved in the operation of that business on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment involves responsibilities unrelated to the Panametrics Divested Assets (such as persons with job responsibilities related to products that compete or may compete with the Panametrics Divested Assets). In addition, any person who possesses such Confidential Business Information related to the Panametrics Divested Assets and who becomes involved in the Combined Entity's business related to any product that competes or may compete with the Panametrics Divested Assets must not provide, discuss, exchange, circulate, or otherwise disclose any such information to or with any other person whose employment relates to such businesses. Finally, any GE or former GE or Agfa employee with documents that contain information that he or she believes might be considered Confidential Business Information related to the Panametrics Divested Assets and who has not received specific instructions as to how the documents in his or her possession should be disposed of should contact the contact person identified at the end of this notice.

No employee for GE or the Combined Entity who has work responsibilities in any way related to products that compete or may compete with the Panametrics Divested Assets shall have access to any facility containing Panametrics Divested Assets; provided, however, that such employees may have access with the consent of the owner of the Panametrics Divested Assets.

Furthermore, the Decision and Order restricts any employees of Panametrics who were involved in the marketing or manufacturing of the Panametrics Divested Assets from performing a similar function for the Combined Entity relating to ultrasonic nondestructive testing for six (6) months from the closing of the GE/Agfa transaction.

Any violation of the Decision and Order or the Order to Maintain Assets may subject GE or the Combined Entity to civil penalties and other relief as provided by law.

CONTACT PERSON

If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Order to Maintain Assets, you should contact

_____.

ACKNOWLEDGMENT

I, _____ (print name),

hereby acknowledge that I have read the above notification and

agree to abide by its provisions.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from General Electric Company ("GE"), which is designed to remedy the anticompetitive effects resulting from GE's acquisition of the nondestructive testing ("NDT") business group of Agfa-Gevaert N.V. ("Agfa"). Under the terms of the Consent Agreement, GE will be required to divest its Panametrics ultrasonic NDT business to R/D Tech, Inc. ("R/D Tech"). The divestiture will take place no later than twenty (20) days from the date GE consummates its acquisition of the Agfa NDT business. The Consent Agreement also includes an Order to Maintain Assets that requires GE to preserve the Panametrics ultrasonic NDT business as a viable, competitive and ongoing operation until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a stock and asset purchase agreement dated January 17, 2003, and amended September 19, 2003, GE proposes to acquire Agfa's NDT business group ("Proposed Acquisition"). The total value of the Proposed Acquisition is approximately $437 million. The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for the research, development, manufacture, and sale of certain types of ultrasonic

NDT equipment, specifically: (1) portable flaw detectors, (2) corrosion thickness gages, and (3) precision thickness gages.

II. The Parties

GE is a diversified technology and services company headquartered in Fairfield, CT. GE is made up of a broad range of primary business units, each with its own number of divisions. GE Aircraft Engines, the business unit that proposes to acquire Agfa's NDT assets, is the world's leading manufacturer of jet engines for military and civil aircraft. Another business unit of GE, GE Power Systems, offers NDT equipment through the NDT Division of Panametrics, Inc. With its headquarters and manufacturing operations in Waltham, MA, Panametrics researches, designs, manufactures, and sells ultrasonic NDT equipment and systems.

Headquartered in Mortsel, Belgium, Agfa is one of the world's leading imaging companies. Agfa researches, develops, produces, and sells a wide variety of NDT equipment through its Krautkramer, Pantak, Seifert, and RADView subsidiaries. Agfa offers a complete range of ultrasonic NDT equipment, including portable and stationary instruments, customized testing machines and accessories, as well as application solutions, training and service.

III. Ultrasonic NDT Equipment

GE, through its Panametrics subsidiary, and Agfa, through its Krautkramer subsidiary, are the two largest suppliers of ultrasonic NDT equipment in the United States. Ultrasonic NDT equipment includes, among other products: (1) portable flaw detectors; (2) corrosion thickness gages; and (3) precision thickness gages. Ultrasonic NDT equipment is used to inspect the structure and tolerance of materials without damaging the materials or impairing their future usefulness. Manufacturers and end users in a variety of industries use ultrasonic NDT equipment for quality control and safety purposes. Customers of these products

purchase the type of ultrasonic NDT equipment that is best-suited for the inspection they need to conduct and, because of the unique performance characteristics of each type of equipment, there is little opportunity to switch to alternative equipment. In fact, even a price increase of five to ten percent for portable flaw detectors, corrosion thickness gages or precision thickness gages would not likely cause a significant number of customers for these products to switch to any alternative product.

The United States is the appropriate geographic market for portable flaw detectors, corrosion thickness gages and precision thickness gages in which to analyze the competitive effects of the Proposed Acquisition. Because ultrasonic NDT equipment frequently needs to be calibrated and repaired to ensure accuracy, customers prefer to purchase from suppliers with local service and support. Furthermore, customers tend to purchase from companies with a proven reputation for accurate and reliable equipment, and are reluctant to switch to a new company that does not have a proven track record for providing accurate and reliable equipment. Foreign suppliers that have not established the necessary service and support networks, brand reputation, and customer acceptance in the U.S. are not effective competitors for U.S. customers and would not be able to constrain a price increase for portable flaw detectors, corrosion thickness gages or precision thickness gages in the U.S.

The U.S. markets for portable flaw detectors, corrosion thickness gages, and precision thickness gages are all highly concentrated. If the Proposed Acquisition is consummated, GE's market share would exceed 70 percent in each of the U.S. markets for: (1) portable flaw detectors; (2) corrosion thickness gages; and (3) precision thickness gages. In each of these markets, GE and Agfa are the two largest suppliers. For many customers, GE and Agfa are the two top choices when considering a supplier of portable flaw detectors, corrosion thickness gages and precision thickness gages. By eliminating competition between these two leading suppliers, the Proposed Acquisition would allow GE to exercise market power unilaterally, thereby increasing the

likelihood that purchasers of portable flaw detectors, corrosion thickness gages and precision thickness gages would be forced to pay higher prices and that innovation in these markets would decrease.

Significant impediments to new entry exist in each of the U.S. markets for portable flaw detectors, corrosion thickness gages and precision thickness gages. First, a new entrant would need to devote significant time and expense to researching and developing a product. Second, a new entrant must undertake the lengthy and costly process of establishing a track record of reliability and accuracy for its product. This track record is critical to customers because ultrasonic NDT equipment is relied upon to ensure the quality and performance of their products. Finally, a new supplier of portable flaw detectors, corrosion thickness gages or precision thickness gages must spend a great deal of time and money to develop a broad service and support network that customers depend upon. For these reasons, new entry into the markets for portable flaw detectors, corrosion thickness gages and precision thickness gages would not be accomplished in a timely manner even if prices increased substantially after the Proposed Acquisition. Additionally, new entry into the markets for portable flaw detectors, corrosion thickness gages, and precision thickness gages is unlikely to occur because the costs of entering the markets are high relative to the limited sales opportunities available to new entrants.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the U.S. markets for the research, development, manufacture, and sale of portable flaw detectors, corrosion thickness gages, and precision thickness gages by requiring GE to divest its worldwide Panametrics ultrasonic NDT business. Pursuant to the Consent Agreement, the Panametrics ultrasonic NDT business will be divested to R/D Tech. The divestiture will take place no later than twenty (20) days from the date GE consummates its acquisition. If the Commission

determines that R/D Tech is not an acceptable buyer or that the manner of the divestiture is not acceptable, GE must unwind the sale and divest the Panametrics ultrasonic NDT business to a Commission-approved buyer within ninety (90) days. Should GE fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest the Panametrics ultrasonic NDT business subject to Commission approval. The trustee will have the exclusive power and authority to accomplish the divestiture within twelve (12) months of being appointed, subject to any necessary extensions by the Commission.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that R/D Tech is a well-qualified acquirer of the divested assets. R/D Tech, a private corporation headquartered in Quebec, Canada, researches, designs, manufactures and sells eddy current, acoustic emission, and phased array instruments for manual and automated NDT inspections. With U.S. offices located in Massachusetts, North Carolina, Pennsylvania, and Texas, R/D Tech has the resources, related experience and capabilities to ensure that it will become an effective competitor in the markets for portable flaw detectors, corrosion thickness gages and precision thickness gages. R/D Tech has the necessary industry expertise to replace the competition that existed prior to the Proposed Acquisition. Furthermore, R/D Tech does not pose separate competitive issues as the acquirer of the divested assets because R/D Tech does not produce, or is not a major supplier of, any of the product lines being acquired.

The Consent Agreement contains several provisions designed to ensure that the divestiture of the Panametrics NDT business is successful. For a period of one (1) year from the date the divestiture of the business is accomplished, GE is prohibited from soliciting or inducing any employees or agents of the ultrasonic

NDT equipment business involved in the divestiture to terminate their employment with R/D Tech. The Consent Agreement also requires that, post-divestiture, any remaining GE employees with access to confidential business information related to the Panametrics ultrasonic NDT business sign a confidentiality agreement. Pursuant to this agreement, employees will be required to maintain confidential business information as strictly confidential, including the nondisclosure of such confidential information to other GE employees. Finally, the Decision and Order allows the Commission to appoint an Interim Monitor, if necessary, to assure that GE complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement.

The Consent Agreement also contains an Order to Maintain Assets. This will serve to protect the viability, marketability and competitiveness of the Panametrics ultrasonic NDT business until it is divested to R/D Tech. The Order to Maintain Assets became effective upon the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until GE successfully divests the Panametrics ultrasonic NDT business according to the terms of the Decision and Order.

In order to ensure that the Commission remains informed about the status of the Panametrics ultrasonic NDT business pending divestiture, and about the efforts being made to accomplish the divestiture, the Consent Agreement requires GE to file periodic reports with the Commission until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

Complaint

IN THE MATTER OF

TENET HEALTHCARE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4106; File No. 0210119
Complaint, January 29, 2004--Decision, January 29, 2004

This consent order addresses practices used by Respondent Tenet Healthcare Corporation, a for-profit corporation that owns or operates more than 100 hospitals throughout the United States; Respondent Frye Regional Medical Center, a for-profit corporation owned by Tenet Healthcare Corporation that operates a 338-bed hospital in Hickory, North Carolina; and the Piedmont Health Alliance, Inc. ("PHA"), a for-profit physician-hospital organization operating in the western North Carolina area of Catawba, Burke, Caldwell, and Alexander Counties (known as the "Unifour" area), which has as members approximately 450 physicians – or roughly 75 percent of the physicians in the Unifour area – and three of the five Unifour area hospitals, including Frye Regional Medical Center. The order, among other things, prohibits the respondents from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving PHA. The order also prohibits the respondents from facilitating exchanges of information between or among physicians concerning whether, or on what terms, to contract with a payor, and from attempting to engage in – or inducing anyone to engage in – any action prohibited by the order. In addition, the order requires the respondents, for five years, to notify the Commission at least 60 days prior to initially contacting, negotiating with, or entering into agreements with payors, concerning any qualified risk-sharing arrangement or qualified clinically-integrated arrangement, as defined in and permitted under the order. The order also prohibits the respondents from challenging or interfering with the termination, required by any Commission order, of any contract between PHA and any payor pursuant to which Frye is reimbursed for hospital, physician, or other healthcare services.

Participants

For the Commission: *David M. Narrow, Christi J. Braun, Karan R. Singh, Mary Connelly-Draper, Emily Jones, David R.*

Pender, Jeffrey W. Brennan, Joseph Eckhaus, Roberta S. Baruch, Timothy A. Deyak, Louis Silvia and *Mary T. Coleman.*

For the Respondents: *Clifford H. Aronson, Skadden, Arps, Slate, Meagher & Flom, L.C.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Tenet Healthcare Corporation ("Tenet") and Frye Regional Medical Center, Inc. ("Frye"), herein collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This action concerns a horizontal agreement among approximately 450 physician shareholders and non-shareholder subcontracted physicians (collectively, "physician members") of Piedmont Health Alliance, Inc. ("PHA"), to agree collectively on the prices they demand for physician services from payors, including health insurance plans, health maintenance organizations, preferred provider organizations, employers directly providing self-funded health care benefits to their employees and their employees' dependents, and other third-party purchasers of health care benefits. The physicians, in conspiracy with Frye and with and through PHA, have eliminated price competition to the detriment of payors and consumers in the "Unifour area" of North Carolina, which comprises Alexander, Burke, Caldwell, and Catawba Counties.

THE RESPONDENTS AND OTHER PARTIES

2. PHA, a physician-hospital organization ("PHO"), is a for-profit corporation based in Hickory, North Carolina.

3. PHA's three hospital members are Frye, Caldwell Memorial Hospital ("Caldwell Memorial"), and Grace Hospital ("Grace"). Caldwell Memorial and Grace are organized as nonprofit corporations.

4. Tenet is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal address at 3820 State Street, Santa Barbara, California 93105.

5. Frye is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal address at 420 North Center Street, Hickory, North Carolina 28601. Tenet controls Frye, an acute care hospital with 338 staffed acute care beds. Frye is the largest hospital in the Unifour area.

6. PHA's 450 physician members include both primary care and specialist physicians. A substantial majority of these physicians practice in small group practices on a for-profit basis. A small number of PHA physician members are salaried employees of a PHA member hospital.

7. Tenet owns one or more medical group practices that provide physician services to patients in the Unifour area and employ physicians who are members of PHA.

JURISDICTION AND INTERSTATE COMMERCE

8. Tenet, through its subsidiaries, including Frye, has been engaged in the business of providing physician and hospital services in the Unifour area for a fee.

9. The general business practices of Tenet and Frye, including the acts and practices herein alleged, are in or affecting "commerce," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

BACKGROUND

10. Payors often contract with physicians, hospitals, and other providers of health care services in a geographic area to create a network of health care providers ("provider network") that have agreed to provide health care services to enrollees covered under the payors' programs. Those providers may enter into contracts individually and directly with the payor, or through a provider organization, such as a PHO.

11. To become members of payors' provider networks, physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees under the payors' programs. Physicians entering into such contracts often agree to reductions in their usual compensation in order to obtain access to additional patients made available to them by the payors' contractual relationships with their enrollees. Such reductions in physician fees may permit payors to constrain increases in, or reduce, the premiums they charge to their customers, or to offer broader benefits coverage without increasing premium levels or out-of-pocket expenditures by enrollees.

12. Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Unifour area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fees for a particular year (*e.g.*, "110% of 2003 RBRVS").

13. Absent agreements among competing physicians on the prices and other contract terms on which they will provide services to the payor's enrollees, competing physicians or medical group practices decide unilaterally whether to enter a contract to participate in the payor's provider network on the terms and conditions, including price, offered by the payor.

14. Some self-insured employers contract with other payors to gain access to established provider networks. Payors who are not self-insured employers typically sell their programs to various customers, including employers or other entities that purchase or arrange for (and sometimes pay all or part of the cost of) programs providing health care benefits to their employees and their employees' dependents.

15. To be marketable and competitive in the Unifour area, a payor's health plan generally must include in its physician network a large number of primary care and specialist physicians, offering services in a sufficient number of practice fields, who are available to customers at convenient or accessible locations, and at affordable prices. Because the substantial majority of the primary care and specialist physicians who practice in the Unifour area are members of PHA, many payors doing business in the Unifour area cannot offer marketable and competitive health plans without having at least a substantial portion of PHA's physician members in their provider networks.

FRYE WAS INSTRUMENTAL IN PHA'S FORMATION AND EXPANSION

16. In 1993, Frye's Chief Executive Officer ("CEO") formulated a plan to create a PHO that would include Frye and physicians who practiced at Frye. Frye paid a health care consultant to conduct surveys of physicians practicing at Frye to determine their level of interest in forming a PHO, and the services they would expect the PHO to offer. The consultant told Frye that the surveyed physicians "stated a need to form the group to negotiate with group clout and power" and "maintain[] their

income" in anticipation of the arrival of managed care organizations to the Unifour area.

17. At the request of Frye's CEO, the chief of Frye's medical staff recruited eight physicians practicing at Frye to serve on a PHO "steering committee" with Frye's CEO and Chief Operating Officer ("COO"). This committee met periodically, for more than a year, to make decisions about the purpose, form, and organization of the PHO.

18. Frye's Board of Directors authorized Frye's CEO to use Frye funds to develop the PHO. Some of this money was used to pay a health care consultant and others who assisted the steering committee in establishing the PHO.

19. In 1994, PHA was incorporated and its shareholders elected a Board of Directors, made up of physician and hospital representatives from among the PHA membership. Frye's COO initially directed PHA's operations. Frye's CEO conducted a management search, which led to PHA hiring a full-time CEO in 1995. PHA's CEO was charged with overseeing the day-to-day operations of PHA, subject to approval by the PHA Board.

20. In early 1995, Frye's CEO and other representatives of PHA participated in discussions with Caldwell Memorial, Grace, and their medical staffs about the possibility of joining PHA to form a "super PHO." In 1996, PHA amended its Articles of Incorporation, Bylaws, and Policies and Procedures to permit Grace, Caldwell Memorial, and their respective medical staffs to join PHA and share equally in its governance.

21. Frye has invested substantial funds to further PHA's formation and expansion. PHA's other hospital members and its physician members likewise have paid substantial money to PHA to further PHA's formation and expansion.

RESPONDENTS HAVE ENGAGED IN PRICE-FIXING AND OTHER ANTICOMPETITIVE ACTS

22. According to its records, PHA was "created to be a contracting entity for its members and serves to negotiate managed health care contracts with [payors]." In 1994, PHA informed potential physician members that "[e]ach [payor] contract will be carefully reviewed to determine advantages and disadvantages (including but not limited to reimbursement issues) to Piedmont Health Alliance participants and only those [contracts] which the directors determine to be favorable on balance to our participants as a whole will be signed."

23. PHA's physician members signed agreements that bound them to participate in all contracts that PHA entered, to accept PHA-negotiated prices, and to agree that if PHA entered into a contract with a payor with which the physician had an individual contract, then that physician would terminate the individual contract. PHA agreed to attempt to negotiate contracts with payors that included all PHA physician members.

24. In early 1994, the PHA steering committee established a Contracts Committee to negotiate contracts with payors on behalf of PHA and its physician and hospital members. The PHA Bylaws authorized the Contracts Committee to evaluate and negotiate proposed contracts with payors on behalf of PHA and its members. Until 2001, the Contracts Committee met regularly and was actively involved in PHA's contracting activities. Frye's COO and Chief Financial Officer ("CFO") participated in the activities of the Contracts Committee during this period. Over that period, PHA negotiated and entered into more than 50 payor contracts.

25. From 1994 through 1996, Frye's CFO and COO served as PHA's principal contract negotiators with payors. Beginning in 1996, PHA's CEO and her staff assumed the responsibility for negotiating PHA's payor contracts, and PHA's Board and

Contracts Committee advised PHA's CEO regarding the price and other contract terms to demand from payors.

26. PHA's Board must approve PHA contracts with payors before they can take effect. PHA's Board is composed of 14 physician directors and six hospital directors, two representing each hospital (but with only one vote per hospital). Contract approval requires that both a majority of the PHA physician directors and two of the three hospital shareholders approve the contract. Frye's, the other PHA hospitals', and the physician members' representatives on the PHA Board voted on the approval of contracts containing physician fee schedules that PHA collectively negotiated with payors.

27. PHA hired actuaries and other consultants to develop physician fee schedules containing price terms that PHA subsequently demanded from payors as a condition of contracting for the services of PHA's physician members.

28. PHA's most common contracting method has been to enter into a single-signature contract between PHA and a payor that covers the services of all PHA physician members. Payors that failed to reach agreement with PHA on contract terms, including price and price-related terms, were denied access to PHA's physician members for inclusion in their provider networks.

29. PHA's physician members agreed with each other and with PHA that they would not deal individually, or through any other organization, with any payor with which PHA was attempting to negotiate, or had signed, a contract jointly on behalf of PHA's members. Until 2001, the physicians' participation agreements with PHA expressly included this provision. After 2001, this provision was no longer written into the PHA participation agreements, but PHA physicians nonetheless continued to adhere to it. PHA's physician members also refused to deal directly and individually with payors after PHA terminated its contracts with those payors.

30. By and through PHA, the member physicians and hospitals, including Frye, jointly agreed to require payors, as a condition of dealing with the PHA physicians, to refrain from contracting with non-PHA physicians or physician organizations in the Unifour area.

PHA'S SO-CALLED "MESSENGER" APPROACH TO CONTRACTING CONSTITUTES PRICE-FIXING

31. Competing physicians sometimes use a "messenger" to facilitate their contracting with payors in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Legitimate messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. At less cost, payors can thus discern physician willingness to contract at particular prices, and assemble networks, while physicians can market themselves to payors and assess contracting opportunities. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

32. In February 2001, the PHA Board voted to change prospectively PHA's method of contracting with payors for physician services. PHA called its new contracting method the "modified messenger model." PHA told physician members that this contracting method would not apply to existing PHA payor contracts or to contracts then in the final stages of negotiation – all of which contained price and other terms that the PHA physician members had fixed and jointly demanded through PHA. Since the PHA Board's decision to institute its so-called "messenger" method for contracting, many existing PHA payor contracts renewed, and a number of new contracts were finalized, without being processed through PHA's messenger model.

33. In setting up this new contracting method, PHA told its physician members to report to PHA the minimum price levels they would accept under payor contracts. To aid physicians in making these price decisions, PHA informed them of the prices they had been paid for their most common medical procedures under several pre-existing, PHA-negotiated payor contracts. All such contracts contained prices that the physicians had collusively fixed and demanded through PHA. Many PHA physician members used these fixed prices to determine the prices that they would demand under the new "messenger" method.

34. PHA has processed a total of two payor contracts for its physician members pursuant to its "messenger" method for contracting – one with CIGNA HealthCare of North Carolina, Inc. ("CIGNA"), and the other with United HealthCare of North Carolina, Inc. ("United"). PHA and its members, including Frye, engaged in price-fixing in connection with both contracts. PHA negotiated with CIGNA and United, respectively, on the overall average price levels that each would pay to all PHA physicians in the aggregate. PHA engaged in this conduct without transmitting contract offers to its physician members for their unilateral acceptance or rejection.

35. After fixing the overall average price level that would be paid to all its physician members under each of these two contracts, PHA, through its actuarial consultant, created fee schedules that established different price levels for each medical procedure and for different medical specialties. The actuary calculated these fee schedules such that, in their aggregate, they would total the overall average price level that PHA had negotiated for all PHA physicians to receive under the contract. In effect, the overall average price level was the "pie" that the PHA physicians collectively would share, and the fee schedules were the "pieces of the pie" that individual physicians could earn – depending on their specialty and the procedures they performed. PHA negotiated for United's and CIGNA's acceptance of these fee schedules. It did so without transmitting contract offers to its physician members for their unilateral acceptance or rejection.

36. PHA negotiated with United and CIGNA regarding, or collectively agreed on, various other contract terms as well – including pricing terms such as a demand for periodic, across-the-board percentage increases in physician fee levels to occur at certain times under the contract, and cost containment programs – without transmitting contract offers to PHA physician members for their unilateral acceptance or rejection.

37. After PHA had collectively negotiated with United and CIGNA on behalf of its physician members, more than 90% of PHA's physician members agreed to participate in those contracts.

FRYE CONSPIRED WITH PHA PHYSICIANS TO FIX PHYSICIAN PRICES

38. Beginning in 1994 and continuing through the present, through its representatives on the PHA Board and otherwise, Frye acted to implement and facilitate the fixing of prices that PHA physicians charge payors for services rendered. Frye agreed with PHA and its physician members to fix physician prices by, among other things: (a) approving proposed contracts with payors that included fixed prices for PHA's physician members; (b) rejecting proposed contracts or contract terms, including price, that payors offered to PHA's physician members; (c) authorizing PHA's Contracts Committee and other representatives to negotiate with payors for fixed physician fee schedules and prices; (d) authorizing PHA representatives to make specific counteroffers to payors containing fixed prices for PHA physician members; (e) authorizing development of, and approving, physician fee schedules for use by PHA in negotiations and contracting with payors; (f) terminating contracts for physician services between PHA and payors; (g) approving recommendations of the PHA Contracts Committee concerning payor contracts and terms, including physician payment rates; and (h) refusing to contract with payors for hospital services unless those payors agreed to meet the PHA physicians' price-fixed terms.

PHA'S PRICE-FIXING IS NOT JUSTIFIED

39. PHA's collective negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

ANTICOMPETITIVE EFFECTS

40. Respondents' actions described in Paragraphs 16 through 38 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Unifour area of North Carolina in the following ways, among others:

A. price and other forms of competition among PHA's physician members were unreasonably restrained;

B. prices for physician services in the Unifour area have increased or been maintained at artificially high levels; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

41. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of January, 2004, issues its Complaint against Tenet Healthcare Corporation and Frye Regional Medical Center, Inc.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Tenet Healthcare Corporation ("Tenet") and Frye Regional Medical Center, Inc. ("Frye"), hereinafter sometimes referred to as "Respondents," and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for their consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Tenet is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of

the State of Nevada, with its principal address at 3820 State Street, Santa Barbara, California 93105.

2. Respondent Frye is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal address at 420 North Center Street, Hickory, North Carolina 28601.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent Tenet" means Tenet Healthcare Corporation, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Respondent Frye" means Frye Regional Medical Center, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

C. "Piedmont Health Alliance" or "PHA" means the Piedmont Health Alliance, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees,

agents, attorneys, representatives, successors, and assigns of each.

D. "Hospital" means a health care facility licensed by any state as a hospital.

E. "Medical group practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

F. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services to a payor through such entity. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

G. "Payor" means any person that pays, or arranges for payment, for all or any part of any physician or hospital services for itself or for any other person. "Payor" includes any person that develops, leases, or sells access to networks of physicians or hospitals.

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

I. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

J. "Preexisting contract" means a contract that is in effect on the date this Order becomes final.

K. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

L. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services, hospital services, or both physician and hospital services in which:

1. all physicians and hospitals that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians and hospitals that participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

M. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services, hospital services, or both physician and hospital services in which:

1. all physicians and hospitals that participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians and hospitals that participate jointly to control costs and improve quality by managing the provision of physician and hospital services, such as risk-sharing involving:

   a. the provision of physician or hospital services to payors at a capitated rate,

   b. the provision of physician or hospital services for a predetermined percentage of premium or revenue from payors,

c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians or hospitals that participate to achieve, as a group, specified cost-containment goals, or

d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by hospitals or physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

N. "Tenet physician PHA member" means any physician practicing in a medical group practice owned or controlled in any manner by Respondent Tenet or Respondent Frye, whose services are paid for pursuant to a preexisting contract between Piedmont Health Alliance and any payor, and for as long as such physician continues to receive payment pursuant to such contract.

O. "Unifour area of North Carolina" means the North Carolina counties of Alexander, Burke, Caldwell, and Catawba.

II.

IT IS FURTHER ORDERED that Respondent Tenet and Respondent Frye, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians practicing in the Unifour area of North Carolina:

1. to negotiate on behalf of any physician with any payor;

2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or

4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Piedmont Health Alliance;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians practicing in the Unifour area of North Carolina concerning any physician's willingness to deal with a payor, or the terms or conditions, including any price terms, on which the physician is willing to deal with a payor;

C. Attempting to engage in any action prohibited by Paragraph II.A or II.B above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving, or conduct by, Respondent Tenet or Respondent Frye that:

(i) solely involves physicians employed by Respondent Tenet or Respondent Frye, or any physician to the extent he or she is providing services pursuant to a contract with Respondent Tenet or Respondent Frye; or

(ii) is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that Respondent Tenet shall assure that no Tenet physician PHA member, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, submits claims for payment pursuant to a preexisting contract between Piedmont Health Alliance and any payor, where such claims are for services provided at any time ninety (90) or more days after the date this Order becomes final; *provided, however,* that Respondent Tenet may permit any Tenet physician PHA member to continue to submit claims for payment pursuant to contracts listed in Confidential Appendix A of this Order.

IV.

IT IS FURTHER ORDERED that, for a period of four (4) years after the date this Order becomes final, Respondent Tenet and Respondent Frye, directly or indirectly, or through any corporate or other device, shall cease and desist from entering into any arrangement with any physicians pursuant to which Respondent Tenet or Respondent Frye acts as a messenger, or as an agent, for or on behalf of any physicians practicing in the

Unifour area of North Carolina, with payors regarding contracts or terms of dealing involving the physicians and payors.

PROVIDED, HOWEVER, that, nothing in Paragraph IV of this Order shall prohibit any agreement involving, or conduct by, Respondent Tenet or Respondent Frye that solely involves physicians employed by Respondent Tenet or Respondent Frye, or any physician to the extent he or she is providing services pursuant to a contract with Respondent Tenet or Respondent Frye.

V.

IT IS FURTHER ORDERED that:

A. For five (5) years after the date this Order becomes final, pursuant to each qualified risk-sharing joint arrangement with any physician or each qualified clinically-integrated joint arrangement with any physician in which Respondent Frye is a participant ("Arrangement"), Respondent Tenet or Respondent Frye shall notify the Secretary of the Commission in writing ("Notification") at least sixty (60) days prior to either Respondent's contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any physician or hospital in such Arrangement.

PROVIDED, HOWEVER, that Notification shall not be required for any Arrangement in which all the physician participants:

(i) are employed only by Respondent Tenet, Respondent Frye, or Respondents Tenet and Frye; or

(ii) are physicians who have contracted with Respondent Tenet or Respondent Frye, but only to the extent that the physician is providing services pursuant to that contract.

PROVIDED FURTHER, that Notification shall not be required for subsequent contacts with any payors pursuant to any Arrangement for which Notification has been given pursuant to this Paragraph V.A.

B. With respect to any Arrangement, Respondent Tenet or Respondent Frye shall include the following information in the Notification:

1. the name, address, telephone number, medical specialty, and medical practice group, if applicable, of each physician participant, and the name of each hospital where he or she has privileges;

2. the name and telephone number of the person responsible for each hospital participant's relationship with the Arrangement;

3. a description of the Arrangement and its purpose, function, and geographic area of operation;

4. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;

5. an explanation of how any agreement on prices (or on contract terms related to price) furthers the integration and achieves the efficiencies of the Arrangement;

6. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and

7. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician or hospital services in any area, including, but not limited to, the market share of physician services in any area or the market share of hospital services in any area.

C. If, within sixty (60) days from the Commission's receipt of the Notification, a representative of the Commission makes a written request for additional information to Respondent Tenet or Respondent Frye, Respondent Tenet or Respondent Frye shall not engage in any conduct described in Paragraph V.A. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission or its staff that a violation of the law or of this Order may not have occurred. Further, receipt by the Commission from Respondent Tenet or Respondent Frye of any Notification of an Arrangement is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

VI.

IT IS FURTHER ORDERED that:

A. Respondent Tenet and Respondent Frye shall not challenge or interfere with any termination, required by a Commission order, of a contract between Piedmont Health Alliance and any payor, pursuant to which contract Respondent Frye receives payment for the provision of hospital, physician, or any other healthcare services.

B. Within thirty (30) days after the date this Order becomes final, Respondent Tenet shall distribute by e-mail with return receipt requested, or by first-class mail with return receipt requested, a copy of this Order and the Complaint:

1. to each officer who is at the level of senior vice-president or higher, each member of the board of directors, and each regional director of managed care of Respondent Tenet;

2. to the chief executive officer, the chief financial officer, and each person having primary responsibility for managed care contracting of each hospital owned or controlled by Respondent Tenet, except for Respondent Frye; and

3. to each officer, each member of the board of directors, and each person having primary responsibility for managed care contracting of Respondent Frye.

C. Within thirty (30) days after the date this Order becomes final, Respondent Tenet shall distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each payor with which Respondent Frye has a record of having been in contact since January 1, 1994, regarding contracting for the provision of hospital services or physician services.

D. For a period of five (5) years after the date this Order becomes final, Respondent Tenet shall distribute by e-mail with return receipt requested, or by first-class mail with return receipt requested, a copy of this Order and the Complaint:

1. to each officer who becomes a senior vice-president or higher, each member of the board of directors, and each regional director of managed care of Respondent Tenet, and who did not previously receive a copy of this Order and the Complaint, within ninety (90) days of the time that he or she assumes such responsibility;

2. to each person who becomes the chief executive officer, the chief financial officer, or a person having primary responsibility for managed care contracting of each hospital owned or controlled by Respondent Tenet, except for

Respondent Frye, and who did not previously receive a copy of this Order and the Complaint; and

3. to each person who becomes an officer, a member of the board of directors, or a person having primary responsibility for managed care contracting of Respondent Frye within ninety (90) days of the time that he or she assumes such responsibility.

E. For a period of five (5) years after the date this Order becomes final, Respondent Tenet shall:

1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to each payor that contracts with Respondent Frye for the provision of hospital or physician services, and that did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such payor enters into such contract;

2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians employed by and hospitals owned by Respondent Tenet within the Unifour area of North Carolina, with such prominence as is given to regularly featured articles; and

3. cooperate with the Commission in any action related to this proceeding that the Commission may take against Piedmont Health Alliance or any physician who participates in Piedmont Health Alliance, by i) producing, at its own expense, information and documents in its or Respondent Frye's possession, custody, or control; ii) making its or Respondent Frye's representatives available to provide deposition or hearing testimony, as may be requested by any duly authorized representative of the Commission; and iii) making its or Respondent Frye's representatives available, upon reasonable notice, for interviews in person or by telephone with Commission staff. Nothing in this paragraph shall require the production of materials as to which

Respondent Tenet or Respondent Frye may assert a valid claim of privilege on its own behalf or pursuant to the terms of any written joint defense agreement with any respondent in any Commission proceeding against Piedmont Health Alliance or any physician who participates in Piedmont Health Alliance.

F. Respondent Tenet shall file a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:

1. a detailed description of the manner and form in which Respondent Tenet and Respondent Frye have complied and are complying with this Order;

2. the name, address, and telephone number of each payor with which Respondent Frye has had any contact related to contracting since this Order became final;

3. copies of the e-mail return receipts and signed postal return receipts required by Paragraphs VI.B through VI.E of this Order; and

4. a detailed description of any actions taken in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement provided for in Paragraph II of this Order.

PROVIDED, HOWEVER, that, if Respondent Frye no longer is owned or controlled by Respondent Tenet, then Respondent Frye (rather than Respondent Tenet) shall have the obligation to comply with those provisions of Paragraphs VI.B through VI.F of this Order to the extent applicable to officers, members of the board of directors, other officials, or official reports or newsletters of Frye.

VII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, the creation or dissolution of subsidiaries, or any other change in Respondent Tenet or Respondent Frye that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission of any change in its principal addresses within twenty (20) days of such change in address.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Tenet and Respondent Frye shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order;

B. Upon five (5) days' notice to Respondent Tenet and Respondent Frye, and in the presence of counsel, and without restraint or interference from them, to interview officers, directors, or employees of Respondent Tenet and Respondent Frye.

X.

IT IS FURTHER ORDERED that this Order shall terminate on January 29, 2024.

Confidential Appendix A

[REDACTED FROM PUBLIC RECORD VERSION]

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Tenet Healthcare Corporation ("Tenet") and Frye Regional Medical Center, Inc. ("Frye"). The agreement settles charges that Tenet and Frye ("Respondents") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by directly facilitating the orchestration and implementation of agreements among the physician members of Piedmont Health Alliance, Inc. ("PHA") to fix prices and other terms on which the physicians would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Tenet or Frye that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

Frye is a for-profit corporation that operates a 338-bed hospital in Hickory, North Carolina. Tenet is a for-profit corporation that owns or operates over 100 hospitals throughout the United States, including Frye. Frye was instrumental in the foundation and operation of PHA, a for-profit physician-hospital organization ("PHO"), operating in the western North Carolina area of

Catawba, Burke, Caldwell, and Alexander Counties that is known as the "Unifour" area. PHA has as members approximately 450 physicians, or roughly 75% of the physicians in the Unifour area, and three of the five Unifour area hospitals, including Frye. A separate complaint has been issued against PHA and 10 of its physician leaders relating to their activities.

In 1993, Frye's Chief Executive Officer ("CEO") developed a plan to create a PHO that would include Frye and the physicians practicing at Frye. He hired a consultant to survey the Frye physicians regarding what they would expect from a PHO. The consultant reported that the Frye practicing physicians "stated a need to form the group to negotiate with group clout and power" and "maintain their income" in anticipation of the arrival of managed care organizations in the Unifour area. Frye's CEO and Chief Operating Officer ("COO"), along with eight physicians practicing at Frye, formed a steering committee, which was responsible for establishing and organizing the PHO.

PHA was established in 1994 with the aim of facilitating collective bargaining by physicians with health plans in order to obtain more favorable fees and other terms than PHA's physician members could obtain through dealing individually with health plans. In early 1994, the PHA steering committee established the Contracts Committee to negotiate contracts with payors on behalf of PHA's physician members. Frye's Chief Financial Officer ("CFO") and COO actively participated on the Contracts Committee, and were the PHA physicians' principal contract negotiators between 1994 and 1996. In 1996, PHA expanded to include Caldwell Memorial Hospital ("Caldwell Memorial") and Grace Hospital ("Grace"), both nonprofit hospitals, and their respective medical staffs.

PHA is managed and controlled by a Board of Directors made up of 14 physician directors and six hospital directors, two representing each hospital member (but with only one vote per hospital member). Thus, Frye has two representatives on the PHA Board of Directors. Both a majority of PHA physician directors

and two of the three voting hospital directors must approve each payor contract entered into on behalf of PHA's physician members. The PHA Board representatives voted on the approval of contracts containing physician fee schedules that PHA collectively negotiated with payors. Since 1994, PHA has negotiated and executed over 50 contracts with payors.

The complaint alleges that with the assistance of Frye and Tenet, PHA has successfully coerced a number of health plans to pay artificially high prices to PHA physician members, and thereby raised the cost of medical care in the Unifour area. As a result of the challenged actions of Tenet and Frye, consumers in the Unifour area have been, and are, deprived of the benefits of competition among physicians. By facilitating agreements among PHA member physicians to deal only on collectively-determined terms, and through PHA's and its members' actual or threatened refusals to deal with health plans that would not meet those terms, Tenet and Frye have violated Section 5 of the FTC Act. The collective negotiation of fees and other competitively significant terms by PHA physician members with the assistance of Frye and Tenet has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

The Proposed Consent Order

The proposed consent order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence, while allowing Tenet and Frye to engage in legitimate conduct that does not impair competition. For example, other than the limitation in Paragraph IV regarding acting as an agent or messenger, the proposed order does not prohibit involvement in vertical arrangements between Frye or Tenet and physicians that do not involve illegal horizontal agreements among physicians. The proposed order is similar to recent orders that the Commission has issued to settle charges relating to unlawful agreements to raise physician prices.

The proposed order's specific provisions are as follows:

Analysis

The order's core prohibitions are contained in Paragraphs II, III, and IV. Paragraph II.A prohibits Tenet and Frye from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving PHA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between or among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bans them from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondents from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other orders addressing health care providers' collective bargaining with payors, certain kinds of agreements are excluded from the general bar on joint negotiations. First, Tenet and Frye would not be barred from activities solely involving their employed physicians. Second, Tenet and Frye are not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing hospitals and physicians, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." However, such arrangements must not restrict the ability, or facilitate the refusal, of the arrangements' physician members to deal with payors on an individual basis or through any other arrangement. As discussed below in connection with Paragraph V, Tenet and Frye are required to notify the Commission about such an arrangement prior to negotiating on behalf of the arrangement's members or before those members jointly discuss any terms of dealing with a payor.

As defined in the proposed order, a "qualified risk-sharing joint arrangement" must satisfy two conditions. First, all physician and

hospital participants must share substantial financial risk through the arrangement and thereby create incentives for the physician or hospital participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

As defined in the proposed order, a "qualified clinically-integrated joint arrangement" also must satisfy two conditions. First, all physician and hospital participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians and/or hospitals, in order to control costs and ensure the quality of services provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Paragraph III requires Tenet to assure that no physician practicing in a medical group practice owned or controlled in any manner by Tenet or Frye submits claims for payment pursuant to a preexisting contract between PHA and any payor, where such claims are for services provided at any time 90 or more days after the date the order becomes final. However, the order permits these physicians to continue to submit claims for services pursuant to certain PHA contracts listed in Confidential Appendix A. The purpose of Paragraph III is to prevent Tenet and Frye employed or contracted physicians from continuing to receive the benefit of the unlawfully fixed prices under PHA's contracts with payors.

Paragraph IV prohibits Tenet and Frye, for four years, from directly or indirectly entering into any arrangements with any physicians practicing in the Unifour area under which Tenet or Frye would act as an agent or messenger for those physicians regarding contracting or terms of dealing with payors. An exception is made for those physicians employed by Tenet or Frye.

Analysis

In the event that Frye or Tenet forms a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, Paragraph V requires the Respondents, for five years, to notify the Commission at least 60 days prior to initially contacting, negotiating, or entering into agreements with payors concerning the arrangement. This notice is not required for arrangements in which all the physician participants are employed by Frye or Tenet. Notification is not required for subsequent negotiations or agreements with payors pursuant to any arrangement for which notice was already given under Paragraph V. Paragraph V.B sets out the information necessary to make the notification complete. Paragraph V.C establishes the Commission's right to obtain additional information regarding the arrangement.

Paragraph VI.A prohibits Tenet and Frye from challenging or interfering with the termination, required by any Commission order, of any contract between PHA and any payor, pursuant to which Frye is reimbursed for hospital, physician, or other healthcare services. This provision helps to ensure the effectiveness of any future Commission order against PHA.

Paragraph VI.B requires Tenet to distribute the order and complaint, within 30 days after the order becomes final, to each officer who is at the level of senior vice-president or higher, each member of the board of directors, and each Tenet regional director of managed care; to the CEO, the CFO, and each person having primary responsibility for managed care contracting of each hospital, other than Frye, owned or controlled by Tenet; and to each officer, each member of the board of directors, and each person having primary responsibility for managed care contracting for Frye.

Paragraph VI.C requires Tenet to distribute the complaint and order, within 30 days after the order becomes final, to every payor with which Frye has been in contact since January 1, 1994, regarding the provision of hospital or physician services.

Paragraph VI.E.3 requires Tenet to cooperate with Commission staff in any litigation, or other action taken by the Commission, against PHA and any of its member physicians.

The remaining provisions of Paragraph VI, and Paragraphs VII through IX, of the proposed order impose obligations on Tenet (or Frye, if it is no longer owned or controlled by Tenet), with respect to distributing the proposed complaint and order to payors that contract with Frye and to other specified persons, and the reporting of certain information to the Commission.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

VITAL BASICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4107; File No. 0123248
Complaint, April 26, 2004--Decision, April 26, 2004

This consent order addresses practices used by Respondent Vital Basics, Inc., and by Respondents Robert B. Graham and Michael B. Shane, individually and as officers of the corporation, relating to the advertising and promotion of Focus Factor – a dietary supplement containing, among other things, vitamins, minerals, botanicals, and amino acids – and V-Factor Natural Pack, a dietary supplement containing, among other things, yohimbine and L-argenine that was marketed as a men's sexual performance enhancer. The order, among other things, prohibits the respondents from representing that Focus Factor or any substantially similar product (1) improves the focus, memory, and concentration of healthy adults; (2) alleviates stress, fatigue, irritability and mood swings in healthy adults; (3) makes children and teenagers feel more alert, focused, and mentally sharp; (4) improves students' ability to concentrate and their academic performance; or (5) improves senior citizens' memory, mental clarity, and energy; unless the claims are substantiated by competent and reliable scientific evidence. The order also prohibits the respondents from making any future claims about the safety, performance, benefits, or efficacy of any food, drug, or dietary supplement for certain functions or processes – or the treatment, cure, mitigation, or prevention, of any disorder – without possessing competent and reliable scientific evidence that supports such claims. The order requires the respondents to disclose any material connection that exists between an endorser and the respondents or any other person or entity – involved in marketing or selling the product or program that is the subject of the endorsement – and to pay $1 million to the Commission.

Participants

For the Commission: *Tawana E. Davis, Shira D. Modell, Heather Hippsley, Mary K. Engle* and *Dennis Murphy.*

For the Respondent: *Jonathan Shapiro, Moon, Moss, McGill & Shapiro, P.A.,* and *William C. MacLeod, Collier Shannon Scott, PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Vital Basics, Inc., a corporation, Robert B. Graham, individually and as an officer of Vital Basics, Inc., and Michael B. Shane, individually and as an officer of Vital Basics, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Vital Basics, Inc. ("Vital Basics") is a Maine corporation with its principal office or place of business at 100 Commercial Street, Portland, Maine 04101.

2. Respondent Robert B. Graham ("Graham") is an officer and director of respondent Vital Basics. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Vital Basics.

3. Respondent Michael B. Shane is an officer and director of respondent Vital Basics. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is that of Vital Basics' wholly-owned subsidiary, Vital Basics Media, Inc., 330 Madison Avenue, New York, NY 10017.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed the dietary supplement Focus Factor since at least 2000. According to the package label, Focus Factor contains more than forty (40) ingredients, including vitamins, minerals, dimethylaminoethanol, Bacopa monnieri extract, huperzine, and phosphatidyl serine. Respondents Vital Basics, Graham, and Shane sell adult and children's versions of Focus Factor. A bottle of adult Focus Factor costs $74.95. A bottle of children's Focus Factor costs $49.95.

5. Respondents have also advertised, labeled, offered for sale, sold, and distributed the dietary supplement V-Factor Natural Pack (hereinafter "V-Factor") since at least 2000. According to the package label, V-Factor contains L-arginine, yohimbine, and ginkgo biloba.

6. Focus Factor and V-Factor are "foods" or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

7. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

ADVERTISING AND PROMOTION OF FOCUS FACTOR AND V-FACTOR

8. Respondents have disseminated or have caused to be disseminated advertisements for Focus Factor, including but not limited to the attached Exhibits A through I. These advertisements contain the following statements:

Radio Advertising

a. "Smith: I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.

I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.

In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll

feel more alert, more focused, and 'on task.'" [Exhibit A: "Kyl 2" (emphasis in original)]

b. "Smith: This is Dr. Kyl Smith. . . . My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy.

(Electronic voice mail 'beep')

Ware: This is Marlene Ware. I'm calling on behalf of my son. He's having a tough time at school, and this has made such a difference. He's remembering things. I can't believe it! I wanted to tell you how much of a difference it's made for my son . . . Focus Factor. It has made a tremendous difference.

Smith: Focus Factor is safe, it's natural, and it works. Call now so you can immediately begin improving your memory, concentration, mood, focus and energy." [Exhibit B: "Donut Ware"]

c. "Smith: I'm Dr. Kyl Smith. I've seen first-hand how *frustrating* it can be when a child has trouble with focus and concentration. Parents come to me because their children are unfocused, distracted . . . and they just don't know what to do about it.

That's why I developed Focus Factor. It's an effective, all-natural supplement with one purpose: to give your child's brain the exact nutrients it needs to function at its very best.

Focus Factor is for students who need help with concentration, and memory. In just a few days, your child will feel alert, focused, and mentally sharp.

And by the way, there's also an adult formula I created for *grown-ups* who want to improve memory, concentration,

and mood." [Exhibit C: "School's in Session" (emphasis in original)]

d. "I'm Rob Graham, president of Vital Basics. Our revolutionary Focus Factor all-natural supplement was developed to expand *your* powers of focus. Have you ever noticed how effortless things seem when you're 'on?' You're 'on' when your brain function is high. You're 'off' when your brain function is low. Focus Factor contains over 50 nutrients sharpen your brain function." [Exhibit D: "Rob 3" (emphasis in original)]

e. "Host: Well hello again . . . welcome to the Vitalbasics radio program. We bring you vital health information on over 300 great radio stations covering all 50 states . . . and y'know what? I can count on two fingers – literally – the number of times I've actually invited a guest back on this program. Today is one of those times.

Dr. Kyl Smith is back with us at our invitation, and this time he's right here in the studio with us . . .

***

So these are just a few of the phone messages we received, um . . . Here's a 65-year old woman . . . . She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic . . . she thought she was getting dimwitted . . . and she says Focus Factor started working almost immediately.

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Here's a letter from a 65 year old woman I spoke with. And she says 'I tried ginkgo biloba for months, and it didn't do anything for my memory. But my memory is now wonderful since I've started taking Focus Factor. I noticed the difference within a couple of days.'

***

And I have some comments from some of the doctors we've spoken with. For example, this is a medical doctor . . . this

is an M.D. named Lee Cowden, Dr. Lee Cowden. He's a cardiologist, and internist . . . and he says, uh . . . 'Compared to other supplements on the market, the nutrients in Focus Factor are present at better levels . . . and in the ideal forms more likely to enhance brain function. Taking Focus Factor results in a significant improvement in memory, concentration, and overall well-being.' Pretty strong comment from a medical doctor.

***

Host: [T]his is the supplement that is designed to literally supercharge your brain." [Exhibit E: "4600"]

f. "Host: Hi and welcome to the VitalBasics radio program. I'm Bill Begley. This is the health and wellness program you can hear on over 200 radio stations from coast to coast. We're in California, Massachusetts, Florida, Texas, Hawaii, Alaska . . . you name it, we're there, and we appreciate you tuning in today. Thank you very much for joining us.

***

My guest, on the phone with us today is Dr. Kyl Smith. . . . Thousands and thousands of hours, folks, this man has put into this breakthrough, this secret that we're going to let you in on today. Dr. Smith, we have so much to talk about ...it's a blessing to have you on the program. Welcome.

Kyl: Thank you, Bill. I'm honored to be here.

***

Host: Anita Sohn is with us. She is a school administrator. And listen to this, this is an amazing story: She put her entire *class* on Focus Factor. Anita, welcome to the program. Can you tell us why you did that and what happened.

Anita: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would

come and say "what can we do about this?" then I would start to tell them, "Okay, this is what I would do in this situation. And it couldn't hurt, it can only help . . . try it." So they started, one by one, each child started testing out the Focus Factor. And as a result, my entire class was on the Focus Factor. We have just . . . we've had just a wonderful time on it.

Host: So you put 'em on the product . . . and what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely.

***

Smith: [W]e see a noticeable improvement in the way a person feels it does not matter if it's a child, a teen or an adult, in 1 to 10 days. Now I typically tell people, stay on Focus Factor each and every day consistently and you'll notice a difference within 2 weeks. But I've got to tell you Bill that most people come back after the first day and they say, "Wow, what did you put in this stuff. I haven't felt this good since I was a teenager."

***

Host: All right, we'll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks, these are people we spoke with earlier this week. First we'll hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients – adults, children, seniors – some very interesting comments here. And Jon, if we could, let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about . . . a year and a half ago. Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets and from that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women,

men, and children as well. It's an excellent product just to help enhance the brain function. I believe Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue . . . poor focus and irritability . . . it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function – not just with children, not just with adults, and not just with seniors . . . it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it . . . everyone in my family is on Focus Factor. Number one, yes it has vitamins and minerals in it. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts, numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral [sic] has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

Host: So there you have just a few of the many doctors who recommend Focus Factor to their patients. These doctors were not paid in any way for their comments today . . . .

***

Host: . . . And it is my great honor and pleasure right now to have on the phone with me Representative Rick Green. Rick is with the state house in the State of Texas. And he uses Focus Factor himself and his family. Representative Green, welcome to the program. Thank you very much for joining us.

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Host: Now what's your story with Focus Factor?

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the times that you do get with the family . . . started taking [Focus Factor] about a year ago and found that was exactly the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of y'know, how . . . you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen.

***

Kyl: We're all having problems with memory today. It's not our fault. We have an innate ability to have an awesome memory. All we have to do is feed our brain the nutrients it's starving for to enhance energy production. And Focus Factor supplies those nutrients . . . .

Host: So it's kind of like memory in a bottle.

Kyl: Exactly.

***

Host: For over 5 years, Focus Factor has been available only through doctors' offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program when you order, and you can even get a 30-day supply absolutely *free*." [Exhibit F: "Bill #4400" (emphasis in original)]

g. "Host: This is an incredible story. And I want us to start at the very beginning. Tell us about what inspired you to create Focus Factor?

Smith: It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time. I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels?*. . . . And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, *Hey, what do you do when your patients ask this question? Did I miss something?*

***

Host: Now tell me this, in your experience, do you see improvements in kids' school work?

Smith: Absolutely. We've seen dramatic improvements in academic performance. And let me give you an example. A child that comes to mind, his name is Brian. . . . Brian was a child that was kicked out of no less than 4 schools. He would not respond to his parents or any kind of authority outside like, like principals or teachers. After being on Focus Factor, in one year he was on the honor roll . . . and two years later he graduated from high school with honors.

***

Host: . . . Now, earlier this week we spoke with several people who say Focus Factor has dramatically improved their quality of life. So if you or anyone in your family – anyone you know – could use some help with mood, energy, memory . . . y'know just clearing out those mental cobwebs, you need to listen to this.

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings. That it gives you a little pick-

up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me – right there. I've attributed a lot of mood swings or depression here and there, you know, to just the age I'm going through right now, you know being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. I was amazing. I notice right away when I don't take Focus Factor. It's hard to describe. You just have to try it. And everybody I've talked to that I've recommended it to has said the same thing.

Kristin Rister-Wheatley: My name is Kristin and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I am on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance, the way she felt in school – the way she'd concentrate. I've shared it with my friends. I've shared it with my family. They, everyone feels the same way. We all love Focus Factor." [Exhibit G: "Leisa #4500" (emphasis in original)]

Television Advertising

h. "Host: Welcome to the Vitalbasics Health Show . . . . Several months ago, we interviewed a leading expert in nutrition who is generating controversy with his assertion that there's a nationwide epidemic called "Brain Starvation" that affects men, women and children alike in this country. According to Dr. Kyl Smith, memory loss, poor concentration, mood swings and fatigue are causing a

dangerous drop in effectiveness in the workplace and a higher level of tension and even anger in the home. He also introduced a new dietary supplement called Focus Factor that helps people with these everyday problems. Dr. Smith, welcome to the program again.

***

Host: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking Focus Factor and it was about the American revolution and I was able to remember all kinds of things. So I'll you what, let's roll the clip . . . .

Host from previous show: 'I started reading this 400 page book . . . very dense, very dry . . . and what I found was, I'm remembering everything virtually in this book. I'm remembering the names of British Lords and generals and dukes and battle sites and chains of events that happened. This book literally came alive to me . . . not only as I was reading it, but after, my comprehension was extraordinary.'

Host: And I have to say, since that program aired, things just seem to get better and better and better, its sort of a cumulative effect. A couple of things that I notice. First of all, my memory just seems to keep getting better . . . . So one thing I can do is visualize things better, which helps me to remember. The second big thing is multitasking. In the past, when I would get all different projects thrown at me at once, I would panic. Because it just seemed so overwhelming. Since taking Focus Factor what I find is I can more calmly prioritize things. I can focus on each task better, which means I get it done more quickly generally. And I can just get the projects done faster. So that just eases all of that stress that normally would have come down on me." [Exhibit H: "Bill's Case Studies"]

Internet Advertising

i. "**Finally! A safe, easy and natural way to improve focus, memory, mood, concentration and energy.** Focus Factor is a superior natural supplement that enhances brain function.

* * *

This revolutionary dietary supplement is perfect for the whole family

- Men and women feel more focused and alert throughout the day.
- Women report relief from irritability and mood swings.
- Seniors say they feel an improvement in memory, mental clarity, and energy.
- Children and teens love the effect on focus and concentration."

[Exhibit I (emphasis in original)]

9. Respondents have disseminated or have caused to be disseminated advertisements for V-Factor, including but not limited to the attached Exhibits J through M. These advertisements contain the following statements:

Radio Advertising

a. "Denise: Hi, I'm Denise Diamond. Welcome to the *Vital Basics Health Show*. If your sex life isn't as satisfying as it used to be, our guest today says he has some groundbreaking new information that may give you and your partner what you need to re-ignite the spark in your relationship.

We'll talk about some of the prevailing myths about sex that often prevent couples from enjoying the intimacy that they deserve. And he'll tell us about a new solution that is safe and easy . . . and is something you can use right now to improve your sex life.

Carlon Colker, M.D. is Medical Director and CEO of Peak Wellness in Greenwich, Connecticut. He's been practicing in the health care field for over 20 years. In fact, he pioneered the first wellness clinic on the East Coast. He is an attending physician at Beth Israel Medical Center in New York City, Greenwich Hospital in Greenwich, Connecticut and Stamford Hospital and St. Joseph's Hospital in Stamford, Connecticut. He is one of the most sought-after consultants in the country and has written extensively about sexual health. We're very fortunate to have him on the program today. Dr. Colker, thank you for joining me.

Colker: Thanks so much for having me.

***

Diamond: We're back with Dr. Carlon Colker. We're talking about sexual response in men and ways in which you can make every day feel like you're on your honeymoon. And Doctor, I understand you have some exciting news regarding a recent clinical trial on the V-Factor Natural Pack. Could you tell us about that. These results are just fascinating.

Colker: Yeah, the news *is* exciting. The V-Factor Natural Pack is a product that I've specifically formulated and I've clinically tested to support and improve sexual function and response. As I like to say, it's just like dialing the right combination on a lock. The V-Factor Natural Pack has a precise formula and the exact levels of ingredients to unlock sexual potential. Just like the lock example, the right combination of ingredients in the proper proportions is really the key for improving sexual satisfaction.

Diamond: So this was a well-designed clinical trial. And the #1 response was: 'increased sexual satisfaction.' That was the feedback that you got from the men that were in the trial. And isn't that *exactly* the kind of solution men are looking for?

***

Diamond: Knowing that there's a positive clinical trial behind this . . . and everybody wants to be safe, this should give men out there who are listening a peace of mind that they can trust the product, that they can believe in that. Can you tell us a bit more about that?

Colker: Oh yeah, well, this is the idea that we have a clinical trial behind this supporting the effectiveness off the product in terms of increasing sexual satisfaction. And that's so important. And, of course, the ingredients in the V-Factor Natural Pack have been well-investigated and the ingredients have been carefully selected, and there's quite an amount of research behind these substances . . . in particular the one that we spoke about, the idea of increasing nitric oxide, and that's something that one of the ingredients in the V-Factor Natural Pack can really do, and that's what's amazing. [Exhibit J: "Natural Pack #7000" (emphasis in original)]

b. "Announcer: Welcome to the VitalBasics radio program with Dr. Shari Lieberman and Carlon Colker, M.D. Today, Drs. Lieberman and Colker talk about a revolutionary new approach to solving some of today's most talked about health issues, including sexual performance, poor memory, concerns about prostate health, and emotional well-being. And now, let's join Dr. Shari Lieberman and Dr. Carlon Colker.

***

Lieberman: Y'know what I love, Carlon? I love when the downside is . . . *nothing* . . . . Once again, it's safe, it's natural . . . there's no downside. And I love that as a clinician.

***

Lieberman: I . . . and, once again, who can benefit from this? If you are feeling not the same pep and drive as you have had in the past when it comes to sex . . . [I]f your sexual desire, sexual performance, sexual energy, just isn't what it's been in the past . . . And I have to tell you

something: This is a product that, once again, you have nothing to lose. If you are experiencing low sex drive, low sexual desire . . . if you've *never* experienced your sexual performance or desire to where it should be . . . whether you're a man or a woman or you want to perhaps enhance your sexual performance or desire, this is a product, once again . . . why not give it a try? There's no downside . . . it's completely safe and natural, and I just love that about the product." [Exhibit K: "Natural Pack #5000" (emphasis in original)]

c. "No stimulants. No drugs. Just safe, clinically-proven ingredients chosen for one thing and one thing only . . . ." [Exhibit L: "Sexy"]

Television Advertising

d. "Diamond: If your sex life isn't as satisfying as it used to be, my guest has some groundbreaking new scientific information that may give you exactly what you need to improve your sex life. He'll tell us about a new supplement that's easy, safe, clinically tested . . . and is something you can use immediately to improve your level of sexual satisfaction. . . . Dr. Colker, thank you for joining us.

***

Diamond: [W]hat can men expect from this, specifically? They're out there, they're wondering, they want to know.

Colker: Well as our clinical trial showed, when an individual takes the V-Factor Natural Pack they are going to experience increased sexual satisfaction and a better sexual response. . . .

***

Diamond: We're back with Carlon Colker, M.D. We're talking about a revolutionary breakthrough that improves sexual function and satisfaction . . . some very dramatic results. Doctor, we've been talking a little bit today about the clinical trial that went into this, the due diligence that

went into the V-Factor Natural Pack. So much good verbatims [sic] that came back from the people that were part of the study. What were they telling you?

Colker: Well it's so important to recognize that having a clinical study behind the product is so important because it tells you that this product really works and that's the whole idea. There are too many products out there that don't have a clinical study to support their use. If the man's taking V-Factor Natural Pack, they can expect to have improved satisfaction, have a greater satisfaction . . . .

***

Colker: And then the V-Factor Natural Pack itself – the actual final formula – has also been tested and shown to be safe and effective.

***

Diamond: I think that patients, and you've told me your patients, are very savvy, though in terms of the products that they purchase. And sometimes they're a little bit suspicious . . . as well they should be. That's the good thing about the V-Factor is the clinical study that went behind it, your personal effort and the effort of other people, the safety, the data, the documentation, the verification . . . it's all there.

Colker: Yeah, it's so important because there are so many products out there, and lord knows I wrote the book on it. So I can tell firsthand you [sic] there are many, many products out there and most of them don't work and they don't have clinical studies to support their safety and efficacy. The nice thing about the V-Factor Natural Pack is you do have a product that has been clinically tested. It is safe and effective." [Exhibit M: "Natural Pack DK"]

FOCUS FACTOR

10. Through the means described in Paragraph 8, respondents have represented, expressly or by implication, that:

(a) Focus Factor improves the focus, memory, and concentration of healthy adults;

(b) Focus Factor alleviates stress and combats the fatigue, irritability and mood swings that healthy adults experience;

(c) Focus Factor makes children and teenagers feel more alert, focused, and mentally sharp;

(d) Focus Factor improves students' ability to concentrate and their academic performance;

(e) Focus Factor improves senior citizens' memory, mental clarity, and energy;

(f) Focus Factor improves adults' ability to absorb information in books and to recall facts, figures and names; and

(g) Consumers who start taking Focus Factor regularly will feel its effects in as little as one to ten days.

11. Through the means described in Paragraph 8, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 10, at the time the representations were made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 10, at the time the representations were made. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

V-FACTOR

13. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that V-Factor is safe for virtually all men.

14. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that, they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made. Therefore, the representation set forth in Paragraph 14 was, and is, false or misleading.

16. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that the clinical study of the V-Factor Natural Pack conducted by Dr. Carlon Colker proves that V-Factor is safe and is effective at improving sexual response and function.

17. In truth and in fact, the clinical study of the V-Factor Natural Pack conducted by Dr. Carlon Colker does not prove that V-Factor is safe and is effective at improving sexual response and function. The clinical study referred to by respondents does not provide competent or reliable scientific evidence of the safety or efficacy of the V-Factor Natural Pack. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

CONSUMER AND EXPERT ENDORSERS

18. In their advertising and sale of Focus Factor, respondents have represented, directly or by implication, that various individuals are endorsers of Focus Factor. Respondents have

failed to disclose adequately that certain of those individuals had material connections with Focus Factor. Specifically, at the time of providing their endorsements:

a. Some of the consumer endorsers were the principals in a public relations company that had been retained by Creative Health, Inc. (the company that had developed Focus Factor and licensed respondent Vital Basics to market the product) to promote Focus Factor, and their company earned a commission on sales resulting from its promotional work;

b. One of the consumer endorsers was Creative Health's attorney; and
c. Some of the expert endorsers were Focus Factor distributors who earned profits based on their sales of the product.

These facts would materially affect the weight and credibility given by consumers to the endorsements and would be material to consumers in their purchase or use of the product. Therefore, the failure to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

19. In their advertising and sale of Focus Factor, respondents have represented, directly or by implication, that consumers' endorsements were made voluntarily and without compensation. Respondents have failed to disclose adequately that Vital Basics solicited consumer endorsements by promising a free 6-month supply of Focus Factor to those individuals whose testimonials were used in the company's advertising. These facts would materially affect the weight and credibility given by consumers to the endorsements and would be material to consumers in their purchase or use of the product. Therefore, the failure to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

DECEPTIVE FORMAT

20. Through the dissemination of advertisements referred to in Paragraphs 8 and 9, including but not limited to "Bill #4400" and "Natural Pack #7000," transcriptions of which are attached hereto as Exhibits F and J, respondents have represented, directly or by implication, that these advertisements are independent radio programs and are not paid commercial advertising.

21. In truth and in fact, these advertisements are not independent radio programs and are paid commercial advertising. Therefore, the representation set forth in Paragraph 20 was, and is, false or misleading.

22. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this twenty-sixth day of April, 2004.

Focus Factor
:60 Radio
Kyl 2
(9/13/00)

ISCI code FF17
File name Focus Factor RS 17

Dr. Kyl Smith: Do you ever get the feeling you've misplaced your memory...and you can't remember where you put it?

I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.

I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.

In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll feel more alert, more focused, and "on-task."

Focus Factor has been a huge success for kids, teens, adults and seniors. And now you can try it yourself with absolutely no risk.

Tag (:18) Ask how you can get a free 30-day supply of Focus Factor with your order! Call 1-800-_____. That's 1-800-_____. Money back if you're not delighted. Call 1-800-_____.

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510 Congress Street
Portland, ME 04101
(207) 775-5007

Focus Factor
:60 Radio
Donut Ware
(2/12/01)

ISCI code FF49
File name Focus Factor RS 49

Dr. Kyl Smith: This is Dr. Kyl Smith. A doctor's true reward is helping people. My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy. Here's another message from our Focus Factor voice mail: **(:15)**

Electronic voice mail "Beep"

Marlene Ware—Mother [:20]
This is Marlene Ware. I'm calling on behalf of my son. He's having a tough time at school, ans this has made such a difference. He's remembering things. I can't believe it! I wanted to tell you how much of a difference it's made for my son…Focus Factor. It has made a tremendous difference.

Dr. Smith: Focus Factor is safe, it's natural, and it *works*. Call now so you can immediately begin improving your memory, concentration, mood, focus and energy. I'll even give you a free 30-day supply with your Focus Factor trial pack. **(:13)**

Announcer: Call 1-800-_____. That's 1-800-_____. Money back if you're not delighted. Call 1-800-_____. **(:12)**

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(207) 775-5007

Focus Factor
:60 Radio
School's in Session
(8/17/00)

ISCI code FF16
File name Focus Factor RS 16

Dr. Kyl Smith (:48)— School's in session…and as a parent, more than anything else, you want to see your child do their best.

I'm Dr. Kyl Smith. I've seen first-hand how *frustrating* it can be when a child has trouble with focus and concentration. Parents come to me because their children are unfocused, distracted…and they just don't know what to do about it.

That's why I developed Focus Factor. It's an effective, all-natural supplement with one purpose: to give your child's brain the exact nutrients it needs to function at its very best.

Focus Factor is for students who need help with concentration and memory. In just a few days, your child will feel alert, focused, and mentally sharp.

And by the way, there's also an adult formula I created for grown-ups who want to improve memory, concentration, and mood.

Call now and *feel* the difference when you supercharge your brain…with Focus Factor.

Tag (:12) Ask how you can get a free 30-day supply of Focus Factor with your order! Call 1-800-_____. That's 1-800-_____.

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100 Commercial Street
Portland, ME 04101
(207) 775-5007

Focus Factor
:60 Radio
Rob 3
(5/8/01)

ISCI code FF59
File name Focus Factor RS 59

Have you ever thought about the difference between a laser beam and a light bulb? A laser beam can measure the distance to the moon within 2.4 inches. It can cut through steel and perform delicate eye surgery. A light bulb…can only light up a small room.

I'm Rob Graham, president of Vital Basics. Our revolutionary Focus Factor all-natural supplement was developed to expand your powers of focus.

Have you ever noticed how effortless things seem when you're "on?" You're "on" when your brain function is high. You're "off" when your brain function is low.

Focus Factor contains over 50 nutrients that sharpen your brain function.

If you're ready to harness the laser-like qualities of your brain, try Focus Factor. It's safe, effective and there's nothing quite like it *anywhere*. But don't take my word for it, call today and try it risk-free for 30 days.

Call 1-800-_____. That's 1-800-_____. Ask how you can receive a free month's supply with your order. Call 1-800-_____.

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100 Commercial Street
Portland, ME 04101
(207) 775-5007

Focus Factor RI 5 THIRD EDIT...12/12/00 SHOW #4600

Intro: Well hello again...welcome to the Vitalbasics radio program. We bring you vital health information on over 300 great radio stations covering all 50 states...and y'know what? I can count on two fingers—literally—the number of times I've actually invited a guest back on this program. Today is one of those times.

Dr. Kyl Smith is back with us at our invitation, and this time he's right here in the studio with us...came all the way from Dallas, Texas. Dr. Smith is an expert in nutrition, pediatrics and anti-aging. He's the founder and president of the Creative Health Institute in Texas. Now, his claim to fame...the reason he's here with us today...is his fascination with your brain. Specifically, how it works, how it functions, and what we can do—all of us...men, women, kids, teenagers, senior citizens—to make it perform even better. What does that mean? It means improving your memory so you don't forget your wife's anniversary or where you left the car keys. It means better focus and concentration so you can get your work done without distractions. And it means having lots of energy instead of feeling tired and drained all the time.

Today Dr. Smith is back with some brand new information that will *shock* you—like, is your brain *shrinking*? We'll talk about that. Dr. Kyl Smith, welcome back.

Well, thank you, Bill. Again, I'm honored to be here.

If you would, for the listeners who don't know you yet, who didn't catch you the last time you were on, give us a quick summary of your background...how you got into this field...and where you're coming from.

Well, Bill, it all began when I graduated from my internship and started build my own practice. I noticed immediately that people were coming to me with similar types of questions, and they all had to do with brain function. Let me give you a good example...

Moms would come to me and they'd say, *Dr. Smith, my son or daughter suffers with poor focus or concentration. Is there anything we can do that's natural that can help?* Business professionals would say, *Dr. Smith, it seems like I wake up in the morning in a fog...I can't focus on demand. I'm drinking coffee to try to stay awake and alert. And, to be honest with you, I'm in my 30's or 40's, and I'm starting to notice my memory's not what it used to be, and I'm afraid this is affecting my job performance.* And another one that I heard quite commonly. Spouses would come to me—usually wives asking me about their husbands, but sometimes the other way around—they'd say, *Dr. Smith, my husband comes home from work and he is mentally drained. It's like he doesn't have any energy left for me or the family. And worse, he brings home irritability and mood swings. I know you're helping people with mental function, please help!* Well, these consistent questions, led me to do an exhaustive search of the medical and nutritional research at the time to find out, is there anything we can do to improve concentration? Can we have a better memory as we age...30, 40, and 50 years of age? So the technology that came back from this search was the original technology that's in Focus Factor today.

Now, we have spoken a few times since our last program, and what I found fascinating is that, as you were doing this search... there's like over 3,000 clinical studies that you have accessed in putting together this new supplement called Focus Factor. Is that correct?

Absolutely. We are in the information age, there's no doubt about it. And when it comes to medical studies and nutritional studies on the brain—how it works, and how diet and nutrition can affect brain function in a positive way—there's tons of information out there...literally over 3,000 research articles right now done on the link between diet, nutrition and the brain. And the stuff we're going to talk about today is fascinating. We really can take control of our destiny when it comes to how we focus, think, and our memory.

And what also struck me is that this is such a huge problem. You had mentioned that the #1 reason why people go to their doctors these days isn't for little aches and pains or the sniffles...it's for irritability, it's for mental fatigue...memory, things like that. Is that correct?

Mental function...poor mental function...mental fatigue. These are the #1 types of complaints in doctors' practices across the country. I mean...give you a good example: people in their 30's, 40's, 50's. Most people are relying on note pads, Post-It pads and planners just to get through the day.

Yeah, yeah.

They tell me if they lose their little note pad they are sunk. And how many people can relate to going to the grocery store...you got just 5 things to get, milk's on your list. You come home...you got no milk. Or now...listen to this: listeners at home, think if you can relate to this: You're in a social situation—or maybe even worse, a business situation—you're meeting someone right now. This person's really important to you. You shake their hand. By the time your handshake breaks, it's like the name just falls to the floor.

Yeah...

You're looking at him or her and you're thinking to yourself, *I was just introduced to them, and I can't even remember their name.*

It's embarrassing.

In a *social* situation.

Yeah.

...that's embarrassing. But think of it in business. Poor memory, a sluggish memory, can cost you your job performance.

So these are huge problems, and you have created a supplement—it's called Focus Factor—the response has been absolutely tremendous to it. And I want to read a few of the phone messages that we got after the last program...and you would not believe how many of our affiliate stations—we're on over 300 stations—and how many stations called up and said, *Do you mind if we run that show again? We got such a huge response, people want to hear it again...*

That's great...

So these are just a few of the phone messages we received, um... Here's a 65 year-old woman. She didn't say where she was from, but she said her husband ordered Focus Factor. She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic...she thought she was getting *dimwitted*...interesting choice of words there, and she says, *Focus Factor started working almost immediately. I felt like a different person.* And I know results will vary from person to person, but I found these very interesting. Here's a woman from your stomping grounds, Texas. She says she's in the insurance industry...a very fast paced office. Lots of multi-tasking going on. She says, *I've been taking Focus Factor for a couple weeks and saw a huge difference. Just unbelievable.* And I'm going to do one more here, because this shows how the product can help children as well...

Great...

A teacher in New Jersey—and also a mother. She bought Focus Factor for her son, who had trouble with focus and concentration. And she says, *he had trouble concentrating on one thing at a time. And Focus Factor has helped him to sit down and concentrate on one activity at a time. He gets his work done on time now.* And this is interesting: He says, *He wants to do more work now...*

Wow.

So she says, *We've seen progress with Focus Factor and will continue to order it.* So when you get a child who actually *wants* to do his homework, I think that's pretty incredible.

Doctor, I want to talk about seniors for a moment, because I understand they can benefit enormously from Focus Factor And unfortunately, I think what happens is...when we see older folks in our lives—grandparents, aunts, uncles, even our parents—having trouble with memory or concentration, we tend to ignore them or brush them aside...or we even make fun of them...Y'know, *Gramps is just having a little slow today*. And You're saying if we were to just help them support their brain a little bit more, it could improve their memory and concentration a lot.

This is very true. As a matter of fact, seniors share with me that many times they're embarrassed because they do feel like they're a little slower. They many times have to ask their children or their grandchildren to slow down just a little bit...and that's embarrassing. I gotta tell you...speaking to seniors, when I do lectures across the country, or I do radio or television, seniors are one of my favorite groups to speak to. Why? Because they can be passionate about health. Many times, they want to make and improvement, and they want to make an improvement *now*.

Now. Yeah.

Most seniors will tell me they've been taking nutritional supplements for maybe *years*, and never noticed a difference in how they feel. Can you imagine? Well, the thing that seniors tell me that Focus Factor does is it gives them that mental spark , that energy like they used to have. They feel like their memory is more on-task. They can recall things easier with less effort. And the thing I really like to hear is how it improves relationships. And let me give you a good example: A lady comes up to me—an elderly lady—when we're filming a television program, and she says, *Dr. Smith, I gotta tell you about my husband. This man was the most cantankerous, irritable man you've ever met. All he ever wanted to do was sit in his armchair. But after taking Focus Factor, he gardens with me, we go on walks together...it's like I've got my sweetheart back.*

Hey, here's a letter from a 65 year-old woman I spoke with. And she says, *I tried ginkgo biloba for months, and it didn't do anything for my memory. But my memory is now wonderful since I've started taking Focus Factor. I noticed a difference within a couple of days.*

And I've got to answer a question here. Why does this happen? It happens because the brain needs much more than an herb or one nutrient to help it with cognitive function. You need protector nutrients—antioxidants that are shown to help protect brain function. You need nutrients that improve brain function, like the B vitamins. You need specific herbal extracts that may be precursors to neurotransmitters that science says improves focus, concentration and memory. You put these together in a comprehensive brain support product, and...what do you have? You have stories of better concentration...people going to work, getting more done in less time, coming home with energy to spare...instead of that old story of coming home and just being fatigued and lethargic.

Excellent. Well, uh, I can see we're running out of time here, so I have to take a quick break. We want to give you information on how you can get a hold of Focus Factor for yourself. So we're going to do that in just a moment. But right now I want you to listen to some of the people we spoke to recently, and how Focus Factor is affecting their lives. So take a listen to this, and we'll be right back.

Kelly Brown: My name is Kelly Brown and Focus Factor has been a wonderful product for us. It has tremendously helped my son with his schoolwork and at home also. The benefits that I have seen with Focus Factor for myself is...I'm a working mother—I'm very tired when I get home at night, I'm very stressed out. Focus Factor for me has just boosted my energy in the evenings to where I can keep going, I can keep up with my children. And afternoons at work, too, I don't get tired, I don't get irritable. I just...for some reason I'm just wide-eyed and ready to go!
Roger Thompson: My name is Roger Thompson. I've been taking Focus Factor for about 6 weeks now, and the results have been just phenomenal. My mood has improved dramatically. I'm better able to focus and to communicate with other people. I feel a lot better. Focus Factor has made a huge difference, and I would really love to thank Dr. Smith for coming up with this and making it available to the general public. It's a super product, and I'd recommend it to anybody who's busy, stressed-out or just needs a little boost in their lives. It's just great.

Millie Hull: My name is Millie Hull, and I have tried Focus Factor after trying many other supplements which *never* worked for me. I thought they would just sit in my stomach and not even dissolve. Focus Factor is different. It *does* work. It clears the 'foggies' from the mind and gives you the energy you need to go do what you need to do. I have two grandchildren that I take care of...I have the energy for them now, as well as working a full-time job. I can do all these things and have the energy to still have time for recreation. And I have the clearness of mind to get things done that I need to do and think clearly to do these things. I just love Focus Factor.

(CTA #1)

And we're back. Welcome back to the Vitalbasics radio program. This is Bill Begley, and my special guest today, back for an encore, is Dr. Kyl Smith, the founder and president of the Creative Health Institute in Texas, and the creator of this amazing supplement called Focus Factor. Recommended for seniors, students, men, women...and doctor, I've been taking it myself. I've been taking it for about 6 months now. I'm going to tell my own story a little bit later on in the program, but it's helped me dramatically, so...

Wonderful.

So...in your experience, who do you find benefits from Focus Factor? Any specific groups of people?

Bill, everyone...it doesn't matter if you're a business professional, a senior, a teen, or a child, you have a need to support the most important organ in the brain. Focus Factor's perfect for that. It provides specific dietary supplements, or nutrients, that enhance the brain's ability to produce mental energy. We all need that. I mean, think, today many adults are suffering with poor memory. And many times they don't notice it in the beginning. It sneaks up on them...

Yeah, yeah.

Meaning that we rely on Post-It pads all around the house. We gotta write things down to remember it. If you lose your planner you're lost.

Yeah.

Focus Factor's important for all of us. Some of the most touching stories I...come from parents who've given the product to their children, and they see what they call a *transformation* in their child. They seem interested in things in the past they weren't interested in, and one of the curious intangible things parents say is many a times they see an improvement in their child's self-esteem. That makes a world of difference to me. As the formulator of the product, that touches me 'cause that's exactly what I formulated the product to do. Seniors tell me they get that mental spark, that mental edge back that they've been looking for for so long and they feel like they've lost it...they've found it again...and business professionals. They tell me that they can go to work, they feel like get more done in less time and come home with energy to spare.

Well the big buzzword these days in business is *multitasking*...

Exactly.

...which basically means you have to do 3 people's jobs instead of just your own job. So I know we've spoken with a number of people who use that word...it's just a buzzword these days...multitasking. People are able to shift from one project to another very easily...

...and not lose the project.

Exactly...not lose the project. And be able to complete each project...or see each project through...finish it...and do a good job.

Exactly.

So I take it the reason this is so effective is because the ingredients are more easily absorbed by the brain?

Exactly. Specific nutrients cross the blood/brain barrier readily. In other words, the brain accepts these nutrients. It finds them as foodstuffs. These are the nutrients we've used in Focus Factor to enhance brain function.

So if you're taking the wrong nutrients, it's kind of like putting a square peg in a round hole. It just can't go in. But if you have the right nutrients, it's just a nice fit, and the brain gets it and...boom.

Very close. If you're taking the wrong nutrients, quite frankly they pass in the stool, and they don't even absorb through the bloodstream. If you're taking the right nutrients...I guess your analogy is great...if you're taking the right nutrients they easily pass through the digestive system into the bloodstream, delivering their benefits to the cell, where you want them.

Okay. Now, this was originally only available through doctors' practices. What are...what's the medical community saying about this?

We have had phenomenal success across the country. What we call it is a grassroots movement because originally, Focus Factor started just by word of mouth referral from doctor to doctor...from patient to family. The reason I attribute that success is the fact that Focus Factor works. I mean, very quickly doctors realized they could take this product themselves, or recommend it to a patient, and that person would come back to the doctor in just a few days or weeks and say, *Hey Doc, what did you give me? It's like this cloud's been lifted off my head. I can focus, I can concentrate. I've got my memory back! Thanks, Doc!* Well, what's he going to do? He's going to recommend this product to virtually anyone in his practice that are suffering from poor mental function.

Sure.

He's taking it himself, he's recommending it to other doctors. I think this is why we've been so successful across the country today.

And I have some comments from some of the doctors we've spoken with. For example, this is a medical doctor...this is an M.D. named Lee Cowden, Dr. Lee Cowden. He's a cardiologist, and internist...and he says, uh..."Compared to other supplements on the market, the nutrients in Focus Factor are present at better levels (that's what we just talked about) and in the ideal *forms* more likely to enhance brain function. Taking Focus Factor results in a significant improvement in memory, concentration, and overall well-being." Pretty strong comment from a medical doctor.

Wonderful.

Here's a doctor, Gary Sconyers, who says, "I've seen Focus Factor firsthand as a doctor <u>and</u> as a parent. (I think that's important) When my son started taking it, he became more consistent, and his self-esteem improved by leaps and bounds." So a few powerful comments from the medical community. I think it's neat that it's been accepted, and I think it adds a lot of credibility to you and the product...the fact that is *started out* with doctors.

And I've got to tell you, in the beginning, doctors were skeptical. Now, this is an innovative product. It literally provides the nutrients the brain needs for enhanced mental function. Well, doctors first tried it on themselves and their children. Now this was neat because they became advocates for the product, recommending it to virtually everyone.

Okay, we have to take a quick break in just a moment. But very quickly I want you to listen to some more people in their own words and what they're saying about Focus Factor. And we'll give you the opportunity to call the 800 number—toll-free number—so you can get Focus Factor for yourself and for your family...and listen to this...

Paula Clark: My name is Paula Clark and I live in New Jersey and I have a pretty hectic life. I'm a working Mom. I started Focus Factor for my child who is 10 years old who was having a tough time focusing in school and staying on-task. I found that Focus factor...after one week I saw a noticeable difference. I saw that his homework assignments were being accomplished and being done. He has a happier feeling, a happier mood. So I then decided then, well, if it's working so well for him, I'm going to try this also, seeing that I do I do have my mood swings. I tried it and it really has improved my life as well. Now my whole family is taking it—my 15 year old, my 10 year old, myself—I gave it to my husband and he loves it also.

Jack Huff: My name is Jack Huff. I'm in Lake Havasu City, Arizona. I've been taking Focus Factor for 4 months now. And I really feel it's helped all areas of my life. Being able to focus, which is a great... Focusing, sometimes you might not think it's that big of a deal, but it's really the key to a lot of things—focusing— and that'll lead you through projects. It's helped my relationship with my wife, believe it or not, just by not being so down and in kind of a dark cloud situation. Lots of energy to go do the things I want to do. If you want an extra boost—not just a little extra boost, it's a major turnaround contribution to your...being vital to feeling alive...being able to go do stuff without worrying about being drained mentally or physically.

Sally Nelson: My name is Sally Nelson and I've been taking Focus Factor for ten weeks now. The thing I found when I first started taking it is my energy level in the afternoon gradually came up to the point where I feel very focused, I feel very energetic and I feel very excited about my life in general. I feel alive—that's really what I want to say. I feel very alive, very energetic, very focused. And I feel very excited.

(CTA #2)

And welcome back to the Vitalbasics radio show. Bill Begley with our special guest...back for an encore appearance, Dr. Kyl Smith. He's the founder and president of the Creative Health Institute in Texas, and also the creator of Focus Factor. This is the supplement that is designed to literally supercharge your brain. And doctor, before we go, I want to bring this up. This really freaked me out. I gotta tell you...when I learned that, after the age of 30, the brain begins to shrink??

Exactly.

Tell us about that.

I hate to tell you it's true. After the age of 30, after we pass by that magical age where you notice that spare tires comes on easier, and our health starts to decline, one of the medical facts is the brain slowly begins to shrink in its size. In addition, between the age of 30 and 55, we'll lose about 25% of the synapses in the brain. In addition, about 80% of people above the age of 35 complain that they notice their memory is not what it used to be.

That makes sense.

But the good part is...science shows us today that there is a lot we can do to support normal mental function.

Now for folks who are just tuning in, give us a quick recap...20 seconds or less...what is Focus Factor and what does it do?

Focus Factor is a totally unique dietary supplement that feeds the brain. It does this by providing specific nutrients that enhance the brain's ability to produce mental energy. The second thing that Focus factor does is it provides nutrients your brain is starving for that enhances focus, concentration and memory by naturally enhancing neurotransmitters in the brain.

All right, I want to read a few more letters from people who have written us based on the last radio program that you did with us. Very quickly…"No more monthly highs and lows." A woman who's a business professional, a wife and mother who says, *I feel like my brain functions better. I have more energy. My mood swings are not the highs and lows that they used to be.* And one more. This is a woman in her 50's who's a registered nurse. And she says, *We interested in Focus Factor because of the natural help we thought it would bring to kids with poor focus and concentration. We've seen positive results with it. We've seen their ability to concentrate and improve the focus that they have on their work.* Now she says, *I have been taking Focus Factor myself. It worked for me within the first week. I've noticed that my thinking is more clear. I'm able to remember more, focus and get rid of "cloudy thinking"…*

Wonderful.

As she calls it. How does that make you feel when you hear all these positive stories about a product that you did the research on and created yourself from scratch?

Bill, I have to tell you: I never imagined that Focus Factor would provide the benefits for people that they're telling us it's providing for them. I mean, I created the product to enhance focus, concentration and memory for myself, for my patients and the people I was lecturing to. What I never, ever imagined are the stories that would come back. The life-enhancing stories. As seniors say, it gives them their mental spark back. It motivates them to do things that are actually good for them, like walk and garden. And to think now that the product is in the hands of artists, athletes, pro football players, actors…and now I'm being told that my product is being taken by a gentleman in NASCAR. Bill, this is like a dream come true for me.

That's tremendous, and if I may…do you mind if I share my story…

I'd love for you to.

…about Focus Factor? You gave me the product and I started taking it. And I gave it a good 30 days. And I was going to see the movie *The Patriot*—it was a big hit—and I just wanted to do a little homework, to kind of brush up on the revolution and learn a little bit more about it so I would understand the movie better and what was happening. So here I am taking Focus Factor, and I pulled out this great big 'coffee table book'—it's about 400 pages. It's a very dense book about the Revolution. And I'm reading and I'm reading…and it's coming to life for me. Even though it was written in a very dry way—it wasn't the most excitingly written book. But for me, I was absorbing it very well, and what's most remarkable, is when I was done reading, I kept the information…it was retained.

Wonderful.

I can still rattle off the names of British generals and Lords and prime ministers and where battles happened…and who's army did this and who's army did that and all that kind of stuff. And it was fascinating. And I found that Focus Factor really helped with my memory, with my ability to concentrate on the book, and my ability to comprehend it.

Wonderful.

It was tremendous.

Bill, why didn't we have this when we were in college?

I don't know! My grades would've been much better, I'm sure.

I wish I did…

…if we'd had it. So I personally want to thank you for introducing me to this product, because it certainly has had a profound effect, and not just with that one book, but I'm finding just in general I'm remembering things better…I'm comprehending…I'm *focusing* better. We mentioned earlier the term *multi-tasking*, having to do many things at once. When you're in radio, you're multi-tasking every single day. And I'm finding that it is, in fact, easier to do all these tasks and complete them and do them well.

Well thank you. That means a lot to me.

Hey, we're just...we're outta time here. So Dr. Kyl Smith, thank you for joining us in the studio—flying here from Dallas, Texas to be my guest.

Thank you. Bill, I appreciate so much all you've done in sharing this with other people.

Well, when something works, you tell people about it, that's all. Folks, thanks for joining us folks here on the Vitalbasics radio program. We will talk again soon. Thank you, and take care of yourself and God bless.
(CTA #3)

CTA Copy: Hi, this is Bill Begley. I want you to think about the last time you really felt *good*. A time when you were energetic, focused, and mentally sharp. Picture taking all that positive energy and putting it into a tablet—a tablet that's all-natural, effective, and as easy to use as putting your shoes on in the morning. That's the best way I can describe Focus Factor. I take it every day to keep me focused and energetic, and countless people who have heard this program across the country have called to say they love it, too. For more information on how you can try it risk-free, call this toll-free number. It's 1-800-_____. That's 1-800-_____.

Call now and mention the Vitalbasics program and you can even get a free 1-month supply to try with your order. Ask for details. Focus Factor is for senior citizens...working moms...students in every grade level...business professionals...anybody who wants and needs a natural boost in their memory, concentration, mood, and energy.

There's a 30-day money back guarantee. Call and ask about the doctor's special offer. It's 1-800_____.
That's 1-800_____.

Focus Factor radio infomercial "Bill"...version 2...7/11/00 SHOW # 4400

BILL: Hi and welcome to the *VitalBasics* radio program. I'm Bill Begley. This is the health and wellness program you can hear on over 200 radio stations from coast to coast. We're in California, Massachussetts, Florida, Texas, Hawaii, Alaska...you name it, we're there, and we appreciate you tuning in today. Thank you very much for joining us.

Today we're going to talk about the most important thing in your life..and, for that matter, the most important thing to your *children*. It's not your job, or your money, or your house or even your car. Y'know what it is...the most important thing? It's your *brain*. Yes it is. Because when your brain...or your mind...isn't working the way it should, nothing else matters...nothing seems to go right. It's like a dead battery. But think about it...and again, think of your children...when your brain *is* working the way it should...you're energetic, you're in a great mood, you get more done, you're more outgoing and likable...you stand out from everyone else...and it doesn't matter if you're 5 years old or 105! Now, grab a pencil and a piece of paper, because what we're going to do is give some incredibly useful information this half-hour on how you and your children can supercharge your brain. I'm telling you, it's easy, it's systematic...it's a technological breakthrough that's *sweeping the nation*. If your children have trouble behaving or concentrating in school...*or* if you have older relatives or friends who seem to be losing their mental edge...even if you're in business and you have trouble staying focused or "on task" during the day...please listen at least for a few minutes because you'll be able to help yourself and the ones you love. Okay? Okay.

My guest, on the phone with us today, is Dr. Kyl Smith. He's Founder and President of the Creative Health Institute in Texas. He's a recognized expert in the field of nutrition, pediatrics and anti-aging. He's Vice president of Education at the Texas Integrative Practitioner's Association—it's a non-profit agency that includes Medical Doctors and alternative health practitioners and so on. And he's also been a Senior Advisor of Research and Development for a major pharmaceutical company. *Thousands and thousands* of hours, folks, this man has put into this breakthrough, this *secret* that we're going to let you in on today. Dr. Smith, we have so much to talk about...it's a blessing to have you on the program. Welcome!

Kyl: Thank you, Bill. I'm honored to be here.

Thank you very much for joining us. Now, we *all* feel run down from time to time. We all get cranky and tired...we get that foggy feeling...sort of what we call mental fatigue. But lately it seems like it's reaching epidemic proportions. Would you agree with that?

Absolutely. I mean we see this in our children. We have obviously many children, several with lack of attentiveness; lack of ability to focus and concentrate, but this is permeating teens, adults, and senior citizens. Many people say that they come home and they just don't have the energy to give to their families—their husbands, wives, and spouses—what they need to after they get done with work. In other words, they are so drained; their mental batteries are so drained when they get home from work they just can't be the people they want to be.

I know you've done a tremendous amount of research behind this product...folks, it's called *Focus* Factor. Dr. Smith, what's the story behind Focus Factor?

It really all started when I was finishing my internship and starting my own practice. You see I was sitting there day after day in front of patients that had a similar complaint—and this is as true today as it was 7 years ago. Patients would come in and they would say, Dr., I'm tired. Like I said I have to drink coffee in the morning to wake up and I have to do something in the afternoon like caffeine to stay awake. Or they'd say, "My child has problems with attentiveness and focus and concentration in school." Or "My spouse is irritable when they get home from work. Is there anything we can do that's natural, that's good for them that can help them?" Well, Bill this question got under my skin. It really bothered me because I was suffering with the same exact thing.

So, you're in the same boat as the rest of us.

Exactly. We all were. So, of course the first thing I did is I did the easy search. I went out to doctor friends of mine, physicians, and asked them what do you say when your patients ask this question? And none of them had a good answer. They would say typical things like, "Tell them to reduce their caffeine intake 'cause caffeine kills your energy in the afternoon." But I'd say to them, "Well they're drinking caffeine like I am because they're tired in the first place. What do you do?"

It's a vicious cycle.

It's a vicious cycle. So I created this product for my own practice and it became so popular a USP pharmaceutical company picked me up and said, "Dr. Smith we want you to create a product specifically for kids." We did that and then they put me on my first tour and Bill I went out there and I was shocked. I was taken aback by the results people were getting in their lives. And they weren't the results I expected. Like, I built the product to help improve focus, concentration and memory.

Right.

But what happened is that people were coming to the lectures with stories about how it had transformed their child's self-esteem. Let me give you an example. This one lady stood up and it was I think, Rochester, Indiana. She stood up and she said, "The thing that touches me about Focus Factor is how it's changed my son's life." "My son was the child at school that nobody wanted to play with. He would throw temper tantrums and disrupt class if he didn't get his way. After giving him Focus Factor for just one week, the teacher wrote a note home and said what are you doing different? Your son is sitting still and he's completing his work."

Wow, so the teacher noticed this?

Exactly, in just one week. Now the Mom said...again, she was sitting there crying, and this really shook me too. She said, "The thing that touches me is my son is going to be a different man because of this product. Instead of being the boy that goes to school without interpersonal relationships, instead of being the child that no one seems to like, he's nurturing friendships and his self-esteem is improving. That's when I said to myself this has to be my God-given mission—to teach people about nutrition and the brain. It's important for kids because their every-day experience translates into who they feel like they are. But it's the same for us adults, too. If we have good days on top of good days, this compounds and it improves our self-esteem. And I picked up somewhere along the line in my lectures this statement: "To do really good in life, you've got to feel really good." And that's what Focus Factor is all about.

Well, and it's such a unique product, too. I mean, there are products out there...you hear about them all the time...for things like prostate health, and cardiovascular health and so on and so forth. But I have never ever ever heard of a breakthrough like this that specifically targets the most important part of our body—the brain.

The brain. The very organ that determines how we feel when we wake up in the morning and how we feel when we come home from work. The organ that's gonna determine what kind of day we're going to have this afternoon, and if I'm in a business where I have to talk to people, how I'm going to communicate with them. It's going to determine when I come home what kind of spouse I am and parent because of my mental energy reserves. If our mental batteries are drained, it's going to affect how we relate to our world.

Is there anything unique about the brain versus, say, other organs in the body in terms of what it needs to produce that energy?

Absolutely. The brain seeks specific forms of nutrients for energy production, and this is key. If you happen to find a magnesium from the wrong source, you're not going to produce mental energy from that magnesium, no matter how much you take. So we selected exactly the types, the sources of nutrients, that the research showed was necessary to improve brain function.

So it's kind of like putting a key in a lock. You know, if you have the wrong key, it's not going to open it up.

That's a great analogy, exactly.

In fact, we have someone who knows exactly what we're talking about. Anita Sohn is with us. She is a school administrator. And listen to this, this is an amazing story: She put her entire *class* on Focus Factor. Anita, welcome to the program. Can you tell us why you did that and what happened?

Anita Sohn: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say, 'what can we do about this?' then I would start to tell them, 'Okay, this is what I would do in this situation. And it couldn't hurt, it can only help...try it.' So they started, one by one, each child started testing out the Focus Factor. And, as a result, my entire class was on the Focus Factor. We have just...we've had just a wonderful time on it.

So you put 'em on the product...you talked to their parents first...but you put 'em on the product, and what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely. Now, I've been on the Focus Factor personally myself for 2 years. When I got on it and started finding the difference that the supplement makes on a daily basis...not just when I need it...I am the most awesome woman on Focus Factor, as well as my children.

So I think it would be safe to say you're a believer in this product.

Anita: Oh, *very* safe to say.

Well, Anita, it has really been an honor to talk to you. I know you're busy and I don't want to take up any more of your valuable time...you've obviously got more important people, your students, to spend some time with. But thank you for being with us today, and telling us this very amazing and important story.

Anita: No problem! Thank you. Bye-bye.

Bye bye. Now, back to you, Dr. Kyl Smith. Obviously some fantastic and life-changing results with children. And folks listening...imagine having the best of both worlds with *your* kids: Better behavior <u>and</u> better performance in school. That is something that's pretty much unheard of these days. But doctor, you say that men and women got hold of this stuff after the kids tried it and they love it too.

Absolutely. The typical story that we get is a parent, let's say a mom, would typically buy Focus Factor for their child because they wanted to enhance their ability to focus and concentrate in school. And pretty soon, their son would come home from school and say, "Mom, I had the best day. I aced my test and I finished my homework before I got home." And the mom would say to herself, "I need this stuff. I need to go to work and get my work done before I come home. I need to come home with energy to spare and have less irritability." So pretty soon the mom would start taking the product. She'd love it so much she'd tell the dad about it. Pretty soon you'd have family after family, doctor and physician after physician referring the product to more and more people.

Okay, we have to take a quick break. But coming up we'll talk with some doctors who recommend Focus Factor to their patients; as well as a member of the House of Representatives from the state of Texas. We'll hear how he's become a better lawmaker and a better husband and father because of Focus Factor—a very dramatic story. Right now, it's your chance to call our toll-free telephone number so you can get on a 30-day, risk-free trial of Focus Factor and try it for yourself. So let's take a moment and do that now.

CTA #1

And welcome back to the VitalBasics radio program. I'm Bill Begley and our special guest today is Dr. Kyl Smith. He's the creator of a product called Focus Factor. Fascinating story behind it. It started out as supplement to help kids with learning and behavior problems—and I think we all know that can be such a nightmare...so it helped with that at sort of a grass-roots level, but then adults starting using it because they found that it had this amazing effect on their own memory, energy, mood...and just their ability to stay "on-task. Earlier this week, I had the great pleasure to speak with some people who say that Focus Factor has dramatically improved the quality of their life. So folks, if you or anyone in your family could use a little help with mood or energy, concentration or memory—just sort of clearing out the mental cobwebs—please listen to this. Jon, if we could, let's roll the tape.

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings that...it gives you a little pick-up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me—right there. I've attributed a lot of mood swings or depression here and there, you know, to just the age I'm going through right now, y'know, being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. Everybody I've talked to that I've recommended it to that has taken it has said the same thing.

Kristin Rister-Wheatley: My name is Kristen and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I'm on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance the way she felt in school—the way she could concentrate. I've shared it with my friends. I've shared it with my family. Everyone feels the same way. We all love Focus Factor.

Dr. Smith did you have any idea when you created this product, Focus Factor, that it would have this kind of affect on peoples' lives?

No I didn't. And like I was saying previously, I developed Focus Factor to help enhance focus, concentration and memory. So as a doctor, I'm expecting to hear stories about focusing and concentrating. What I never imagined is how this would impact our lives, on a very personal level. For instance, when we were filming a television program around Focus Factor I had a wife say that she felt that this Focus Factor saved her marriage. She said that her husband and her both now come home from their work with more mental energy, less irritability, they can relate and communicate better and, maybe most importantly, they're patient with each other when they communicate. She said this literally saved her marriage. I hear stories from people constantly about the benefits that this product brings in their lives that I would have never imagined.

Well, I know that everybody's a little bit different and results will vary from person to person. But in your experience, how quickly does it work?

Focus Factor...we see a noticeable improvement in the way a person feels it doesn't matter if it's a child, a teen or an adult, in 1 to 10 days. Now I typically tell people, stay on Focus Factor each and every day consistently and you'll notice a difference within 2 weeks. But I've got to tell you Bill that most people come back after the first day and they say, "Wow, what did you put in this stuff? I haven't felt this good since I was a teenager." We've got senior citizens say, "Dr. Smith, you've given me my life back. I now have that energy—that mental energy—that I used to have when I was a child." Stories like this, it's just incredible.

And this is different from regular multi-vitamins in that you're going to actually feel this working pretty quickly, right?

There's a big key there, and that's another great question. It's very common when I'm in a live audience that I'll ask people to stand up if they are taking a multivitamin. Now, almost everyone stands up. But then I ask the people to sit down who are actually feeling a difference from that vitamin they are taking, in some way, shape or form, energy or they feel healthier. And the only people who sit down are the people that tell me they are taking Focus Factor. The rest of the people standing up, which is usually the majority of the people who haven't been introduced to the product yet, will tell me that they have been taking a vitamin for years and they have not noticed one benefit.

Yeah that's a really good point. I don't know anybody who says, "Oh, I take a multivitamin and I feel great." You know, they just kind of take it. It's just something they do, and they never feel any results from it.

Right. And my goal and my dream, my desire is to educate people that we should expect much more from our nutritional supplements.

All right, we'll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks, these are people we spoke with earlier this week. First we're going to hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients—adults, children, seniors—some very interesting comments here. And Jon, if we could, let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about a year and a half ago. Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets. From that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue...poor focus and irritability...it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function—not just with children, not just with adults, and not just with seniors...it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it...um...everyone in my family is on Focus Factor. Number one, yes it has vitamins and minerals in it. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

So there you have just a few of the many doctors who recommend Focus Factor to their patients. These doctors were not paid in any way for their comments today. Dr. Smith, there are obviously thousands and thousands of supplements out on the market. Out of all these products, why is Focus Factor getting all this attention?

I think the bottom line is Focus Factor works. Physicians recommend Focus Factor across the country because they realize very quickly it works for themselves and it's working for their patients. And it's helping improve lives in many different ways—from the improved focus and concentration to improved emotions, feeling like you're going to have a better day, feeling like your on you're game. And this results in referral after referral after referral. And as you know we have distributed this product throughout the US and Canada for five years now. The exciting thing is Focus Factor is now available direct from the manufacturer, so people can get a hold of Focus Factor and not have to pay that expensive office visit.

All right, I want to take another quick break here. Folks now you can try Focus Factor…I hope you will, for yourself, for your children, your spouse…absolutely risk-free—even the phone call is free, and we're going to give that number up in just a moment. And we'll be right back to talk some more with Dr. Kyl Smith right here on the Vitalbasics radio program.

CTA #2

And welcome back. Bill Begley talking with Dr. Kyl Smith about Focus Factor. This is a ground-breaking supplement sweeping the country right now that helps supercharge your mental edge—your brainpower. And we're talking about some incredible benefits here with memory, concentration, mood, energy—absolutely remarkable for children helping them overcome learning difficulties and behavioral challenges—seniors who are starting to feel the mental effects of getting older. Men and women who are trying to juggle family and work. Absolutely remarkable product. And it is my great honor and pleasure right now to have on the phone with me Representative Rick Green. And Rick is with the state house in the State of Texas. And he uses Focus Factor himself and his family. Representative Green, welcome to the program. Thank you very much for joining us.

Rep. Green: Glad to be here, thanks for having me.

Now, what's your story with Focus Factor?

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the time that you *do* get with the family and I wanted something that wouldn't just affect me physically...I mean, I've had vitamins before that I could tell a physical difference...but with this product I was looking for something that would give me the mental clarity to deal with all these different tasks at the same time...and that was what I had been told about Focus Factor...started taking it about a year ago and found that was *exactly* the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of, y'know, how you...you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen. I mean, I could...whatever the task at hand was, I could concentrate on getting that done knowing I had these other things to deal with…

Sounds to me like you give a whole new definition to the phrase multi-tasking.

Rep. Green: [laughs] If there's a multi-*multi*-tasking, then that would fit.

Now, it sounds to me like you've really personally benefited from this. Do you feel like your family has benefited as well?

Rep. Green: Well, my 4 year-old has been taking the chewable vitamin, which...I took the chewable Focus Factor for awhile myself before I got on the adult Focus Factor. And the great thing about it is, we've always tried to get him to take a vitamin of some kind, and when Dr. Smith came out with Focus Factor it was the only one that he'll say, 'I want to take my vities!'.

So he likes the taste.

Rep. Green: He likes the taste, so that's a significant advantage over most of the products that are out there.

What would you say to our listeners who might still be skeptical about Focus Factor?

Rep. Green: Well, I think, um, being someone...y'know, personally I've always been interested in taking supplements and vitamins and those kinds of things, so it was a lot easier, um, for me to make the decision to try something that I thought was gonna help what I was looking for. A lot of times we spend money on something that's supposed to be doing all these great things but you never feel it, you never notice if it did. With Focus Factor you're going to actually *know* that there's something different in the way that you are operating as a human being. Your brain's working better, your body's feeling better. I mean, with a product like that, what have you got to lose?

And your experience has been that it's really changed your life, helped your family, it's been good for your kids. Sounds like it's been great for you.

Rep. Green: And let me tell you, I can tell when I *don't* take it.

That's interesting. That's very interesting. Because, that's always an important test of a supplement, incidentally, is if you feel a difference when you *stop* taking it.

Rep. Green: Right.

Well, thank you very much for coming on the program today, Representative Rick Green. I know you're very busy and we appreciate you dropping by for a few minutes.

Rep. Green: You bet. Y'all have a great one.

Dr. Smith, what goes through your mind when you have a state representative tracking you down to tell you what a great product you have?

It's amazing to me. I never imagined that Focus Factor would enhance so many lives across the country. And I really love to hear testimonies from professionals like Representative Green who have the ability to really impact thousands of lives with what he does every day.

Well, I'm looking at the clock...we're almost out of time. Are there any final words of wisdom you want to leave our listeners with?

Absolutely. I want people to try this product because of what I've seen in my own life and I've seen across the country happen for people who take it. I mean think of how many times you've walked into a room in your house, you got there and you said to yourself, "What am I doing here?" How many times have you misplaced the car keys? Or, how many times have you gone through the embarrassing experience of meeting someone, you're being introduced right now someone from a friend, you meet them, by the time your hands part the name falls to the floor.

Happens all the time.

We're all having problems with memory today. It's not our fault. We have an innate ability to have an awesome memory. All we have to do is feed our brain the nutrients it's starving for to enhance energy production. And Focus Factor supplies those nutrients. And you have an opportunity to try this product and experience what it can do for you firsthand.

So it's kind of like memory in a bottle.

Exactly.

Folks, it has science behind it. It's recommended by doctors, parents, kids who say they can focus and concentrate better, seniors can benefit enormously...if you're in business, this is a must. A remarkable scientific breakthrough. The first of its kind. And Dr. Kyl Smith, thank you very much for coming on the program, being our guest and bringing us this information. I know you're a very busy man and we wish you all the best with Focus Factor.

Thank you Bill. I've enjoyed it.

Folks, we're simply out of time. I'd like to thank our engineer, Jon, today for all of his help and assistance. And definitely thanks to all of you for making this, once again, one of the most popular health and well-being programs in the country. We're on over 200 radio stations from coast-to-coast and it's all because of you. Thank you very much and we look forward to talking with you again very soon right here on the VitalBasics radio program. Til then, take care and God Bless.

CTA copy: Hi, this is Bill Begley. If you would like more information about *Focus Factor*, the supplement that supercharges your brain, please call toll-free: 1-800-_____. That's 1-800-_____.

For over 5 years, Focus Factor has been available only through doctor's offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program when you order, and you can even get a 30-day supply absolutely *free*.

Focus Factor is effective, all-natural, and guaranteed to give you noticeable results *quickly* or your money back. There are two formulas: the berry-flavored chewables for children…and the easy-to-swallow tablets for grown-ups.

Call now and be sure to ask about the doctor's special offer. It's 1-800-_____. That's 1-800-_____.

Focus Factor radio infomercial...Leisa...version 2...7/10/00 SHOW #4500

Hi and welcome to the *VitalBasics* radio program. I'm Leisa Hart.

Are you under a lot of stress trying to juggle work and your family? Do you sometimes have mood swings or trouble remembering things? Or maybe your child has behavior problems or learning difficulties. Well, listen up, folks. We're going to discuss a revolutionary breakthrough that is literally sweeping the nation. It's helping countless people of all ages get back their mental edge. My guest today is Dr. Kyl Smith, founder and president of the Creative Health Institute in Texas. He's a recognized expert in the field of nutrition, pediatrics and anti-aging. He's Vice president of Education at the Texas Integrative Practitioner's Association—it's a non-profit agency whose members include Medical Doctors and alternative health practitioners. He's been Senior Advisor of Research and Development for several major health care and pharmaceutical companies. And what brings us to today's topic is he has conducted *thousands* of hours of research to create this new breakthrough called *Focus Factor*. Dr. Smith, we have so much to talk about...and I am so glad to have you on the *VitalBasics* program.

Thank you. I'm honored to be here.

This is an incredible story. And I want us to start at the very beginning. Tell us about what inspired you to create *Focus Factor*?

It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time. I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels?* Or they'd say something similar like, *Y'know, my son has problems with attentiveness in school. He can't focus and concentrate, and it's affecting his academic performance.* Or...or the best one: the wife would say, *Hey, my husband comes home from work and he's drained. He's irritable, he has mood swings...he's just, it's like his batteries in his brain are drained at the end of the day. Is there anything that we can do to boost his energy levels and get rid of those mood swings?* Well, the problem was, these questions, these constant questions, got under my skin because I was suffering with the same thing. I mean, *I* was that guy waking up in the morning and drinking coffee just to try to feel good, and I was drinking some kind of caffeine in the afternoon just to try to stay awake. And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, *Hey, what do you say when your patients ask this question? Did I miss something?* And they didn't have a good answer, either. They'd say something like, well, *cut your caffeine consumption out.* I'm thinking to myself, *well, that's why we're drinking caffeine! We feel tired in the first place, right?* So I looked for a solution, and ultimately this led me to do a medical and nutritional research search of all the nutritional information that's out there...regarding nutrition and the brain. This search resulted in the first technology that we put into Focus Factor. Pretty soon I was picked up by a pharmaceutical company that asked me to create a product specific for kids to enhance brain function—to increase focus and concentration. Well, this product was an outlandish success. And I'll never forget this one lecture that they sent me out to across the country. This lady stood up—and I'm telling you this because this is a moment that really changed my life—this lady stood up and she said, *Dr. Smith, the thing that touches me about Focus Factor is what it's done to my son's life. You see, before Focus Factor, my son was the boy at school that no one wanted to play with. He would throw temper tantrums and disrupt class if he didn't get his way. After 1 week of taking Focus Factor, his teacher wrote a note home that said, 'what are you doing different? Your son is sitting still, finishing his work in class...'* And the mom said this: *The thing that is most impressive is I'm watching his self-esteem grow.* Well, Leisa...as she's crying, I'm sitting there trying to fight back tears and I'm saying to myself, *This is a mission.* We've got children suffering with this today. We've got adults and senior citizens with problems with focus and concentration, and this can have a profound negative effect on our life. Somewhere along the line I picked up the saying, *In order to do really good in life, you've got to feel really good.* And that's what Focus Factor is all about.

Now, as I hear you saying this, it's a picture I see everyone that I'm relating to as you're saying these...y'know, inability to focus...and then you're talking about the mother saying she's having her child on Focus Factor. I've got family members, I've got myself, everyone that can relate to this...

Exactly.

Now tell me what is the principle behind Focus Factor?

There are really 2 underlying principles. Number 1...and this might seem simple on the surface but it's really important. We've gotta make up for the nutrition that's lacking in our diet today. ~~You see~~, it's virtually impossible to come out of the grocery store with nutritious food today. Most everything in our cart, even if we're trying to avoid junk food, has been processed. Like refined sugar, refined flour... We've gotta realize that most of the nutrients in our food have been milled and refined out. This means we're filling our body with foods that are void of nutrition. What does this mean to us in real life? It means we wake up in the morning and we feel lousy. We've slept 8 hours but we still feel fatigued and lethargic. You try to hit that 'snooze' button to get another 10 minutes of sleep, like that's going to make a difference. Then you go to work and you feel irritable. You can't get much done. You come home and you feel mentally drained. So the first principle...we've gotta make up for what's missing in our diets. The second principle...this is really profound and this is the technology behind Focus Factor: Is there are specific nutrients that feed the brain's ability to create mental energy. If these specific nutrients are missing in our diet, or the multi-vitamin that we happen to pick, we'll never feel an increase of energy. We can be taking a multi-vitamin and still feel sluggish and lethargic. Focus Factor makes up for that by supplying the specific nutrients the brain uses for energy production.

Now with that in mind, we've got a formula for kids and a formula for adults, right?

Right.

Now tell me this, in your experience, do you see improvements in kids' school work?

Absolutely. We've even seen dramatic improvements in academic performance. And let me give you an example. A child that comes to mind, his name is Brian. He's the son of a doctor in my area that's a huge advocate of Focus Factor, probably because of this, y'know, this result in his own life. Brian was a child that was kicked out of no less than 4 schools. He would not respond to his parents or any kind of authority outside like, like principals or teachers. After being on Focus Factor, in one year he was on the honor roll...and two years later he graduated from high school with honors. Now, the most impressive thing to me is not the academic performance...and let me say, that's an extraordinary result. That doesn't happen in every case. But to me the most impressive thing isn't the better grades. What's impressive is the fact that Brian's self-esteem went up. He feels better about himself. He communicates with his parents, with peers, with authority figures like teachers even better. And as a result, he, in my opinion's gonna accomplish more in life. Instead of graduating as that child that feels like a failure, he graduated with quite an achievement and feels better about himself. That, to me, is the magic and the difference that feeding the brain, feeding the batteries in our brain and recharging them, can do.

So how about home-schooling? It seems like Focus Factor could really be a benefit because at home there's a lot of distractions, there's a lot of challenges.

True. I think you're correct. And one of the things that I've noticed about home-schoolers as I travel across the country and do lectures, it seems that many of the lectures are filled with parents that have chosen to do home schooling. And it's my perception that these parents are more attuned to what's going on in their child's life. It's like they've taken responsibility for what's going on in their education, and they're very interested in what they can do nutritionally to help boost their child's performance. And the most common story that these home-schoolers tell me is, with Focus Factor, their child accomplishes more in less time with energy to spare...to go play and do the things they might want to do. So it's neat. They can be right there with their children and they see first-hand the experience of feeding the brain.

. I have with me now Anita Sohn. Anita is a school administrator, and she put her whole *class* on this amazing product. Anita, can you tell us why you did that and what happened?

Anita: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, or previously to that time, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say, 'what can we do about this?' then I would start to tell them, 'Okay, this is what I would do in this situation. And it couldn't hurt, it can only help...try it.' So they started, one by one, each child started testing out the Focus Factor. And, as a result, my entire class went on the Focus Factor. We have just...we've had a wonderful time on it.

And what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely.

That's just an unbelievable story. So they were really aware of the difference it makes. They can feel it.

Anita: They were *very* aware of it. Now, I've been on the Focus Factor personally myself for 2 years. When I got on it and started finding the difference that the supplement makes on a daily basis...not just when I need it. I am...I am the most awesome woman on Focus Factor, as well as my children.

So it would be safe to say that you're truly a believer in this product.

Anita: Oh, *very* safe to say.

Well, Anita, it has really been a pleasure talking to you. Thank you so much for being with us today.

Anita: Thank you. Bye-bye.

We're going to take a quick break. Coming up you'll hear from some doctors who recommend Focus factor to their patients. Right now it's your chance to call our toll-free telephone number so you can get a 30-day risk-free trial of Focus Factor. We'll be right back with Dr. Kyl Smith on the VitalBasics radio program.

CTA #1

Welcome back to the VitalBasics radio program. I'm Leisa Hart with special guest Dr. Kyl Smith, creator of *Focus Factor*. It started out as a supplement to help kids with learning and behavior challenges...but Doctor, you say that men and women got a hold of this stuff and they love it, too...

Well that's right, Leisa. The original formula for Focus Factor was a chewable for kids. But the interesting thing that happened was...the product would go into the typical household. The child would come home from school and say, *Mom, I had a great day! I aced my test and I finished my homework before I got home!* And the mom would notice that the child is less irritable...she can connect with him better. And then, of course, the mom started saying to herself, *Well, I need this stuff, too. I need to have a better day. I need to get more accomplished, and I certainly could use a lift in my mood.* This product went out into the field and it is an outlandish success. Because us adults realize that we need a mental boost...a natural mental boost every day.

So *that's* how you know whether a supplement really works. So it starts with the moms are giving it to the children...the children are performing wonderfully. And they'rekind of like, *I need this stuff, my husband needs this stuff...*

Right.

Y'know, friends are telling friends. School teachers are telling the parents about it. And then doctors are telling their patients...*you need to try this stuff.* I can't think of a single person on this planet that would not benefit from this...

It's true.

I mean, men, women, young old, children, seniors, everybody…

That's true.

It is fantastic. **[edit]** Now, earlier this week we spoke with several people who say Focus Factor has dramatically improved their quality of life. So if you or anyone in your family—anyone you know—could use some help with mood, energy, memory…y'know just clearing out those mental cobwebs, you need to listen to this:

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings. That it gives you a little pick-up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me—right there. I've attributed a lot of mood swings or depression here and there, you know, to just the age I'm going through right now, you know being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. I notice right away when I don't take Focus Factor. It's hard to describe. You just have to try it. And everybody I've talked to that I've recommended it to has said the same thing.

Kristin Rister-Wheatley: My name is Kristen and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I am on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance the way she felt in school—the way she'd concentrate. I've shared it with my friends. I've shared it with my family. They, everyone feels the same way. We all love Focus Factor.

Dr. Smith, did you have any idea when you were creating *Focus Factor* that it would have this kind of effect on so many people's lives?

I had no idea. Realize from a technical standpoint I created the product to enhance focus, concentration and memory…and even boost emotions like feeling better with a better mental state, mental attitude. I never expected, though, the real-world examples that come from people taking Focus Factor. I'm always surprised… I'll never forget, this one lady came up to me during filming a television program…she was an elderly lady…and she said, *Dr. Smith, I have to tell ya…before Focus Factor, my husband was the most irritable, cantankerous man you've ever met in your life. But after Focus Factor, we cut off the television now. We go on walks. I can get him to garden with me. We do hobbies like we used to. It's like I've got my old sweetheart back.*

Oh, that's wonderful. Imagine if she coulda had Focus Factor a long time ago…but better late than never.

Exactly.

I'm sure she was just elated.

Dr. Smith, in your experience how quickly does it take to work?

Well I generally tell people 10 days. Take Focus Factor consistently for 10 days. But what's really common is the fact that you're gonna notice a difference the first day you take it. I say 10 days to be conservative. I don't want anyone to be disappointed. And the thing that I always point out is there are absolutely no stimulants in Focus Factor. There's no caffeine. As a matter of fact, it's the nutrients that our brian needs for energy production so it's the best way we can supplement our diet and support our brain, which is obviously the most important organ in the body.

Now, for people out there are seniors today, what's this going to do for them?

Well, the most common thing seniors say, is they feel like they recaptured that energy that they had when they were younger. I mean, Focus Factor literally puts that spark back in their life where they feel like doing more. And let's talk about memory if we can. Because, again, like I say, seniors *worry* about their memory many times. I think the whole world, especially...let's just take this country...are suffering with memory problems. You've got children at school with problems focusing and concentrating and learning. You've got adults, you've got seniors. Now think about this: How many times have you been introduced to somebody...and, or let's say the person listening's been introduced to somebody...and by the time their handshake breaks their name falls to the floor. Or you go to the grocery store. And milk's on your list. You come home, you got 10 items...but no milk.

Where did the milk go?

Well, the bottom line is, we're all suffering with memory problems many times, if we'll be honest. It impairs our ability yo learn. For professionals it impairs their ability to provide a great living because, if they can't learn new tasks, chances are they're not performing to their optimal capacity. It affects kids, and believe me it affects your self-esteem. Focus Factor provides the nutrients necessary to enhance memory, which is a blessing to all of us.

And folks listening, do you remember what the doctor's name is? A little test. It's Dr. Kyl Smith. I'm Leisa Hart. You may have already forgotten that. But the information is there...we just need something to help us get it out.

Everybody has a natural ability to have an awesome memory. You just have to have it released. And Focus Factor provides the nutrients that's going to literally allow you to learn new tasks and access old memories.

Okay let's listen to what some doctors are saying about *Focus Factor*. First we'll hear from Dr. Sean Sieracki...and then from Dr. Jim Van Meter. Now, these are doctors who recommend *Focus Factor* to their patients. Let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about ...a year and a half ago Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets, and from that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue...poor focus and irritability...it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function—not just with children, not just with adults, and not just with seniors...it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it...um...everyone in my family is on Focus Factor. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

So there you have just a few of the many doctors who recommend *Focus Factor* to their patients. Now, Dr. Smith, there are obviously thousands and thousands of supplements out on the market today. Out of all those products, what is is about *Focus Factor* that is getting all this attention?

We've got this wonderful grass roots thing going on in doctor's practices and in families across the country. And I think it's because Focus Factor *works*. I mean, think of how many times people take a vitamin or nutritional supplement and they absolutely do not notice *any* difference in their health, their mental clarity, or anything. Focus Factor very rapidly feeds the brain so you feel like you've got better attentiveness. Increased focus, concentration, increased memory...better mood, y'know what I mean? A better spirit about you.

Does that just turn a light on for them?

That's a great example. Kinda like turning a light bulb on. I think a lot of people, at least in my practice, feel like the light above their head when it lights up when they get an idea, like in a cartoon, is a dull light. With Focus Factor you get a bright light above your head.

Well I'll tell you what, I'd like that bright light all the time. We're going to take another quick break here. Folks, now you can try *Focus Factor* for yourself...absolutely *risk-free*. Even the call is free. The telephone number's coming up. I'm Leisa Hart, and you're listening to the *VitalBasics* radio program.

CTA #2

Welcome back everyone. Leisa Hart talking with Dr. Kyl Smith about *Focus Factor*...a groundbreaking new supplement that helps improve your mental edge. Doctor, for people just tuning in, give us a quick re-cap of the concept behind *Focus Factor* and why our listeners should choose *this* over all the other supplements out there.

Well, Leisa, the concept is simple. Today people are waking up feeling lethargic, they lack energy, they experience mood swings and irritability, lack of focus...because, quite frankly, our diets are just not providing the brain-supporting nutrients that we need to feel great. So I designed Focus Factor to help both adults and children *supplement* their diet...add those brain-supporting nutrients back to the diet...what I never imagined, though, is the stories that come from this product. I mean, I created it to increase focus, concentration and memory. The stories that come back, though, are higher self-esteem. Parents feel like they're better parents because they go to work, they get more done in less time, they come home with energy to spare that they can give their children and their spouse. The stories are just wonderful, life-changing experiences and it's caused me to realize that we all need to support the most important organ in our body...and obviously, that's our brain.

And you're going to feel this pretty quickly, right?

Typical person says that they notice a difference in how they feel within just 1 to 10 days.

Absolutely fantastic.

Texas Rep testimonial: Now, it's my great honor and pleasure to have with me on the phone Representative Rick Green. He's a member of the House of Representatives in the state of Texas, an attorney, business owner and father of a two children. Obviously a very busy man. Representative Green, thank you for joining us.

Glad to be here, thanks for having me.

Now what's your story with *Focus Factor*?

Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the time that you *do* get with the family and I wanted something that wouldn't just affect me physically...I mean, I've had vitamins before that I could tell a physical difference...but with this product I was looking for something that would give me the mental clarity to deal with all these different tasks at the same time...and that's what I had been told about Focus Factor...started taking it about a year ago and found that was *exactly* the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of, y'know, how you...you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen. I mean, I could...whatever the task at hand was, I could concentrate on getting that done knowing I had these other things to deal with...

Sounds to me like you've given a whole new definition to the term *multi-tasking*.

[laughs] If there's a multi-*multi*-tasking, then that would fit.

Do you feel like your family has benefited as well?

Well, my 4 year-old has been taking the chewable vitamin, which...I took the chewable Focus Factor for awhile myself before I got on the adult Focus Factor. And the great thing about it is, we've always tried to get him to take a vitamin of some kind, and when Dr. Smith came out with Focus Factor it was the only one that he'll say, 'I want to take my vities!'.

So he likes the taste.

He likes the taste, so that's a significant advantage over most of the products that are out there.

What would you say to our listeners who might still be skeptical about Focus Factor?

Well, I think, um, being someone...y'know, personally I've always been interested in taking supplements and vitamins and those kinds of things, so it was a lot easier, um, for me to make the decision to try something that I thought was gonna help what I was looking for. A lot of times we spend money on something that's supposed to be doing all these great things but you never feel it, you never notice if it did. With Focus Factor you're going to actually *know* that there's something different in the way that you are operating as a human being. Your brain's working better, your body's feeling better. I mean, with a product like that, what have you got to lose?

And your experience has been that it's really changed your life, helped your family, it's been great for your kids. Sounds like it's been great for you.

And let me tell you, I can tell when I *don't* take it.

That's always an important test of a supplement. If you feel a difference when you *don't* take it!

Right.

Well, Representative Green, thank you so much for coming on the program today. I know you're very busy and we appreciate your time.

Y'all have a great one.

We're almost out of time. This is *your* chance for any final words to our listeners. Anything you want to say before you go?

Well Leisa, Focus Factor is so important to me...I wouldn't start a day without it. I wouldn't let my family go without it. I wouldn't imagine letting my little girl go through life without the nutrients she needs for a great day so she can focus and concentrate and feel good about herself. But maybe the most profound thing is what this does in also adults' and senior citizens' lives. Senior citizens who felt like they don't have that mental spark...they've got that spark back that they used to have when they were younger. People who feel like they're going through a drudgery, a treadmill every day of feeling lethargic and not getting anything done. They're reaching for caffeine and candy to try and mentally stimulate themselves, which, of course, doesn't work. Focus Factor feeds the brain so you literally have that energy back so you feel like you can do more in less time and come home with energy to spare and spend that wonderful energy and time with your family.

Dr. Kyl Smith...thank you so much for being my guest today here on VitalBasics.

Thank you so much, Leisa. I've enjoyed it.

Well, folks, we're out of time. I'm Leisa Hart. Thank you for joining us on the *VitalBasics* radio program.

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CTA copy: . If you would like more information about *Focus Factor*, the supplement that supercharges your brain, please call toll-free: 1-800-_____. That's 1-800-_____.

For over 5 years, Focus Factor has been available for men, women, children and seniors only through doctor's offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program and when you order you can even get a 30-day supply absolutely *free*.

Focus Factor is effective, all-natural, and guaranteed to give you noticeable results *quickly* or your money back. And you *don't* have to buy a separate multi-vitamin because all the essential nutrients you need are in this product. There are two formulas: the berry-flavored chewables for children...and the easy-to-swallow tablets for grown-ups.

Call now and be sure to ask about the doctor's special offer. It's 1-800-_____. That's 1-800-_____.

Focus Factor TV Show "Bill's Case Studies" transcript—April 19, 2001

Opening disclaimer: The following is a paid program for Focus Factor, brought to you by Vitalbasics.

IMPORTANT NOTICE TO CONSUMERS

THIS PRODUCT IS A DIETARY SUPPLEMENT. IT NUTRITIONALLY SUPPORTS NORMAL BRAIN FUNCTION. IT IS NOT A TREATMENT FOR DISEASE. This product is not intended to treat attention deficit hyperactivity disorder or any other mental illness. If you or your child suffer from mental illness, consult a physician for proper treatment.

Title Screen up: "Brain Starvation"

Karen Newton: I kept thinking, it's just approaching middle age. I couldn't sit down and watch a TV show or read a book without falling asleep. Because I was just so tired.
Lois Miller: I didn't think of it as brain starvation. I thought of it as loss of energy...older age...being able to keep up.
Anthony Lazzaro: The most important part of your body is your brain. A lot of people forget to feed their brain the proper food.
Barbara Clemente: Actually I went to a doctor and said, "I'm tired all the time. I can't concentrate. I'm forgetting words." And he told me this was normal—that this was aging and that I should just get used to it.
Cheryl Lee: When a 7 year-old is concerned about his acceptance in class and feeling good about himself and not having any friends...and being separated from his friends in the lunch room, that, to me, is more of a concern than just being an active young boy.
Tom Newton: There's so many things about the brain that we don't understand...
Susette O'Neal: It's very important that you feed your brain—this is the thing that's going to carry you through the next 50 or 60 years.

Bill: Welcome to the Vitalbasics Health Show. These people and millions just like them have made a shocking discovery. Despite the abundance of food in this country, despite the fitness craze, people still feel tired and mentally drained. Several months ago on this program we interviewed a leading expert in nutrition who is generating controversy with his assertion that there's a nationwide epidemic called "Brain Starvation" that affects men, women and children alike in this country. According to Dr. Kyl Smith, memory loss, poor concentration, mood swings and fatigue are causing a dangerous drop in effectiveness in the workplace and a higher level of tension and even anger in the home. He also introduced a new dietary supplement called Focus Factor that helps people with these every day problems. Dr. Smith, welcome to the program again.

Dr. Smith: Thank you, Bill. Again, I'm very glad to be here.

Bill: What is brain starvation and what are the signs we might have it?

Dr. Smith: Brain starvation, basically, occurs to all of, I believe, us on a daily basis when we fail to consume the nutrients that our brain needs for optimal function. And the way we feel when this occurs is we feel sluggish and lethargic. The problem is, if we were organically farming in our backyard the fruits and the vegetables and growing poultry and cattle like they did in the early 1900's in the backyard of the farm, and we were producing the grain products ourselves—taking the raw wheat, grinding it up and making the bread—we would have all the nutrients we needed from our diet. But we don't live that way anymore. The way *we* live is we go to the supermarket and we buy processed foods...the processed grain examples that we used, where literally the magnesium, the Vitamin B6 and other neuro-factors have been removed from the grain and not added back after processing. Now, here's another key, we humans have been manipulating our brain for years, our whole lives to try to change how we feel. A good example is chocolate, caffeinated beverages, even candies and sugar will alter brain chemistry and enhance neurotransmitters. The problem is they do it artificially.

Bill: But it's not just you, you know, Dr. Smith saying this. This is being widely reported in the mainstream press. First one: *Pain and fatigue are the two most common health related problems that cause people to seek help from their health practitioners.* Words they use to describe their condition include: exhaustion, lethargy, inability to sleep at night combined with inability to stay awake during the day.

Dr. Smith: Bad combination.

Bill: Another one and this was a headline in USA Today, it was a cover story on it. It said, *our lives are all crumpled up with stress, multi-tasking, high expectations, lack of manners. Now we're amid a new epidemic of anger, sometimes deadly anger*. Now that we know that this is serious problem, tell us, what is Focus Factor and what does it do?

Dr. Smith: Focus Factor fills that huge gap of nutrients that's missing from every one of our diets. In other words, it helps to ensure that we consume the nutrients we need every day for healthy and optimal function for both the brain and the body. But Focus Factor actually goes one step beyond that. Focus Factor fills that gap with nutrients that have been shown in science to be some of the best quality, both natural ingredients…ingredients that have a high absorption in the human body. This is very important. If we want to make an impact on our health, we need to consume natural ingredients and ingredients that are very absorbable to the body.

Bill: Recently we took our cameras out across the country. We went from the east coast to the west coast and back again to find out how brain starvation affects people on a day to day basis, and how Focus Factor helps them get back to a normal productive lifestyle. Our first stop was Cleveland, Ohio and this highlights the fact that Focus Factor really is a supplement for the whole family. Tom Newton is the Midwest regional promotion's manager for Electra Records. His wife Karen is a medical transcriptionist and they have two school age daughters, Katie and Jackie. Take a look...

Newton family testimonial:
Tom Newton: One of things that really brought it home for me was, my boss called me out on a conference call and asked me a question. It was a simple question. And I wasn't paying attention. And, y'know, in front of all your peers, you're like, *what was the question? [laughs]*…and you just kind of see your career slowly slipping away.
Karen Newton: I'd find myself dozing off at the movie theatre because I was tired. But I thought, I have too much on my plate, I need more help at home…I'd be just yelling at the kids—they need to help me more and he needs to help me—and…so yeah, I was just running on empty for a couple of years there.
Tom/Karen Newton: **Karen:** One morning I just woke up and literally I felt good. And I thought, this has got to be Focus Factor working. **Tom:** Did you ever notice the difference in your mood from a Monday morning to a Friday afternoon? Well, I remember distinctly the first time I took it, because it was a Monday morning, and I remember taking the Focus Factor—doing my shower and all that. And then when I actually got to my office, it was like, *All right! I feel like Friday afternoon for some reason!* I couldn't figure that out. But, that was the beginning, and that's the kind of feeling I had a continue to have.
Karen Newton: You just find, like, that you're in a better mood, you have more enthusiasm, you have more patience. It just gets the cobwebs out and everything. You make the most of your day.
Katie Newton: When I'm on soccer field and taking Focus Factor I feel more confident and alert and energetic.
Jackie Newton: I have to get up and go to school every day. I have homework every day. I work almost every day. And Focus Factor just gives me enough energy to go on with my life, like, with a little bit more energy and not as tired as I used to be.

Bill: (Wonder Women introduction): One of the real tests of a product is how quickly the word gets around about it. If everybody's talking about something, it must be pretty good…and by all accounts, a lot of people are talking about Focus Factor, as in this next clip. Lois Miller is a professional real estate broker in Maryland, and she was feeling the effects of "brain starvation." Focus Factor worked so well for her, that she immediately gave some to her nieces.

Lois Miller: My ability to concentrate was…was non-existent. Practically non-existent. My focus was just horrible. I had very bad moods, and my energy level was drained.
Lois Miller: I was seriously considering retiring.
Bridgett Steele: It's frustrating to not be able to take charge of how I feel. For example, late afternoon when I don't feel like doing my work. I fought through it…I worked through it. But in hindsight, it's frustrating because I wasted so much time.
Coralie Miller: I was having a real problem with my energy level. Coming up on my 43rd birthday I just figured I'm getting old and I just can't keep this pace up anymore.
Lois Miller: I heard about Focus Factor on Coast-to-Coast Radio. And it was, like I said, I was in my bed that morning. I was so tired I was thinking about not going in to work. And I heard about Focus Factor and I said, I think I just have to order it.
Bridgett Steele: As a family, we exercise together a tremendous amount. We walk the dogs, we run together, we perform all kinds of outdoor activities, and Focus Factor has been incorporated into that very busy, active life.
Coralie Miller: One of the things you do when you are not able to focus is to stop and grab a snack or something to keep your energy level up. The side result is I'm finding it very easy to maintain not eating the office snacks and thereby keeping my weight off.
Lois Miller: Since taking Focus Factor, my memory is better, my concentration is better, my energy level is better. My ability to cope is better. My ability to endure…my endurance is better.
Bridgett Steele: By the end of the week I think you, as well as those around you, would notice that you can concentrate more—you can block things that would otherwise be distracting, out. Impediments that kept you from performing efficiently are gone, because you somehow find the ability to focus on what you're doing. And your attention to detail will improve dramatically.
Coralie Miller: Of what I know, 3 different people—my aunt, my cousin, and myself—have tried it with 3 totally different body chemistries and have all, in our own way, had very successful results.

Bill: Can you talk a little bit about what's happening in the brain in terms of when our brain's working at full capacity and then when it's starving, as you say?

Dr. Smith: Absolutely, the best way we can do this is to actually take a look inside the brain. As you travel inside the brain you'll notice that tiny telephone lines called neurons carry nerve impulses. However, something unique happens. No two neurons actually connect to each other. They're separated by a gap called the synapse. Now the way the brain actually makes a connection is it makes a chemical connection with what's called a neurotransmitter. Neurotransmitters are formed from the nutrients that we consume from the foods that we eat. So, in our comparison of two neurons you'll see on the left side we have low production of neurotransmitters and on the right we have high production of neurotransmitters. This correlates quite frankly into how you feel. When production of neurotransmitters is high you have a great day. You feel like you can focus and concentrate on demand.

CTA #1 Bill: Folks, if you would like more information about Focus Factor. If you or your kids need help with focus, concentration, memory, energy or mood swings, please call the number at the bottom of you screen. Thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk free trial. Be sure to mention the Vital Basic's Health Show, and when you order you can even get a 30-day supply absolutely free. And we have a special bonus that we did not have available the last time we had Dr. Smith on this program – he has produced a special video that explains more about Focus Factor. This is such a remarkable, revolutionary dietary supplement, and it is so different from anything else out there, this video explains how to take it properly, more information about the ingredients and some fascinating facts on how it literally energizes your brain. This video is free with your order. Remember there are two formulas – there are berry-flavored chewables for children and the easy to swallow tablets for adults.

[Vitalbasics Health Show transition]

Bill: Right now, we are going to find out a little more about brain starvation in some very simply everyday terms, through the foods that we're eating here. And Doctor Smith, you have some surprises for us.

Dr. Smith: We can not assume today that we receive all the nutrients we need from our diet for optimal brain function—for us to feel at our very best. Let's start out with breakfast. Because of the way grain products are refined today in the milling process—from the grain to the refined flour, we can lose up to 90 percent of some nutrients. Let me show you what that means to us. If you start out with simple toast for breakfast, you're gonna have to eat 10 slices to make up for the loss of nutrition in your one or two slices. You can find this referenced in government studies, so it's valid information. Speaking of grain products...if we're looking at cereal (and I love cereal myself)...you'd have to eat 10 servings to make up for the nutrient losses in that cereal. Now, taking our example to lunch...using the same information...there are nutrient losses in the luncheon meat and in the vegetables (as we're going to see). You'd have to make three triple-decker sandwiches to make up for the nutrient losses in these foods.

Bill: I hope you're hungry. That's just incredible

Dr. Smith: Now, this is real information and it's not exaggerated. Notice we don't have junk food up here...we don't have fast food. These are real foods.

Bill: yeah, these look like wholesome foods like we're supposed to eat every day.

Dr. Smith: Exactly. Let me give you a real strong example...as if these weren't strong already. In the case of broccoli, asparagus and green beans, the American Medical Association Council on Food and Nutrition, they state that nutrient losses can be so severe in vegetables, that by the time they get from the farm to the green grocer, they can lose up to 90% of some nutrients. Now, these are what we call "fresh" vegetables. In the case of canned peas, you can lose up to 75 percent of vitamins B5 and B6 which are both neuro nutrients—nutrients the brain uses. Let's bring it to dinner. Taking all this information we put together, you're gonna have to eat 5 servings of tomato sauce to make up for that loss. And then we're back to our grain example—10 servings of the pasta. Because of food storage and food processing, there are losses of nutrients. And if you don't make up for that by taking a good quality nutritional supplement, like Focus Factor, you're gonna suffer.

Bill: And folks, think about your own diet. Chances are you're *not* eating this healthy. Chances are you are sneaking in a lot of junk food...fast food...that kind of thing. So Focus Factor becomes really an essential supplement. I want to introduce to you right now a professional racecar driver named Anthony Lazzaro. Anthony is on the LeMans Series, which are races that last anywhere from three hours to twenty-four hours, and in his profession his mind, his brain is literally going at 180 miles per hour. So, you can really imagine how focused and alert his brain has to be and how he has to be. Now we caught up with him at a race in Sebring, Florida, and here's what he says about Focus Factor...

Anthony Lazzaro My career has been very, very good so far. I've won numerous championships in open-wheel cars. I've won races in sports cars. To get the pole positions, to get the fastest race laps, to get the race wins, you need that edge...and with Focus Factor I have that edge. Your reactions, and what you do in the race car—I mean, we're traveling at 180 miles per hour, we're making split second decisions—your reaction times are everything. And if you're not at the top of your game, and you're not mentally prepared for what you're about to do, you can get in big trouble. Right now, I'm taking Focus Factor about 30-45 minutes before I get in the car. It's part of my daily routine. A lot of people watch their diets, they watch what they eat, they work out, they have different activities that they do for their body, but a lot of people forget about the brain. Focus Factor is brain food. It's what your brain needs to think more clearly. Your brain's telling your body what kind of energy level you're going to have. Focus Factor helps that. The results speak for themselves.

Bill: Here's what I'm thinking with Anthony's story, is that if Focus Factor works for someone like him who is under incredible pressure. I mean he's going nearly 200 mph, I mean that's his job. He drives almost 200 mph for a living. I can only imagine what it would do for the rest of us who aren't perhaps under that kind of pressure all the time.

Dr. Smith: Anthony has taken Focus Factor to extremes that we'll never have in our lives.

Bill (Al Demitri introduction):
Al Demitri lives in Florida, and he plays golf almost every single day. He has a tremendous swing, and take a look at this…

Al Demitri: I had friends who would come down from up north, from Ohio, and down here to Florida on vacation and you stand there and you couldn't maybe remember his first name and here he was a chumming buddy all the way through high school, y'know? And then, once I started taking Focus Factor, I noticed that names were easier… I don't walk into a room and forget what I was going into the room for. And I had problems before. I focus more on cars, where I'm a better and safer driver. The word "Focus" for golf is important as it is for anything. And when I heard the words Focus Factor on the radio, it seemed like it would be something I would like to try. My putting is tremendous now. My drives are going almost 30 yards farther. There's not a member I don't play with—and I play with over a hundred here—that can't vouch for that. I can only say that Focus Factor has done tremendous stuff for me. I mean, just generally…I don't know how to put it. I'm happy. You ever get so happy you're at a loss for words?

Bill (Susette O'Neal intro): We spoke with Susette O'Neal in San Diego. She has a young son named Eric who was really having a tough time focusing and staying on-task. She says it was really a challenge for her and her husband. But because of Focus Factor, there's a happy ending. Take a look…

Susette O'Neal: We have a lot of different things that we do in our lives that we take pride in, and one of those things are our children. To me, there's nothing I wouldn't do for my kid. I want them to have every advantage that they can possibly have. Prior to him taking the product, the other kids made fun of him. Y'know, that really made him feel like he wasn't good enough. But since he started taking that, now he can concentrate, he has confidence, he's able to do the work, he's able to learn, and that's something I feel really good about because I didn't think he could do it before. Really, you have to decide on what would you do to give your kid a better chance, better confidence, and better ability? I can't say enough about it…how it took a frustrated family—mother and father—and now we are just so happy. It's like the burden's off our back now, so we have been telling everybody about Focus Factor. And I hope that other people *use* it because it will make a difference in your life and your child's life.

CTA #2 Bill: And folks, I urge you to call right now and take advantage of Dr. Kyl Smith's special offer on Focus Factor. You can get a 30-day supply today with your order absolutely free, and if you call right now, you'll also get his new video. It explains more about Focus Factor, how to take it for best results, information about the ingredients and additional ways you can get the most out of your brain to improve focus, memory, mood, concentration and energy. There is a formula for kids and one for adults, and I really want to stress here that if you keep doing what you've always done, you're going to keep getting the same results. But this is your chance to do something different. To get your life back on track at work; this is also for your kids, to help them build brighter minds; and to our friends watching right now who are seniors, this can improve your quality of life so dramatically. So, call now and try Focus Factor. It's guaranteed safe and effective or your money back, and be sure to ask about that special offer. If the line is busy, keep trying, do make that call.

[Vitalbasics Health Show transition]

Bill: My guest is Dr. Kyl Smith who is an expert in nutrition, pediatrics and anti-aging and the creator of Focus Factor. We featured Dr. Smith on this program several months ago and the response has been nothing less than remarkable. Now, Dr. Smith, for viewers who are just tuning in, can you briefly explain, "What is Focus Factor?" and "What is it going to do for us?"

Dr. Smith: Focus Factor is basically nourishment for our brain, and what it does is it provides the nutritional factors that our brain needs to produce mental energy and neurotransmitters. Now what this means to us is Focus Factor essentially supports optimal focus, concentration, and memory in adults, teens and seniors.

Bill: And, again, this is natural?

Dr. Smith: This is a natural product, yes.

Bill (Barbara Clemente introduction): I want you to meet one more Focus Factor success story. This is Barbara Clemente. She lives in Maryland, and she's a health care consultant and also works with her husband in his accounting practice.

Barbara Clemente It was a very frustrating, hopeless situation, because I was in constant pursuit of trying to solve this problem—trying to figure out *why* I was tired...*why* I couldn't concentrate...*why* I couldn't get more things done during the day. At that point in time I was under the impression that I was just getting older, and this was the way it was to be. Although we did try every vitamin on the shelf—we pillaged the health food stores. I have yellow stickies everywhere. On cabinets in the kitchen, all over my desk, on the mirror in my bathroom. I mean, it was just...how I was going to get through was to post up what it was I was supposed to do or what I needed to remember. On a scale of one to ten, Focus Factor has helped me at 15. I have energy, I can concentrate. I can do multiple things at the same time and not get confused. I don't forget words anymore. The changes are amazing. We can spend more time now with our grandchildren, as well as the rest of our family, because we're not so tired. I'm not afraid of getting older, now that I have the Focus Factor. Because the decline was so great in terms of energy and memory, that I thought, surely within a couple years I will not remember anything, and be sitting in this chair, just sitting here. But now, the energy is back—the ability to go out and do things, stay up, keep all these balls in the air at the same time.

Bill: If you have a child who has trouble focusing and concentrating and you know that they're bright intelligent kids, I want you to meet Cheryl Leigh. During our road trip we went through Texas and visited Cheryl in her home. We were very moved by her story. Her son's name is Blake and he was having a lot of difficulty, even at home, and listen to Cheryl and see if you can relate to her frustration...

Cheryl Lee: It's a tremendous amount of strain and pressure...and just the guilt alone, as I mentioned earlier, can put a lot of stress on any kind of family. And it wasn't just the school. I mean, we couldn't go anywhere as a family. We didn't want to get sitters for him...we didn't want to go anywhere, we didn't want to go on family vacations because we were not sure at any point in time how Blake was going to react or respond to certain kind of other situations. So it really—"imprisoned" is a strong word, but it really imprisons your family until you understand what it is you're dealing with. Focus Factor is part of our family now because it has transformed my family into an environment that is joyful and peaceful and productive and smiling! About a week or ten days into Blake taking Focus Factor, he came home from school and he had a really good day at school. He talked about his friends. He talked about feeling like he belonged. Getting asked to play on certain sports at school. And that's when I knew we had our son back. And his life has changed. He went from saying, "I have no friends, I don't want to go back to school, I don't even know why you have a son like me..." to "Gosh, Mom, all the kids at school picked me first today, and I had so much fun today, and I got to sit with all my friends at the lunch table." Those are words of joy to a mother.
Blake Lee: I feel very happy...and I just think I'm a good boy and a smart boy.
Cheryl Lee: You want to believe in miracles, but you never really know. I mean...and I use the word miracle and I *mean* that. I really had never believed that something so miraculous could happen so quickly. And I didn't believe there was something out there that could make such dramatic changes in Blake and in our lives. My son has been given a second chance—and I feel like my prayers have been answered.

Bill: That is a tremendous story. And you know what I noticed about that, you know, Blake is such a cute kid but when you look into his eyes, you can really see that he's energetic, he's really focused now, and most importantly when it comes to kids, he's really happy. So this really does help people all across the spectrum – kids, men, women, baby boomers certainly who are starting to feel the affects of getting older, and seniors, at that end of the spectrum.

Dr. Smith: Everyone benefits when they feed their brain.

Bill: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking Focus Factory and it was about the American Revolution and I was able to remember all kinds of things. So I'll tell you what, let's roll the clip....

Bill from previous show: "I started reading this 400 page book...very dense, very dry...and what I found was, I'm remembering everything virtually in this book. I'm remembering the names of British Lords and generals and dukes and battle sites and chains of events that happened. This book literally came alive to me...not only as I was reading it, but *after*, my comprehension was extraordinary."

Bill: And I have to say, since that program aired, things just seem to get better and better and better, it's sort of a cumulative affect. A couple of things that I notice. First of all, my memory just seems to keep getting better. And just a very small example is, I was listening to talk radio the other day and someone mentioned a web address, and Internet address, one time. I got into work the next morning, opened my computer, and I knew that web address. It was right there. So one thing I can do is visualize things better, which helps me to remember. The second big thing is multitasking. In the past, when I would get all different projects thrown at me at once, I would panic. Because it just seemed so overwhelming. Since taking Focus Factor what I find is I can more calmly prioritize things. I can focus on each task better, which means I get it done more quickly generally. And I can just get the projects done faster. So that just eases all of that stress that normally would have come down on me.

Dr. Smith: That's great.

Bill: I want to thank you very much for coming back on the program today and allowing us to share these dramatic stories with you.

Dr. Smith: I thank you and I thank you for sharing your story.

CTA #3 Bill: We're simply out of time. If you'd like more information about trying Focus Factor for yourself, it's a 30-day risk free trial. If you or your kids need help with focus, concentration, memory, energy or mood swings, please call the number at the bottom of your screen right now. Focus Factor's unique and natural blend of vitamins, minerals, botanicals and special cutting edge nutrients, help to energize and revitalize tired brain cells. **[cut to brain animation]** Let's go inside the brain to show you what happens. These are brain cells that need to be energized to keep you mentally sharp. And these pulses of neurotransmitters are what feed the cells their energy. On the left is sluggish neurotransmitter activity. On the right is energized activity. As you heard Dr. Smith say, when you feed your brain the right nutrients, you naturally energize it. Focus Factor feeds the brain in a big way. The 5 benefits most often reported are better focus, memory, mood, concentration, and energy. way You'll feel refreshed, mentally sharp, alert, focused and energetic and that's guaranteed or you get your money back. **[back to Bill]** So call now and be sure to ask about the Dr.'s special offer. If the line's busy, please keep trying, but do make that phone call. Thanks for watching the Vital Basics health program. I'm Bill Begley...take good care of yourself and God Bless.

Closing disclaimer: The preceding was a paid program for Focus Factor, brought to you by Vitalbasics.

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THIS PRODUCT IS A DIETARY SUPPLEMENT. IT NUTRITIONALLY SUPPORTS NORMAL BRAIN FUNCTION. IT IS NOT A TREATMENT FOR DISEASE. This product is not intended to treat attention deficit hyperactivity disorder or any other mental illness. If you or your child suffer from mental illness, consult a physician for proper treatment.

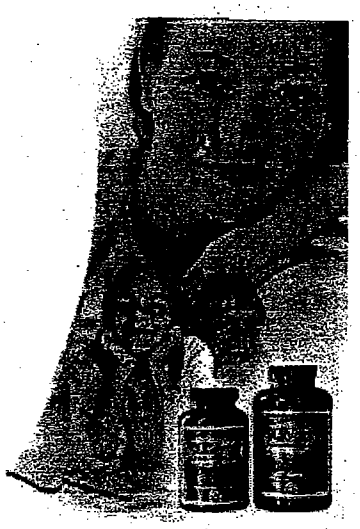

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Exhibit I, page 2

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Exhibit I, page 3

***V-Factor Natural Pack* radio infomercial FINAL EDIT...8/8/01**

Denise: Hi, I'm Denise Diamond. Welcome to *The Vital Basics Health Show*. If your sex life isn't as satisfying as it used to be, our guest today says he has some groundbreaking new information that may give you and your partner what you need to re-ignite the spark in your relationship.

We'll talk about some of the prevailing myths about sex that often prevent couples from enjoying the intimacy that they deserve. And he'll tell us about a new solution that is safe and easy...and is something you can use right now to improve your sex life.

Carlon Colker, M.D. is Medical Director and CEO of Peak Wellness in Greenwich, Connecticut. He's been practicing in the health care field for over 20 years. In fact, he pioneered the first wellness clinic on the East Coast. He is an attending physician at Beth Israel Medical Center in New York City, Greenwich Hospital in Greenwich, Connecticut, and Stamford Hospital and St. Joseph's Hospital in Stamford, Connecticut. He is one of the most sought-after consultants in the country and has written extensively about sexual health. We're very fortunate to have him on the program today. Dr. Colker, thank you for joining us.

Thanks so much for having me.

It's very clear, very obvious that you're obviously a very respected medical doctor. What sparked your interest in sexual health? It's sort of a pathway that most doctors ignore—they just don't want to go there.

Well, Denise, as a specialist in internal medicine, I've seen literally thousands of patients over the years for a whole variety of reasons. These range from simple infections and medical conditions—kind of like your sore throat, your common cold—all the way up to severe, even life-threatening illnesses that require hospitalization. Nonetheless—and this is really interesting—the single most common issue among all of them are questions about their sexual health *if you ask*. I should really add that, as important an issue as sexual health and function is to so many people, they tend to shy away from this subject—they tend to be embarrassed about discussing it. And would you believe that the physicians are no different? They're actually uncomfortable talking about this subject with their own patients. And that's almost a *crime*.

When I think of my health, I think of the food that I eat, the exercise that I get...I don't necessarily think about how important having sex is as it relates to my health.

Well, this is such an important point because sex itself is healthy and that's just a medical fact. We know that sex is healthy and sex is so important to have. It's important for your proper livelihood and your happiness. And if you're not having good sex and your sexual health is not intact, then you almost have to wonder about what you're missing.

It's also common, don't you think, for people to blame themselves? It starts to feed into self-doubt and low self-esteem and just sort of closing off to the world and your partner. It really is sort of the 'blame game,' don't you think?

Oh yeah. The partner...he starts to develop a complex. It really damages the relationship, so much so—you see, the issue is really physical, and that's what people don't realize. And that's of course, a lot more positive. That's where the...more than ever...these natural options come in to help you, and that's what we're here to talk about...exciting breakthroughs like the V-Factor Natural Pack.

Is it true or is it not that your sex life goes downhill when you get older?

Well, there are issues related to aging that certainly can affect the level of sexual health. There's no question about that, I don't think there's any denying that. But if you're generally in good health, there's absolutely no reason—no reason—why your level of sexual satisfaction can't be just as high as you get older—maybe even better than when you were younger, and that's what a lot of people don't realize. I mean, after all, you're older and you have more experience. In fact, just last week I got a call from a fellow in his late 60's that I began actually treating for sexual health about three months ago. Just a little natural support using the V-Factor Natural Pack to enhance his sexual response and function is all that was necessary to really revitalize his sexual health. And I actually love this guy's quote. He told me, "Doc, I'm eternally grateful to you...and so is my wife." And that sort of sums it up.

Well, of course, the women are involved in this as well, and so are the baby boomers. They're heading into their 50's. We hear so much about this generation—they're that virile generation, they're that bullet-proof generation. But have you seen an increase in boomers in your practice, and how much of a shock is it to them?

Oh, absolutely. That's a great point. Yes, more than any previous generation, these so-called baby boomers...they want to remain healthy forever. That's their expectation. They're not going to climb comfortably into the old rocking chair at too early an age. They're going to fight it kicking and screaming every step of the way. They want to stay active and healthy until the end and I think that's a great thing. And this generation's proactive about their health, and that, of course, includes their sexual health. They're also becoming well-educated about the natural options and that's what's so exciting about the V-Factor Natural Pack. It really fills that need.

We've talked about getting older and the baby boomers. But what happens is, is that this can also at the same time affect young people as well. I think that there's an irony there because in our society we think, y'know, the young buck, he's just out there and no problem there. But nothing could be further from the truth.

Yeah. Denise, I have patients coming to see me literally in their 20's. So this is something that I think has a lot to do with the new openness about this. But there was never really an avenue to go. And they may be the people who really have the toughest time in terms of their confidence and self-esteem. Whether you're young or old, the point is you can take action and you can do something about it.

What do you think is the greatest breakthrough recently in this field? You were just saying the new openness...and I would think that probably it's just been in the past 5 years that this topic has even been spoken about...aloud, y'know. People wouldn't even let this topic pass their lips.

It was taboo. It's taboo. You're not supposed to talk about sex. Y'know, if the rule is that you're not supposed to talk about sex, then you're really backed into a corner, and that's unfortunate.

Let's talk about the breakthroughs that have come with this new openness. What do you think is the biggest breakthrough recently?

The idea that a simple substance that we call nitric oxide governs blood flow to the genitals—that's really the most striking medical breakthrough. In fact, the research proving this theory won the Nobel Prize, and that's, of course, nothing less than the most prestigious award in all of medicine and science. And that's impressive. Of course, this is one of the outstanding features of the V-Factor Natural Pack in that it utilizes an active natural ingredient that's been thoroughly tested and shown to increase levels of nitric oxide.

Tell me a little bit more about the V-Factor Natural Pack. I know it's a product you developed. There's science behind it. A clinical trial behind it. Could you give us an overview of how it can help men who may feel inadequate sexually?

Well, y'know, I formulated the V-Factor Natural pack with ingredients that have been thoroughly tested and they've been shown to be safe and effective. The V-factor Natural Pack will help you if your sex life is unsatisfying, or if you just feel like your sex is going downhill—for men who feel like they've lost the spark or the sizzle in their sex life.

I need to get this straight, for me and for our listeners as well. V-Factor's involved in production of this substance you were just talking about—Nitric oxide. Is that right?

Well, since increasing levels of nitric oxide cause blood vessels to dilate, there's an increase in blood flow and activity to the genitals. As you increase the circulation, you raise the level of function. As you promote the function, you dramatically improve the sexual satisfaction. It's that simple.

How does V-Factor compare with all those other products we're seeing out there? And again, that goes back to this new openness—there's been a rush to market for a lot of products. How does V-Factor set itself apart from the other products?

This is a great question. There certainly are quite a number of products out there. But one really nice feature about V-factor Natural Pack is that you don't need to take it every day. You just take it shortly before sexual activity. And that's a really important point. I should also point out that V-Factor contains a very precise combination and amount of ingredients that's designed to be very effective. It's like opening a combination lock. That's the example I like to use. If you don't have the right combination, you're never going to open the lock. I've see other formulas out there with similar ingredients, but either the levels are too low, or something's just missing from the formula altogether. With the V-Factor Natural Pack, you have a precise formula in which I've personally chosen the ingredients and their levels with a great deal of care. So in my opinion, we really have the thoroughbred of sexual health formulas here.

I need to make sure that I have this absolutely correct, though. You just take this shortly before intimacy...and that's it? It's that simple? You don't have to take it every day?

It's that simple. You only need to take the V-Factor Natural Pack shortly before intimacy, so this is not just another multi-vitamin that's going to sit in your cupboard along with all the other vitamin C's and what not that you have there that you forget to take half the time anyway. So it's not going to be a burden. The V-Factor Natural Pack is formulated and designed for a very specific purpose, and that purpose is enhancing sexual satisfaction.

What are the kind of results that a person can expect to see? I realize that the results will vary from person to person...

Well, that's an excellent question. We know that the V-factor Natural Pack enhances the quality of the sexual response in men, since it's been shown in a clinical trial to result in greater sexual satisfaction. And this has been demonstrated clinically. So, of course, enhanced sexual response and function is the primary objective, and that's what's been shown in our tests. But I don't want to forget the ultimate goal. See, all that science is great, but remember, the one thing that every man wants is a closer relationship, a happier couple, and all the benefits that come along with a satisfying level of physical intimacy.

And every man deserves that.

Amen. And every woman, too.

Absolutely. Our guest today...Dr. Carlon Colker. Some very exciting news for men who want to improve their sexual satisfaction...and that of their partner. In just a moment, we're going to reveal the results of a recent clinical trial on the V-Factor Natural Pack. Some very exciting news for men who want to improve their sexual satisfaction...and that of their partner. Plus we'll put to bed some of the most common myths about sex—some of which may *surprise* you. Stay tuned.

[Music sting]

CTA #1

[Music sting]

We're back with Dr. Carlon Colker. We're talking about sexual response in men and ways in which you can make every day feel like you're on your honeymoon. And Doctor, I understand you have some exciting news regarding a recent clinical trial on the V-Factor Natural Pack. Could you tell us about that. These results are just fascinating.

Yeah, the news *is* exciting. The V-Factor Natural Pack is a product that I've specifically formulated and I've clinically tested to support and improve sexual function and response As I like to say, it's just like dialing the right combination on a lock. The V-Factor Natural Pack has a precise formula and the ex..ct levels of ingredients to unlock sexual potential. Just like the lock example, the right combination of ingredients in the proper proportions is really the key for improving sexual satisfaction.

So this was a well-designed clinical trial. And the #1 response was: "Increased sexual satisfaction." That was the feedback that you got from the men that were in the trial. And isn't that's *exactly* the kind of solution men are looking for?

Precisely. I mean, if you're more satisfied with sex, so is your partner.

Okay, well, in light of those results, I want you to help me put to rest some of the most popular myths—and we've been talking a little bit about this today—about sex. Folks, this is a quiz that Dr. Colker's come up with—I'll be taking it with you. He says some of these answers might surprise you. Now this is the first one: Being sexually satisfied becomes more difficult as you get older. Is that true or false? I'm going to say yes. I mean, that's what we hear in our society. Yes, it gets more difficult.

Okay, Denise, this is *false.* Actually, through intimacy, the bond between you and your partner should be stronger than ever as you grow older. So odds are, if your sexual health is intact, you have a mutually fulfilling and happy relationship with your partner. And that's where the V-Factor Natural Pack comes in...it gives you that support for sexual function and satisfaction. The bottom line: <u>don't</u> believe the myth that things have to be more difficult as you get older.

All right, let's go on to the second question. Talking about sex with your partner is all it takes to improve the quality of sex. I think that is another one of those things that we hear in our society.

Well, this is actually false. See, while good communication, of course...y'know, we want to say that's the foundation of any successful and mutually gratifying relationship...there are some things, as we all know, that a conversation is simply not going to change. And the same is true for poor sexual function. Although in some cases, of course, it might help to talk about things with your partner. In most cases, talking is not going to work.

Okay, number 3: Sex is one of the best ways to relieve stress. I'm going to say yes.

Yeah, well this is true, absolutely. A satisfying sexual experience is really one of the best possible ways to relieve stress, and this we know. The V-Factor Natural Pack can get you to the point where sex again becomes a great way to relieve stress.

All right. Number 4: Sex becomes less important as the years go by. You and I have talked about this today, so I know that it's false. But I think my knee-jerk reaction is to say, yeah, it gets less important as you get older.

Yeah, well, this is false. You see, in fact, many couples say that, once the kids, they're up and going to college or they move out of the house, they kind of re-discover this joy of intimacy and they realize that a sexual relationship is going to be more exciting and it's going to bring them even closer than ever. But, again, sometimes you need a little support, and that's where the V-Factor Natural Pack can help make a big difference in their sexual satisfaction.

Number 5: Most sexual function issues are the result of poor self-esteem or lack of confidence. I will say that that's a pretty big part of the picture, but it's not the whole picture.

Mm Hmm. Yeah, that's false. You see, that's what the conventional wisdom used to be. That's really nonsense...that's nonsense. With my patients, I've found that, once we get things functioning well physically, that the confidence and self-esteem generally they take care of themselves.

It's really too bad that there was such a general lack of knowledge in the medical field about sexual health, don't you think?

Oh yeah. I mean, we were really off in the wrong direction. But we have much more knowledge under our belts right now, and we're better able to tackle that issue.

So it's a good time and a good place to reach out for help, even if it feels like a risky proposition.

It most certainly is.

Well those answers are really interesting to the quiz, I think. Do you find that a lot of people come to your practice and have these types of misconceptions about sex?

Oh yeah, that's a great point. So many people have misconceptions about sex. But the good news is that there used to be dozens of myths that people believed, but with the new openness around the topic, those myths are really quickly disappearing. As a physician, of course, that's very gratifying because the end result is that I'm better able to help my patients, and of course my patients are better equipped with the proper knowledge to actually help themselves.

How about women who might be listening now, and the man in her life is maybe frustrated or ashamed and he's reluctant to do anything about it...there's tension, you can cut the tension between them with a knife. Would you recommend they call and get the V-Factor Natural Pack as a way to help him be proactive and start doing something or...

Well look, there's no question about it. I can't think of a more caring and intimate gift than the gift of re-igniting the sexual spark in a couple's relationship. And...no, it's not fair to yourself or your partner to be ashamed of this or hold back in doing something about it. You should do something about it and you should do something about it right now.

I should think that it would be a gift of love, actually. And one of intimacy to someone.

Most certainly. Most certainly is.

Our guest today is Dr. Carlon Colker. He's here with new information on improving your sex life. We'll be back to talk with the doctor a little bit more in just a minute...

[Music sting]

CTA #2

[Music sting]

We're back now with Dr. Carlon Colker. Our topic today is a sensitive one, but it's definitely one worth talking about because it affects so many men of all ages every day, and also affects their partners, too. We're talking about sexual satisfaction and how you can get that spark back into your relationship. And certainly you've probably seen in your practice that there's a lot of secretive...or secret-keeping around this issue, don't you think?

Oh, there's no question about it. I mean, we're talking about a sensitive topic and it's a topic that stabs right at the male ego, this issue of intimacy. Sometimes the first response is to sort of go into a denial and try to ignore this and feel like you don't have a friend in the world, not even your partner. You just can't even talk about it.

That's right. You just retreat into yourself.

And this is true with physicians, too. I mean, again, sometimes you see physicians, how they approach this in a skittish fashion. They're concerned about talking about it...they don't want to go into this subject. And that's, of course, terrible...that's a real, that's really a crime.

There have been results concerning the V-Factor Natural Pack. What are the results that you've seen?

Oh yeah, I've seen some inspiring cases using the V-Factor Natural Pack. In fact, not too long ago, I had a 50 year-old fellow, and he'd been married to his wife for about 30 years. And although they were having considerably less sex in comparison to when they were first married—which, of course, happens—they were still sexually active up until about a year ago. When he came to see me, I gave him the V-Factor Natural Pack with the goal of helping him, and 3 weeks later he actually called me up on the phone...he was thrilled out of his mind...he called it 'sexual energy.' And he was telling me how he got it back. And I was really thrilled as well. And for me, this particular case, as a clinician, this was a case where I really felt for the guy. I mean, it ate him alive...it stabbed at the ego, as many men can understand. So with the V-Factor Natural Pack it was like he had a re-birth...a new lease on life, if you will, is kind of the way he looked at it.

So it extended into other parts of his life as well.

There's no question about it. Again, far-reaching, affecting the couple, affecting even the family, affecting his personal happiness. This is such an important point.

Before the break we were talking about the *V-Factor Natural Pack*. Tell me, is this something that someone should take only if their sex life is going downhili—and I know that there's people who want me to ask this question—or can this help an already good sex life be even better? If good is good, we want it to be great.

Right. Well, again, y'know, I'm a preventive physician...try to prevent things before you have a problem. So of course, if you have a good sex life, it may make it a great sex life. And that's something to keep in mind, too. So you want to get to this before it becomes an issue.

Knowing that there's a positive clinical trial behind this...and everybody wants to be safe...this should give men out there who are listening a peace of mind that they can trust the product, that they can believe in that. Can you tell us a little bit more about that?

Oh yeah, well, this is the idea that we have a clinical trial behind this supporting the effectiveness of the product in terms of increasing sexual satisfaction. And that's so important. And, of course, the ingredients in the V-Factor Natural Pack have been well-investigated and the ingredients have been carefully selected, and there's quite an amount of research behind these substances...in particular the one that we spoke about, the idea of increasing nitric oxide, and that's something that one of the ingredients in the V-Factor Natural Pack can really do, and that's what's amazing.

For our listeners who are just tuning in...once again, the *V-Factor Natural Pack* consists of capsules that you take shortly before intimacy? You just take it shortly before intimacy, it's as simple as that?

It's as simple as that. It's not going to be like something that becomes a burden in your life. It's not going to sit there in your cupboard with your multi-vitamins, your vitamin C's...all of these other substances that you forget to take half the time anyway. This is a substance that's specifically formulated for a specific purpose and that purpose is increasing your sexual satisfaction, and that's so important to recognize.

So many of the other natural supplements that are on the market now purport to have specific results. The V-Factor Natural Pack, however, is a lot different than a lot of those other supplements that are on the market. Could you tell us a little bit more about that?

Well again, yes, compared to other products...you have to remember again, this is not something that you have to take every day. You only need to take this substance shortly before intimacy, and that's important to recognize. Also the fact that this has been clinically tested, y'know...you have to really look for substances out there that are clinically tested...that have withstood the rigors of clinical science.

Yes, I think the science is what makes the difference with this product. We're almost out of time, can you believe it? Is there anything else that you'd like to say to our listeners who themselves or maybe someone, a loved one of theirs or maybe just a friend of theirs might be experiencing low sexual response...why should they call now and take action?

Well, again, it's really important to recognize—for the listeners out there to recognize—that they deserve to have a satisfying sex life. And every day they put it off, every day they ignore what's going on in their lives, they're going to be missing out on a critical part of their relationship. And it's also kind of selfish because, as I think, you're denying the intimacy to your partner, too, so in a big way you have to do it for her as well.

There is, it seems to me, a barrier...and we'll call it embarrassment...to a man reaching out and taking the risk to try V-Factor. The embarrassment can be overwhelming. Can you just sort of give some inside advice to someone who's just sitting there going, *Oh. This is just too painful for me to reach out and get this help.*

Oh, y'know Denise, I'm so glad you brought that up. It's a very sensitive point, and it's a great point to make and something I really think is probably the most important thing to mention. Privacy is key, and I certainly don't want the men out there thinking that when they order that somehow the V-Factor Natural Pack truck is going to pull up in front of their house. That's simply not going to happen. The order's completely confidential. The shipment's going to be sent to you discreetly without any obvious labeling. The confidentially is really the single most important thing to emphasize.

And about the 30-day money back guarantee?

Oh yes. The money back...absolutely something I've insisted upon. If you're not completely satisfied with the results, of course you're going to be able to return it for your money back. There's no questions asked. There's no risk.

Carlon Colker, M.D. has been our guest today. Doctor, thank you for joining us. You've helped us feel more comfortable about discussing this and I know that it's a difficult subject for men to talk about. That's okay, though, because confidentiality is guaranteed with V-Factor. Thanks a lot, Dr. Colker, you've been a great help today.

Thank you so much, and I thank the listeners out there.

I'm Denise Diamond. Take care and God Bless.

[Music sting]

CTA #3

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CTA COPY: If you'd like more information about the *V-Factor Natural Pack*, please call: 1-800-_____. That's 1-800-_____. It's a toll-free number, and your call is completely confidential.

V-factor is safe, the active ingredients are all-natural and it's delivered in plain packaging to respect your privacy. As you heard the doctor say, a recent clinical trial of the V-Factor Natural Pack indicated a significant improvement in overall sexual satisfaction. Plus, the concept behind *V-Factor* is based on Nobel Prize-winning research.
We've worked out a special arrangement with Vital Basics. Call now and find out how you can get a free 1-month supply with your order. Be sure to mention this program when you make that confidential call. I urge you to call now and take advantage of that special offer. If the line's busy, please keep trying. It's 1-800-_____. That's 1-800-_____.

V Factor radio infomercial...FINAL...10/24/00

(Music up)

Announcer: Welcome to the *VitalBasics* radio program with Dr. Shari Lieberman and Carlon Colker, M.D. Today, Drs. Lieberman and Colker talk about a revolutionary new approach to solving some of today's most talked about health issues, including sexual performance, poor memory, concerns about prostate health, and emotional well-being. And now, let's join Dr. Shari Lieberman and Dr. Carlon Colker...

Shari Lieberman: Welcome to the VitalBasics radio show. I'm Dr. Shari Lieberman. Let me just tell you a little bit about my background. I hold a Ph.D. in clinical nutrition and exercise physiology. I am an instructor at the University of Bridgeport School of Human Nutrition. I'm a board member of the certification board for nutrition specialists, and I've written several books: *The Real Vitamin and Mineral Book*, and *Get off the Menopause Roller coaster.*

Carlon Colker, M.D.: And this is Carlon M. Colker, M.D. I'm a physician, medical director and chief executive officer of Peak Wellness in Greenwich, Connecticut. I'm an attending physician at Beth Israel Medical Center in New York City, at Greenwich Hospital in Greenwich, Connecticut, Stanford Hospital and St. Joe's in Stanford.

SL: Well, it's great to have you with us. Today we're going to talk about something a little *personal*. And what we're going to talk about is your libido, and how to make it sing. Because y'know what, Carlon? I found in my practice...a lot of women are complaining about low sexual energy, and low sexual function...and y'know something? It isn't only menopausal women. I'm seeing women in their 20's and their 30's. I've seen my fair share of guys, but most of of the men that I've seen are probably in the 50's, but...

CC: Guys and gals. Guys and gals. But they're getting younger, y'know. I mean, men and women in their 20's, even. 30's and 20's, I mean literally. I think if you're an adult male or female, y'know, it's almost invariable that you're gonna come across this problem at some point in your life, and that's libido, sexual arousal...and these are things that we're discussing.

SL: Y'know, and I think it becomes depressing when that happens. Y'know...you don't feel satisfied, you can't satisfy your partner...but, there's a light at the end of tunnel. Because today we'll be speaking about a very special all-natural product called V-Factor that has very special ingredients that will really get your sexual energy back to where it needs to be.

CC: Absolutely. And these ingredients, which are found in the V-Factor...I've been using them for years in my medical clinic.

SL: Now, Carlon what I'd like to talk about now is probably a little bit more serious and a little bit heavier...and it's really the consequences of failing sexual performance. How it affects someone's relationship, their marriage, the emotional aspect of it. Do you have something that you can share with us?

CC: It's extraordinarily difficult when an individual, or individuals who have had a healthy relationship, a married relationship for many years, start to experience decreased sexual interest. Sometimes it's not a big deal, but a lot of other times it *is* a big deal. And this can be extraordinarily difficult. I...one case comes to mind I remember. This gentleman had been married to his wife for over 30 years. And, although they were having considerably less sex than they did when they had first gotten married...which is also typical...they were still sexually active up until about a year ago. So it's, it's a fallacy to think that individuals aren't sexually active when they get older. But, when there's a decline, even...however small it is...when there's a decline in that sexual activity it *is* noticeable and it does put a tremendous stress on the relationship...and in their case, it was quite difficult.

SL: Well, y'know why it's hard? Y'know why, Carlon? Because, when that happens in a relationship, y'know, you also have to assure your partner...like he had to keep assuring his wife that it wasn't her. I mean, there's so much emotional baggage that gets accumulated when that happens. Because, especially...I could imagine the wife thinking, *is it me? Did he lose his interest in me?*

CC: It's only natural. I mean, how can one partner not think that about the other? They must think, *well, my god, it must be me. I must be somehow failing you.* And that's...it's a terrible burden psychologically to put upon themselves. So...

SL: What about his desire? Was it desire and also the physical ability?

CC: That's a great question. Sometimes it's desire, sometimes it's physical ability, and sometimes it's looped up into both. I generally find...it's kind of like, which came first—the chicken or the egg...because, somehow or another, if one happens to you, then the other's almost invariably gonna follow. And um...when he came to see me, not only did I do a complete physical exam, I also had him checked out by a urologist, because I thought that was important. And, luckily, with the exception of a mild increase in the size of his prostate, he really got a clean bill of health. And, of course, that's great when your doctor says that to you, but it doesn't solve your problem...and it certainly didn't solve his problem getting a—quote unquote—clean bill of health. I think this was a major concern of his. And it's a major concern with a lot of patients his age. I put him on very significant doses of a combination or Argenine and saw palmetto, which is *exactly* what's found in V-Factor. Three weeks later—three weeks!—he was thrilled. I mean, he had...

SL: Oh, awesome...

CC: ...tremendous sexual energy, as he called it. Really, it just nudged him in the right direction. He had his sexual energy, as he called it, it had returned. And these ingredients, which are found in the V-Factor...I've been using them for years in my medical clinic to actual stimulate sexual energy and support the health of my patients, which I'm sure that you've done the same thing.

SL: Exac... Y'know, Carlon, maybe we should talk a little bit about what those ingredients are.

CC: Sure.

SL: One of them, I think that has the most amount of research is an ingredient called L-Argenine. It's just a simple, all-natural amino acid. And what that has actually been shown to do is to support healthy erections in men.

CC: Absolutely. And y'know, the combination of Argenine, saw palmetto for men is such a great, simple combination, especially in effective doses, and we'll talk about that for a minute. And for *women*, Argenine and ginseng...fabulous combination.

SL: It works so well. I mean, this is an all-natural product that can help with your sexual performance, sexual energy...and this is something, once again, we're finding it isn't quite so age-related anymore. We think, y'know, at 50 or 60 we're supposed to be that way, but what we're finding, in fact, is that we don't have to be that way...whether we're 20, 30, 40, or 70...here's something completely natural. Now, the Argenine is really important. And what's really interesting about it, Carlon, is that it works for both men and women. For men, it actually helps maintain something called nitric oxide. And what it does is, y'know, you have to have that blood flow to the area...

CC: That's what it is...

SL: We have to have it flow to the genitals. And what's happening is...our lifestyles...we're not exercising enough, we're not eating right, we're very stressed. Y'know, there's a whole plethora of reasons why, in our environment and our society...y'know, I have to say really, maybe in the last 2 years of my practice, I've probably heard more complaints about libido, than in the 18 years that I've been seeing patients.

CC: Yeah, absolutely. I mean, it's on the rise, and I think that has to do with the new openness that's...a lot of the clinicians out there are having with their patients. I think it's terrific people are coming forward and speaking about these problems. But, y'know, I really should talk about the fact that these ingredients...not just the Argenine, but the ginseng for women, the combination...and the Argenine, the saw palmetto and the ginkgo for men...I mean, these combinations are what's important, and I've always used these substances separately, Shari. That's probably true with you, too, right?

SL: Yes.

CC: But it's great to see that these terrific ingredients are really combined in the two simple and easy-to-use formulas. This is the first time that I've seen them combined with effective dosage. That's...that's important, and that's my warning. Because there's a ridiculous number of other supplements that you're gonna see out there that have the same ingredients, perhaps, that are found in V-Factor...but you gotta pay attention to the dosage. You see, that's the problem. The dosage.

SL: Yeah. I'm going to use a technical word. What other companies do is they *schpritz* it in. Schpritz is...

CC: Don't schpritz. That's what you do to your plants!

SL: Don't schpritz. Now you know what? That's very important what you said. Because you know as well as I do...as you know, we've used supplements in our practices since the beginning of time. Y'know, you look at a product that's supposed to deliver what it's promising. So if you're using another product that claims it has Argenine, if it doesn't have the correct amount, it's not going to deliver what it promises.

CC: Don't schpritz! That's what Shari said.

SL: Just say no!

CC: Just say no. The amounts of the ingredients that are found in V-Factor—again, just as Shari points out—they're all consistent with scientific research...and you've gotta have research to back the ingredients that you put in your product. Now, other formulas...they claim that they have the same ingredients, but you gotta check the label. And you know what I call it, Shari? You gotta do what you do in the grocery store. You gotta check the label, right?

SL: You gotta check...and the same thing with the ginkgo. Y'know, if you schpritz ginkgo in, and you put in 10 milligrams, it's not going to deliver what a product's going to deliver if it has the proper amount of ginkgo. So this is...when I say *scientifically developed*, Carlon and I are both researchers, we're clinicians, we're practitioners, and we use the correct amounts because we read the studies. What I love about V-Factor for Men and V-Factor for Women is that this is a product that's delivering the promise. This is a product that is delivering what it says it's going to deliver. The correct amount...the amounts that were used in the studies...and, y'know, it's just a wonderful thing to be able to have something available for people that's...it's safe, it's effective...we have a separate formula for men, there's a separate formula for women...and it works for really achieving a more positive, more healthy, more vibrant sexual energy. And I think that's what it's all about is...people are losing...losing your libid...that sounds like a great name for a book: *Losing Your Libido*...or a movie!

CC: My goodness, we've got another book.

SL: Do you like?

CC: Between the two of us...

SL: Losing your libido. But people are losing their libido...

CC: Absolutely...

SL: And they don't feel sexual...and they don't feel like their sexual performance is where it could be. And y'know, maybe for a man it's a little bit more of a problem than for a woman. What can I say??

CC: What's more discouraging...is when people have those problems, and they turn to products that...and they're not getting the kind of dosage that they...that nec...that necessitates a proper function...then, of course, you're not getting the right ingredients, not getting the right amounts...and V-Factor does provide you with the full dose you need. *That's* what's important. It's kind of like, y'know, you get ripped off at the diner. All right? You go there and imagine asking for a plate of French fries, and the waiter comes back and he puts a plate of *two French Fries* in front of you! And then he proceeds to argue with you somehow, that, like, *well, you did say French Fries*...y'know. And needless to say, 2 French Fries won't fill you up. So it's the same thing...

SL: It's not the full order.

CC: It's not the full order. So get the full order.

SL: Get the full order. Now, y'know, there are a couple of other things that we should probably touch upon. The saw palmetto for men is *so* important. Saw Palmetto supports healthy prostate function. I have to tell you something: All my husband hears every day is *prostate, prostate, prostate*. He hears it, y'know, in the news...he reads it in the newspaper...

CC: Absolutely. Because, Shari, it's supported by *science*. The research tell us that saw palmetto will support healthy prostate function. It promotes prostate health. It promotes healthy urinary tract function, and normal urine flow, and normal voiding patterns...or urinating patterns.

SL: And this is really important because I think that men are becoming acutely aware of this much younger in life. I mean, even if you're 20...it's almost like, now when I see some young men in my practice, I have men in their 20's and 30's overly concerned about what their prostate's going to be like when they're 50. because their father doesn't have great prostate health...their uncle...whatever. So I think it's a kind of in-your-face kind of thing. So this is a product that men really get a double-whammy with. They get the support for erections...which is very important. They also get the support for keeping a healthy prostate. And they also get something that is in the men's and women's formula, which is the ginkgo. Now, the ginkgo for men...it's very important for both men and women. It supports the healthy micro-circulation. So, once again, we're talking about the blood flow to the sexual organs and other parts of the body as well. But ginkgo also helps with memory, cognitive function—it's a very very important supplement that a lot of people have heard about. And I think that, y'know...I think when your sexual energy is lacking, Carlon, I believe that it can affect other things in your life.

CC: Yeah, absolutely.

SL: You don't feel as vibrant. You don't feel as "up." Y'know, it isn't necessarily that you feel tired...it's just kind of...I would think that it would almost be depressing. I think when you're...

CC: And for some people it's even worse than that. For some people, they're very disillusioned, they're very disheartened. It can ruin marriages. It can really...it can really cause a lot of problems.

SL: And I think that one thing about this product, once again, which I think is so important...is it's natural. In the men's formula you get Argenine, you get ginkgo biloba, you get the saw palmetto. These ingredients are extremely important. You also get Siberian ginseng. In the women's formula, you get the L-Argenine, the ginkgo biloba and the Siberian ginseng. Siberian ginseng is also a product that I think a lot of people are interested in as well. A lot of people are taking ginseng supplements. So this is a supplement, once again, that supports your overall health and well-being. But most important, it's dealing with a very, very personal issue. And we're going to come back in a little bit. We'll be talking more about V-Factor. So I'd like everyone to stay tuned. Once again, you're listening to the VitalBasics radio show, joined with Dr. Carlon Colker and Dr. Shari Lieberman. And we'll be right back, so stay tuned.

CTA #1

SL: Welcome back to VitalBasics radio show. You're joined with Dr. Shari Lieberman and my co-host, Dr. Carlon Colker. Carlon, I think, y'know, what I'd like to do now is kind of share our clinical experience. Because I think we bring something to the table in that...we're talking about ingredients...we're talking about the science...but you and I have actually used these ingredients in our practices. And what's great is...now you've got a supplement that's an all-in one. But...share with me a little bit.

CC: We talk so much about men, and men having problems...and I don't have to tell you, Shari...

SL: Hey, women have problems, too!

CC: ...that women also suffer from decreased libido and other sexual problems. And, y'know, one case in particular comes to mind. Not too long ago, a young women...would you believe she was 28 years old...

SL: I *do* believe.

CC: Well, she came to see me, uh, with among other issues a complaint of not being able to become sexually aroused. Now, here's the sad part of the story. She spent an enormous amount of time and money seeking psychiatric counseling at the advice of one of her friends...

SL: Boy...

CC: Well, this is not an unusual story. Then, y'know, they told her that she was a Type-A personality...she's too stressed, she needs to have more rest for herself, etcetera, etcetera. Y'know, if you're too stressed, y'know, obviously you want to avoid stress. And, y'know, you want to take time for yourself and relax. And all those things can help. But she *tried* all of that and it didn't change her condition one bit.

SL: Frustrating.

CC: Now, remember, this was a relatively young woman. So she even tried taking a couple of the over-the-counter pro-hormones. You've seen those?

SL: Sure. Like the creams and all that kind of stuff. Yeah.

CC: Now...she was actually taking one at the time she came to see me. So, I, of course immediately stopped that nonsense because the side effects in an individual like this would be just incredible and particularly scary. And instead, I chose a natural regimen of Argenine and ginseng. Huh...there ya go...and these substances, as we mentioned, they support healthy circulation. They're exactly what we find in V-Factor. And in her case the results were dramatic. It was almost as if all her body needed was a little bit of a nudge with the natural ingredients to get her the right direction...

SL: But isn't that amazing. You want to know something? If you think about what people have tried...and you know what? What people will *do* to fix that problem.
CC: And...and fortunately in her case, she responded quite well to something that was natural and available...

SL: Super...

CC: ...in this case, in the form of V-Factor.

SL: Y'know, I really want to say to everybody out there: if you are experiencing sexual decline. And sexual...I'm not talking about your age. You can have sexual decline if you're 28...you can have sexual decline when you're 48...you can have sexual decline if you're 68. We're not talking about...we're getting away from the age factor, and instead we're going to be talking about the V-Factor. And this is a product, once again...if you're experiencing a decline in your sexual performance—you're not getting that zip and zing that you used to...

CC: If you're stressed because your pager keeps going off.

SL: That's right! If your pager keeps going off and *that's* affecting your sexual performance...Nothing personal, Carlon, of course...but this is a product that...you have nothing to... Y'know what I love, Carlon? I love when the downside is...*nothing*. The fact of the matter is that the studies support and show: L-Argenine...safe and effective for both men and women. Very important. Once, again, we're talking about the blood getting to your sexual organs and that's very important. We're talking about the ginkgo biloba, which also supports circulation. We're talking about the saw palmetto for men. I mean, a lot of young guys, and certainly almost every man that I see over 50's taking saw palmetto now. I mean, it's a very important thing for men to take. And we're also talking about Siberian ginseng because...that's something that...people like to take ginseng, and I think that this is a very, very synergistic formula. Once again, it's safe, it's natural...there's no downside. And I love that as a clinician. And, y'know, I've spent my whole life recommending specific dietary supplements, exercise regimens, y'know, dietary interventions...I like to do the safe thing first.

CC: Absolutely. And, y'know, one of the things I want to go back to is, again, other products that I've seen out there that some of my patients bring me to take a look at and stuff, y'know, that I've seen, not only cheat you out of the amounts of the ingredients that you need to see results, but they disguise what they're doing by also including insignificant amounts—or, as you put it...

SL: Schpritz!

CC: ...schpritzing. A schpritz of a whole bunch of other ingredients. And I always warn my patients to stay away from products like that. Um, y'know, it's sort of like what I call the "shotgun effect:" They put piddly doses in of everything but the kitchen sink, right, Shari? And then their formulas...y'know, they hope that it hits you with something that works. And, unfortunately, all it does is, uh, lighten your wallet.

SL: Well, y'know, maybe...maybe sometimes people think, y'know, if a product has 20-30 ingredients in it it's going to work better. No. The 20, 30 ingredients...maybe you're sacrificing an amount of 1 or 2 ingredients that are really necessary for it to work. You're listening to Dr. Shari Lieberman and Dr. Carlon Colker on the VitalBasics radio show. Stay tuned, because we'll be right back.

CTA #2

SL: And welcome back to VitalBasics' radio with Dr. Shari Lieberman and Dr. Carlon Colker. Carlon, I just want to kind of recap a little bit about what V-Factor does...y'know, the fact there is a very special formula for men, a very special formula for women...because if some people haven't noticed, we are a little bit different...

CC: That's the point—we're different...

SL: We're a little different...

CC: Gosh, we're the same in so many ways. What is that book...*Men are from Venus, Women are From Mars*...or is it the other way around...
SL: One of those things.

CC: One of those things. But, y'know, again...I've been using the ingredients that are found in V-Factor for years in my medical clinic with my patients. And it helps to stimulate sexual energy. And support the health of my patients. And remember, different formulas...different sexes. You've got Argenine and ginseng for women, and Argenine, saw palmetto and ginkgo for men. And that's what's terrific. These ingredients are combined into two simple, easy-to-use formulas.

SL: I...and, once again, who can benefit from this? If you are feeling not the same pep and drive as you have had in the past when it comes to sex...if your sexual desire, sexual performance, sexual energy, just isn't what it's been in the past... And I have to tell you something: This is a product that, once again, you have nothing to lose. If you are experiencing low sex drive, low sexual desire...if you've *never* experienced your sexual performance or desire to where it should be...whether you're a man or a woman or you want to perhaps *enhance* your sexual performance or desire, this is a product, once again...why not give it a try? There's no downside...it's completely safe and natural, and I just love that about the product.

CC: Yeah, I mean, look. This is a sensitive subject. But as a physician, I can tell you that, uh, patients are now...patients and doctors are now speaking about this very sensitive subject. There's a wonderful new openness, and I know that it's a difficult subject for so many people. So here we are on the radio, discussing this subject openly, and discussing what I think is a healthy, all-natural way to stimulate sexual appetite, sexual energy.

SL: And it's something, once again, that so many people are complaining of. As I said, in my practice—maybe 'cause men don't want to let their hair down as much as the women—I mean, women will come into my practice and sometimes talk about that perhaps as their number-one secret...

CC: Now, you see, men let their hair down in my practice all the time. I don't understand this, Shari...

SL: See? I dunno...now why do they tell you and they don't tell me? What's going on here?

CC: *Vive le difference.*

SL: *Vive le difference*. But, y'know, this is something where a lot of people... Y'know, Carlon, it's almost like you don't feel whole if you don't feel sexual. And you know when you were talking...when we were talking earlier about that patient of yours that...the husband and wife. I have women who are very concerned...they don't feel sexual and their very concerned that their husband...I, I've had women specifically say to me, *I keep telling him it's not him...*

CC: That's what we call a relationship. I mean, there ya go. When you're in a relationship, one partner depends on the other for supporting their own health and happiness. So, y'know, one cannot feel otherwise...and to feel somehow that they might have failed. And so, it's really tragic to see these kinds of things, and it's wonderful to know that we have a way to address them.

SL: Now, this is Dr. Shari Lieberman...

CC: And this is Carlon M. Colker, M.D.

SL: Saying goodbye to you. This is the VitalBasics radio show, and I hope that you join us next time. So we'll see you soon.

CTA copy: If you're listening to this program and you'd like more information about V-Factor, the advanced-formula supplement that enhances sexual function, please call toll-free: 1-800-_____. That's 1-800-_____. You can now get on a 30-day risk-free trial direct from Vitalbasics. Mention this program when you order and you can even get a 30-day supply absolutely free. Be sure to ask for the details. V-Factor is an effective, all-natural supplement guaranteed to give you noticeable results *quickly* or your money back. If you need some help with sexual function...if you have concerns about prostate health, memory or cognitive function, please call right now. There's a formula specifically for men, and a formula specifically for women. Call now and be sure to ask about our special offer. It's 1-800-_____. That's 1-800-_____.

V Factor
:60 Radio
Sexy
(1/11/01)

ISCI code VF21
File name V Factor spot 21

Sexy female Announcer (:45) "V" is for Virility—the quality that makes you a real man…a sexual animal that women *want*. Also known as the "V-Factor."

The best lovers have it. And now you can *get* it.

Introducing new maximum-strength V-Factor—the all-natural supplement that takes your sexual power to new heights.

No stimulants. No drugs. Just safe, clinically-proven ingredients chosen for one thing and one thing only: Heightened sexual function that will drive you—and your partner— wild.

The concept behind V-Factor is so reliable, it's even backed by Nobel Prize-winning science and advanced medical research.

The "V-Factor" is what separates the real men from the pack.

Want it? Get it. Now.

Unlock your V-Factor. Try it *tonight*.

Anncr Tag (:15) Call 1-800-_____. That's 1-800-_____. Your call is confidential and V-Factor is *guaranteed* or your money back. Call 1-800-_____.

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510 Congress Street
Portland, ME 04101
(207) 775-5007

V-Factor Natural Pack TV infomercial...FINAL BROADCAST VERSION...8/9/01

Opening Disclaimer: The following is a paid advertisement for V-Factor, brought to you by Vital Basics, Inc. V-Factor is a dietary supplement designed to support sexual function in healthy men. It is not a treatment for any disease, including sexual dysfunction and impotence.

Denise: If your sex life isn't as satisfying as it used to be, my guest has some groundbreaking new scientific information that may give you exactly what you need to improve your sex life. He'll tell us about a new supplement that's easy, safe, clinically tested...and is something you can use immediately to improve your level of sexual satisfaction.

Carlon Colker, M.D. is the Medical Director of Peak Wellness in Greenwich, Connecticut. He is an attending physician at Beth Israel Medical Center in New York City, and three hospitals in Connecticut: Stamford, Greenwich and St. Joseph's. In addition to treating many patients for male sexual function, he is one of the most sought-after consultants in the country, and has written extensively about sexual health. Dr. Colker, thank you for joining us.

You're recognized as an expert in this field—you've pretty much written the book on sexual health and what comes of that. What sparked your interest in the field of sexual health?

Carlon: Well Denise, as a specialist in internal medicine, I've seen literally thousands of patients for problems—from simple stuff...fever, cough, sore throat, little stuff like that...all the way up to life-threatening illness that actually requires hospitalization. But I can tell you that among all these individuals, the common denominator—the common complaint—is one of sexual health. But that's only if you ask. Because if you don't ask, you're simply not going to know these things. And that's sort of where this taboo idea that it's sort of taboo to talk about sex comes into play. Sometimes the individuals are embarrassed or shy about it. Sometimes even the physicians are.

When you take the step...advance the step as a physician to your patients to ask them about their sexual health, I would wager a bet that a lot of people have never had a doctor ask that. What's their reaction to you?

That's a really good point. Most of them are a little bit shocked, a little bit taken aback at first, as I sort of instruct the residents and the interns I train that that's to be expected. Because most physicians—certainly too many—actually are a little skittish about this subject, and even embarrassed themselves. But that's not appropriate. I mean, one should be able to speak about this with their patients. So when we bring it up, of course at first there's a little shock factor. But then after that there's actually almost a relief that you're asking about it, and you want to make sure that everything's okay on that front, too.

Even 5 or 10 years ago, likely you and I would not be sitting here in front of the cameras talking about sexual health and all that is implied in that. Now there's a new openness. We're seeing it permeating our society.

Yes, and certainly as little as a matter of years ago, we would not be sitting here today and this would be utterly shocking for society. And certainly even today, probably there's many people out there that are actually shocked by this. But here we are on national television, we're talking about sex, we're talking about sexual health. And, y'know, it's been written about in newspapers, it's written about in magazines, it's on radio, it's on television...and that's really a good thing.

The baby boomer generation. I don't know how much I've read about it...or most people have seen research done on the baby boomers, they're the virile generation, they take no prisoners. I mean, this is the can-do generation. And I'm guessing that many of your patients are baby boomers. How are they...how surprised are they when they take that step into your office?

Well, look, they are extraordinarily surprised, because again, these are individuals—the so-called baby boomers—who have their heels dug in. They're not about to climb into the rocking chair and just go passively into retirement and wait to die. They're not going to do that. They want to stay healthy, they want to stay physically active, they want to stay strong, they want to stay virile...and that includes, again, their sexual health. They're very focused on that and they want that to be just as much a part of their lives as everything else.

And they're part of that new openness that we've been talking about, don't you think?
Absolutely.

Not just older folks, not just baby boomers. There are a lot of young people in there.

Well, it's not just individuals in their 60's and 70's, or the baby boomers. This also occurs in individuals in their 20's. So again, the V-Factor Natural Pack is something that younger people can use, and something that *older* people, individuals, can use with a great deal of satisfaction.

Proactive is what we're talking about today. Let's talk about the solution—the V-Factor Natural Pack.

This is a dietary supplement with some natural ingredients in it. And those ingredients are put together in a specific combination, and that's very important because I precisely formulated this product based on the information that's already out there. Collectively we have a clinical study to show the effectiveness of this product. And I think that's what's important. We have a product that really does improve sexual satisfaction in men.

V-Factor Natural Pack is set apart from the rest of the pack by the clinical study—the research that came back, the safeness, the data that supports this, the verbatums from the people that were part of the study—all tell you that this is very effective. Could you compare this—all of that research, the science behind it—compared to some of the other products that people are seeing out there, too.

Sure. Well, I think it's important to recognize that there *is* this clinical study, which I was, of course, the lead investigator into the product. I mean, we did a very, very strict clinical study on it, and we showed that this was, in fact—the V-Factor Natural Pack—really excellent in improving sexual satisfaction in men. It really was terrific. And that's so important to recognize, because so many other products that are out there...I mean, they're based on folklore or they're based on what I call pseudo-science, or they're based on some anecdotal information, and that just means what someone says is true for them. And while that might be good for an individual, and might be interesting, that really isn't scientific enough. We need to know that something's really going to work for people.

That's what sets us apart here. Now, for the layman, what does clinically tested mean, specifically? What does that mean?

Well, to say something that is clinically tested, it means that the product has actually undergone a very careful scrutiny and research where we take the product and we test it against a placebo. And it's in a double-blind fashion where neither the examiners nor the subjects in the study actually know which product they're taking. And they go forward and take the product and see how they do. In the case of the V-Factor Natural Pack, we clearly found the increased level of satisfaction. It was very significant.

V-Factor Natural Pack is also rooted in some pretty heavy-duty research that even came before the clinical trials

Absolutely. One of the ingredients that I selected for the V-Factor Natural Pack actually is based on the Nobel Prize-winning research in the theory that nitric oxide—a substance called nitric oxide—can actually improve circulation to the genitals. And that's so important, because if you improve circulation to the genitals—with nitric oxide, by increasing nitric oxide—then you improve the function. If you improve the function, then clearly your satisfaction's going to get better. And that's so important. But, y'know, I don't want to get away from this idea that, again, a fulfilling relationship is really what we're coming after. I mean, the idea of having good sexual health ultimately leads to a good relationship.

You have the opportunity really to change people's lives. How gratifying is this for you when you see your patients come back to you and say, *Gosh, this has just totally changed my life. I have a whole new lease on life. I've been released from prison.*

Well, it's extraordinarily gratifying, Denise. I mean, that's why I went into medicine in the first place, is to help people in any way that I can. So this was something that was inevitably going to enter my practice in some capacity, and certainly enters the practice of any physician out there at some point or another.
Let's talk about how it really, really works. You take it right before intimacy, and that's it? It's that simple?

Denise, it's that simple. I mean, you don't have to take this product every single day like some products are telling you to do...and therefore it has to sit in your cupboard with your multi-vitamins and all those vitamin Cs that you keep trying to remember to take, but you just can't remember to take every single day. This is a product that you take shortly before intimacy, and that's it. It's that simple.

Were you surprised? Like you were saying, if you have all this stuff that you have to take every day, the irony is that you're going to become a slave to that, too. So you're still a slave...but you haven't gained any freedom at all.

One would like to say that I was pleasantly surprised by the results. But again, I'm a scientist and a physician, and that's so important to recognize that, with the research that we knew already on the ingredients, putting them together was kind of like dialing the right combination of a lock. And again, that's what an experienced physician, an experienced researcher, does, is we put ingredients together that it's only logical that it should be very effective.

It is. But we are all individuals, so we know that the results will vary. But what can men expect from this, specifically? They're out there, they're wondering, they want to know.

Well as our clinical trial showed, when an individual takes the V-Factor Natural Pack they are going to experience increased sexual satisfaction and a better sexual response. Each V-Factor packet or blue packet contains 3 easy to swallow capsules and it's that simple so you can take it with you, you don't have to take the whole box or bottle with you, you can take a simple packet with you and uh-it's just that simple. Very, very convenient, very easy to take, very easy to store.

I like it to because it is so private in nature and it's anonymous in nature.

It's important to recognize that when you order the V-Factor Natural Pack, that V-Factor natural pack truck is not going to be coming up to your house, pulling right in front and dropping off your, your order so that your neighbors can see. That's just not what happens. I mean, this is something that's in total confidence, total anonymity, okay? And the package is delivered to you in unlabeled fashion and that's so, so important because, again, this is a sensitive subject and confidentiality and anonymity, as it is with my patients, is very, very important to the individuals that are, that are interested in the V-Factor Natural Pack can certainly rely on that.

Our guest today is Carlon Colker, M.D.. He's helped countless men improve their sex life, which, of course, has a powerful effect on all areas of a man's life. In just a moment, we'll dispel some of the most common myths about sex. Many of them are so pervasive, they can have a devastating effect on men of all ages. Stay tuned.

[Transition into CTA]

CTA #1: If you'd like more information on the all-new *V-Factor Natural Pack*, please call the number at the bottom of your screen. Your call is always completely confidential. As you heard the doctor say, *V-Factor* is based on a concept that won the Nobel Prize in Medicine...and a recent clinical trial showed a significant improvement in sexual satisfaction. We've worked out a special arrangement for viewers of this program. . .call right now and ask how to get a free bottle with your order. Again, your call is completely confidential, and of course *V-Factor* comes in plain packaging to respect your privacy. Plus there's a 30-day money-back guarantee. This is too important to put off. You need to do something now, and V-Factor is the natural choice for improved sexual satisfaction. Call now, take advantage of that special offer, and don't be surprised if you have better sex more often.

[Dissolve to V-Factor logo with CG: "The Natural Choice for Improved Sexual Health"]]

Intro to SEGMENT 2: We're back with Carlon Colker, M.D.. We're talking about a revolutionary breakthrough that improves sexual function and satisfaction...some very dramatic results. Doctor, we've been talking a little bit today

about the clinical trial that went into this, the due diligence that went into the V-Factor Natural Pack. So much good verbatums that came back from the people that were part of the study. What were they telling you?

Well, it's so important to recognize that having a clinical study behind the product is so important because it tells you that this product really works and that's the whole idea. There are too many products out there that don't have a clinical study to support their use. If the man's taking V-Factor Natural Pack, they can expect to have improved satisfaction, have a greater satisfaction. It's such a key part of happiness and if V-Factor Natural pack can contribute to that intimacy and strengthen the bond between two people by improving their sexual health, then that's what it's all about. That's what we're going after.

So much data supports the safety and the reliability of V-Factor Natural Pack. Can you tell us exactly what it is, though?

This is a product that I specifically formulated and carefully designed to include natural ingredients—and that's very, very important, hence the name V-Factor Natural Pack—that's clearly been shown to have an effective influence on sexual function and sexual health. That's very important. And then the V-Factor Natural Pack itself—the actual final formula—has also been tested and shown to be safe and effective.

You've put together a little quiz, because there are so many myths out there. We've talked a lot about the new openness that we know that's been going on...in our society the past 5 or ten years but still, we're in that transition period where these myths are still layered on that new openness as well. I'm going to, you know, sort of play along with this because, everyone in our society, we're all just human beings. We all have these same myths. First question, being sexually satisfied, or enjoying sex when you get older can't happen...don't like sex when you're over 50, 60 or 70. True False. I'm going to say...I want it to be false.

Well, you know, look, of course, this is false. I mean, to think that you're not going to have good sexual health as you get older, that this is, this is absolutely something that has to happen, it has to get worse, is just silly. It doesn't have to get worse. If anything it should be just the same or even better because, let's face it, you have more experience and so that's something to really keep in mind. If you have a medical problem or some such that really limits you, well that's a different story but if you're otherwise healthy, there's no reason that your sexual health shouldn't be just as good, if not better. Again, that's why we have the option of the V-Factor Natural Pack.

Second question is a lot more difficult, I think and one that I could have gotten tripped up on. Second question is, talking about sex with your partner is really, will improve the quality of your sex life. In other words, all you gotta do is sit down and talk about it and it'll get all better. I would like to think that that's true. I don't think it is, though.

You're saying false.

I'm saying false.

Well that's correct it is false because you know, again, I don't...I don't want to get away from the idea that, you know, communication, good healthy communication is so important in a relationship and forms the foundation of any healthy relationship so communication is important. So you know, you have to do something about it. You have to be proactive about it. Again, that's why we have our option of the V-Factor Natural pack, to help that.

Third question, good sex relieves stress. I think that's easy. I'm going to say yes.

Well, you know that's absolutely true but a lot of people somehow get that confused. Yes, good sex does relieve stress but keep in mind, Denise, if you're having bad sex, then the very thought of the experience, the pressure from your partner, perhaps, to engage in sex, is actually so overwhelming that this actually becomes a problem and you can really actually increase your level of stress.

Fourth question, sex becomes less important as the years go by. We've talked about it a lot. I'm hoping that that isn't true.

No, it's nonsense. I mean, you know, what most couples recognize when the kids grow up or they move out, or they go to college, or whatever, they actually tap into this new level of intimacy and that's really something that's very beautiful...

That's nice.

It's beautiful and it's something that's very healthy, very normal and it's something that you'd like to see. And of course along with that, sometimes you can get a bump in the road. Sometimes younger people experience these things too so I don't want you to think that it's just older individuals.

Fifth question and this is kind of one that I stumbled on, most sexual function issues are the result of poor self-esteem, and...uh... lack of confidence. I don't think so, but I'm not exactly sure why.

And your answer is?

No.

This is absolutely false. To think that these things don't play into the, into the whole equation...

Right.

This of course is not correct either.

People when they come in, potential clients when they come in, patients when they come in, do you find that they have these misconceptions about sex and how damaging are they?

Oh, they have numerous misconceptions about sex and how things are supposed to pan out for them. And younger people tend to exaggerate the frequency of their sex or the quality of their sex. Older people tend to minimize it's importance and pretend it's invisible. It's a... We don't want to talk about it. It's not there. It's not important. So as I like to say, the younger people are lying while the older people are denying and both is unhealthy so you need to get to the truth, and get to the truth of the matter and although this is a sensitive topic, it shoots right to the heart of the matter.

Were you surprised at the success, the level of success of V-Factor in your practice.

Well, you know, I'd like to say that I, I was surprised...um...but and I was pleasantly surprised on a certain personal level to see the accomplishment but of course as a physician, as a medical doctor, as a researcher, uh, there's not a lot of surprise here because, you know, there's so much research behind the individual ingredients in the V-Factor natural Pack. And we designed a clinical study to challenge the combination of those ingredients in a specific clinical study on the actual V-Factor Natural pack, showed us that this increase sexual satisfaction in men and so, you know, really this is all follow suit with the careful research, careful science, so in a way, in that regard, I was not surprised. I expected this to be the, the results.

We shouldn't be surprised either that there are women who are watching the program right now who have a whole variety of questions about this as well. You're advice, and I'm speaking as a woman, your advice. We don't want to continue to damage, you know, self-esteem, but we want to help. We want an act of love, an act of intimacy. So any advice for women who are watching out there. Should they go for it?

It's a tough position to be in because, you know, it seems like almost anything that you do is going to be wrong. It's just gonna...it's just gonna make things worse and you try to open up the subject and try to do that communication that we spoke about earlier and it just seems to be antagonistic. It starts arguments. It gets worse and worse. But you know, uh, call. You know, get the V-Factor Natural pack because, you know, there's no greater gift than this gift of trying to re-ignite the spark in you relationship. There's no greater gift than that gift of intimacy.

Transition to CTA #2: Our guest today is Carlon Colker, M.D.. He's here with important new information on improving your sex life. We'll be back to talk more with the doctor in just a minute, including more essentials every man should know about sexual health.

[Transition to CTA]

CTA #2: If you'd like more information on the all-new *V-Factor Natural Pack*, please call the number at the bottom of your screen. Your call is always completely confidential. As you heard the doctor say, *V-Factor* is based on a concept that won the Nobel Prize in Medicine...and a recent clinical trial showed a significant improvement in sexual satisfaction. We've worked out a special arrangement for viewers of this program. . .call right now and ask how to get a free bottle with your order. Again, your call is completely confidential, and of course *V-Factor* comes in plain packaging to respect your privacy. Plus there's a 30-day money-back guarantee. This is too important to put off. You need to do something now, and V-Factor is the natural choice for improved sexual satisfaction. Call now, take advantage of that special offer, and don't be surprised if you have better sex more often.

[NOTE: Dissolve to V-Factor logo with CG: "The Natural Choice for Improved Sexual Health"]

Intro to segment #3: And we're back with Carlon Colker, M.D., and our topic today is a sensitive one and one that we should talk about because it effects men of all ages, every day, as well as their partners. We're talking about a revolutionary new breakthrough that will help you get that spark back into your sex life.

Proactive is what we're talking about today. Let's talk about the solution—the V-Factor Natural Pack.

This is a dietary supplement with some natural ingredients in it. And those ingredients are put together in a specific combination, and that's very important because I precisely formulated this product based on the information that's already out there. Collectively we have a clinical study to show the effectiveness of this product. And I think that's what's important. We have a product that really does improve sexual satisfaction in men. Each V-Factor packet or blue packet contains 3 easy to swallow capsules and it's that simple so you can take it with you, you don't have to take the whole box or bottle with you, you can take a simple packet with you and uh-it's just that simple. Very, very convenient, very easy to take, very easy to store.

I think that patients, and you've told me your patients, are very savvy, though, in terms of the products that they purchase. And sometimes they're a little bit suspicious...as well they should be. That's the good thing about the V-Factor is the clinical study that went behind it, your personal effort, and the effort of other people, the safety, the data, the documentation, the verification...it's all there.

Yeah, it's so important because there are so many products out there, and lord knows I wrote the book on it. So I can tell firsthand you there are many, many products out there and most of them don't work and they don't have clinical studies to support their safety and efficacy. The nice thing about the V-Factor Natural Pack is you do have a product that has been clinically tested. It is safe and effective.

You take it right before intimacy, and that's it? It's that simple?

Denise, it's that simple. I mean, you don't have to take this product every single day like some products are telling you to do...and therefore it has to sit in your cupboard with your multi-vitamins and all those vitamin Cs that you keep trying to remember to take, but you just can't remember to take every single day. This is a product that you take shortly before intimacy, and that's it. It's that simple.

Results, though, will vary. We know that. What can a person expect? We say 'before intimacy,'—y'know, how long before intimacy and really specifically what can we expect?

Well, that's a great question, Denise. And y'know, with any substance that you take, the response is going to vary, and that goes for any dietary supplement, any medicine—that's just true from one person to another...the results are going to vary. What we do see with the V-Factor Natural pack is, taken shortly before intimacy, individuals have experienced greater sexual satisfaction, and there's no question about that. That's something that we've seen—very strong data.

Peace of mind and the confidentiality that goes behind the product as well. Can you tell us about that?

That's such an important point to emphasize Denise, and I'm so glad you brought that up. I don't want the men out there thinking that if they go ahead and order this product, that somehow the V-Factor Natural pack truck is going to come pulling up to their house and drop off their order. This is simply not gonna happen. When they call it's completely confidential. When they order the package comes to them in an unmarked fashion. So there's complete confidentiality there and that's so important.

There's so many things going for this product, it sounds...the V-Factor natural Pack. There's the clinical trial behind it, and the data that supports it., the persons that have used it and the comments that have come back and to confidentiality, the peace of mind. I think that the attributes really just go on and on. Would you agree?

It certainly is the case and it so nice to know that we have so much research behind the separate ingredients, the natural ingredients in the V-Factor Natural Pack. We have a clinical study to back up the use of the V-Factor Natural Pack. And that's so important, testing the specific formula under clinical conditions, so we're able to feel very confident about this. This substance has been used in countless men out there and they have had great results. And it's so important to see that we do have this option and men do have that option. If their sexual health is a problem they certainly do have this option.

V-Factor has been taken to the next level in terms of due diligence then, obviously and the clinical trial. Its been taken to a different level that the other product that we are seeing on the air at this point at this point, which really have not been through the same rigors as V-Factor has.

This is important because so many of the products out there are formulated by what I call pseudo-science, or there is just some folklore behind the product or they don't have real clinical medical research that backs up the use of the product. In the case of the V-Factor Natural Pack that's exactly what we have. We have a clinically tested product and that's so important to let the people know out there.

V-Factor relies on some pretty heavy-duty research which is pretty impressive. Can you tell us about that?

Well, actually, it is impressive research. The research behind one of the ingredients in the V-Factor Natural pack revolves around nitric oxide. Nitric oxide is a very specific substance that increases circulation. That's not to be confused with nit-*rous* oxide, which, of course, is laughing gas. But again, by increasing circulation you increase function. By improving function, you increase satisfaction.

Anything else to say to the person out there who's watching this, who...they want to. They want to take that risk. Oh they just so want to—it's just hard to breakthrough that barrier.

I say it to my patients and I say it to the viewers, that you deserve to have a satisfying sexual relationship with your partner.

Carlon Colker, M.D. has been our guest today. If you'd like more information about *V-Factor*, please call the number on your screen. Again, it's completely confidential to respect your privacy. I'm Denise Diamond. Thanks for watching.

CTA #3: If you'd like more information on the all-new *V-Factor Natural Pack*, please call the number at the bottom of your screen. Your call is always completely confidential. As you heard the doctor say, *V-Factor* is based on a concept that won the Nobel Prize in Medicine...and a recent clinical trial showed a significant improvement in sexual satisfaction. We've worked out a special arrangement for viewers of this program. . .call right now and ask how to get a free bottle with your order. Again, your call is completely confidential, and of course *V-Factor* comes in plain packaging to respect your privacy. Plus there's a 30-day money-back guarantee. This is too important to put off. You need to do something now, and V-Factor is the natural choice for improved sexual satisfaction. Call now, take advantage of that special offer, and don't be surprised if you have better sex more often.

Closing Disclaimer: The following is a paid advertisement for V-Factor, brought to you by Vital Basics, Inc. V-Factor is a dietary supplement designed to support sexual function in healthy men. It is not a treatment for any disease, including sexual dysfunction and impotence.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Vital Basics, Inc. ("Vital Basics") is a Maine corporation with its principal office or place of business at 100 Commercial Street, Portland, Maine 04101.

2. Respondent Robert B. Graham is an officer and director of respondent Vital Basics. Individually or in concert with others, he

formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Vital Basics.

3. Respondent Michael B. Shane is an officer and director of respondent Vital Basics. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is that of Vital Basics' wholly-owned subsidiary, Vital Basics Media, Inc., 330 Madison Avenue, New York, NY 10017.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondents" shall mean Vital Basics and its successors and assigns, and their respective officers, agents, representatives, and employees, and Robert B. Graham and Michael B. Shane, and their respective agents, representatives and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

5. "Substantially similar product" shall mean any ingestable dietary supplement containing one or more of the following ingredients: phosphatidyl serine, dimethylaminoethanol (DMAE), docosahexaenoic acid (DHA), L-glutamine, L-pyroglutamic acid, pyridoxal alpha ketoglutarate, N–acetyl-tyrosine, GABA, inositol, bilberry, pine bark; bacopa monnieri, Coenzyme Q-10, huperzine, choline, vinpocetine, boron, or vanadium.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Focus Factor or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product's name, that:

a. Such product improves the focus, memory, and concentration of healthy adults;

b. Such product alleviates stress, fatigue, irritability and mood swings in healthy adults;

c. Such product makes children and teenagers feel more alert, focused, and mentally sharp;

d. Such product improves students' ability to concentrate and their academic performance;

e. Such product improves senior citizens' memory, mental clarity, and energy;

f. Such product improves adults' ability to absorb information in books and to recall facts, figures and names; and

g. Consumers who start taking such product regularly will feel its effects in as little as one to ten days;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, or dietary supplement, as "food" and "drug," are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product's name, about the safety, performance, benefits, or efficacy of such product for:

a. the brain or any mental functions or processes (including, but not limited to cognitive function, memory, focus, learning or concentration), stress, anxiety, energy, mood or behavior, academic or business performance, longevity, age-related memory impairment or dementia;

b. sexual response, function, enhancement, or performance; or

c. the treatment, cure, mitigation, or prevention, of any disorder;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of V-Factor or any other product containing yohimbine, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product name, that such product is safe, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall not misrepresent, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, shall disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any product or program, and any respondent, or any individual or entity labeling, advertising, promoting, offering for sale, selling, or distributing such product or program. For purposes of this Part, “material connection” shall mean any relationship that might materially affect the weight or credibility of the endorsement.

VI.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, expressly or by implication, that it is not a paid advertisement; and

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually in the same language as the predominant language that is used in the advertisement, in a clear and prominent manner, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; and

C. Any radio advertisement fifteen (15) minutes in length or longer or intended to fill a time slot of fifteen (15) minutes in length or longer that does not state in the same language

as the predominant language that is used in the advertisement, in a clear and prominent manner, and in a volume and cadence sufficient for an ordinary consumer to hear, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE LISTENING TO IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the stating of the disclosure provided herein.

VII.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VIII.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of $1 million ($1,000,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than ten (10) days after the date that this order becomes final.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Focus Factor and V-Factor in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of these products is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

D. Respondents relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of either respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

IX.

IT IS FURTHER ORDERED that respondent Vital Basics, Inc., and its successors and assigns, and respondents Robert B. Graham and Michael B. Shane shall, for five (5) years after the

last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation including videotape recordings of all such broadcast advertisements;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

X.

IT IS FURTHER ORDERED that respondent Vital Basics, Inc., and its successors and assigns, and respondents Robert B. Graham and Michael B. Shane, for a period of ten (10) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XI.

IT IS FURTHER ORDERED that respondent Vital Basics, Inc., and its successors and assigns, shall notify the Commission

at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

XII.

IT IS FURTHER ORDERED that respondents Robert B. Graham and Michael B. Shane each shall for a period of five (5) years after the date of issuance of this order, notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that may affect his compliance obligations arising out of this Order. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

XIII.

IT IS FURTHER ORDERED that respondent Vital Basics, Inc., and its successors and assigns, and respondents Robert B. Graham and Michael B. Shane shall, within sixty (60) days from

the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIV.

This order will terminate on April 26, 2024, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Vital Basics, Inc., and Robert B. Graham and Michael B. Shane, individually and as officers of the corporation.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves practices relating to the advertising and promotion of two products: Focus Factor and V-Factor Natural Pack. Focus Factor is a dietary supplement containing, among other things, vitamins, minerals, botanicals, and amino acids. Marketing materials for Focus Factor claimed that the product enhanced brain function and improved the focus, memory, mood, concentration, and energy of children, adults, and seniors. V-Factor Natural Pack is a dietary supplement containing, among other things, yohimbine and L-argenine that was marketed as a men's sexual performance enhancer.

According to the FTC complaint, the respondents failed to have substantiation for their claims that Focus Factor: (a) improves the focus, memory, and concentration of healthy adults; (b) alleviates stress and combats the fatigue, irritability and mood swings that healthy adults experience; (c) makes children and teenagers feel more alert, focused, and mentally sharp; (d) improves students' ability to concentrate and their academic performance; (e) improves senior citizens' memory, mental clarity, and energy; (f) improves adults' ability to absorb information in books and to recall facts, figures and names; and (g) works in as little as one to ten days.

The complaint further alleges that the respondents failed to have substantiation for their claims that V-Factor Natural Pack is safe for virtually all men, and falsely represented that a clinical study of the V-Factor Natural Pack conducted by Dr. Carlon Colker proves that V-Factor is safe and is effective at improving sexual response and function.

Finally, the complaint alleges that the respondents: (1) failed to disclose that certain of the consumer and expert endorsers who appeared in advertising for Focus Factor had material connections with the companies and individuals marketing the product, and that other consumer endorsements were solicited by the promise of a free 6-month supply of Focus Factor to those individuals whose testimonials were used in the company's advertising; and (2) misrepresented that certain radio infomercials were independent radio programs, not paid commercial advertising.

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Part I of the order prohibits representations that Focus Factor or any substantially similar product (defined as any ingestable dietary supplement containing one or more specified ingredients): (a) improves the focus, memory, and concentration of healthy adults; (b) alleviates stress, fatigue, irritability and mood swings in healthy adults; (c) makes children and teenagers feel more alert, focused, and mentally sharp; (d) improves students' ability to concentrate and their academic performance; (e) improves senior citizens' memory, mental clarity, and energy; (f) improves adults' ability to absorb information in books and to recall facts, figures and names; or (g) works in as little as one to ten days, unless the claims are substantiated by competent and reliable scientific evidence.

Part II requires that the respondents possess competent and reliable scientific evidence to support any future claims about the safety, performance, benefits, or efficacy of any food, drug, or

dietary supplement for: (a) the brain or any mental functions or processes (including, but not limited to cognitive function, memory, focus, learning or concentration), stress, anxiety, energy, mood or behavior, academic or business performance, longevity, age-related memory impairment or dementia; (b) sexual response, function, enhancement, or performance; or (c) the treatment, cure, mitigation, or prevention, of any disorder. Although the order does not prohibit the trade name "Focus Factor," it does require the respondents to have competent and reliable scientific evidence to substantiate any covered claims conveyed directly or by implication through the use of the product name.

Part III requires that the respondents possess competent and reliable scientific evidence to support any future claims that V-Factor Natural Pack or any product containing yohimbine is safe.

Part IV prohibits any misrepresentation of the existence, contents, validity, results, conclusions, or interpretations of any test or study, in connection with the marketing of sale of any product or program.

Part V requires disclosure of any material connection that exists between an endorser and the respondents or any other person or entity involved in marketing or selling the product or program that is the subject of the endorsement.

Part VI prohibits the creation or dissemination of any advertisement that misrepresents that it is not a paid advertisement, and requires that specific disclosures be included in any video or radio advertisement that is at least fifteen minutes in length.

Part VII permits any representation for any product that is permitted in labeling for such product by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

Part VIII provides for the payment of $1 million to the Commission.

Part IX requires the respondents to retain certain records for five (5) years after the last date of dissemination of any representation covered by the order: (1) all advertisements and promotional materials containing the representation; (2) all materials relied upon in disseminating the representation; and (3) all evidence in respondents' possession or control that contradicts, qualifies, or calls into question the representation or the basis for the representation.

Part X requires the respondents for ten (10) years to provide copies of the order to personnel having responsibilities relating to the subject matter of the order, and to obtain signed copies acknowledging receipt of the order.

Part XI requires that the Commission be notified of changes in corporate structure that might affect compliance obligations arising under the order.

Part XII requires that the individual respondents notify the Commission for five (5) years of any changes in employment that might affect their compliance obligations arising under the order.

Part XIII requires the respondents to file compliance reports with the Commission.

Part XIV provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

CREATIVE HEALTH INSTITUTE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4107; File No. 0123248
Complaint, April 26, 2004--Decision, April 26, 2004

This consent order addresses practices used by Respondent Creative Health Institute, Inc. and Respondent Kyl L. Smith, individually and as an officer of the corporation, relating to the advertising and promotion of Focus Factor, a dietary supplement containing, among other things, vitamins, minerals, botanicals, and amino acids. The order, among other things, prohibits the respondents from representing that Focus Factor or any substantially similar product (1) improves the focus, memory, and concentration of healthy adults; (2) alleviates stress, fatigue, irritability and mood swings in healthy adults; (3) makes children and teenagers feel more alert, focused, and mentally sharp; (4) improves students' ability to concentrate and their academic performance; (5) improves senior citizens' memory, mental clarity, and energy; (6) improves adults' ability to absorb information in books and to recall facts, figures and names; or (7) works in as little as one to ten days, unless the claims are substantiated by competent and reliable scientific evidence. The order also prohibits the respondents from making any claims about the performance, benefits, or efficacy of any food, drug, or dietary supplement for: (a) the brain or any mental functions or processes (including, but not limited to cognitive function, memory, focus, learning or concentration); (b) stress, anxiety, energy, mood or behavior; (c) academic or business performance; (d) longevity, age-related memory impairment or dementia; or (e) the treatment, cure, mitigation, alleviation of the symptoms, prevention or reduction in the risk of any mental, brain, or central nervous system disease or disorder, without possessing competent and reliable scientific evidence that supports such claims. In addition, the order requires the respondents to disclose any material connection that exists between an endorser and the respondents or any other person or entity involved in marketing or selling the food, drug, or dietary supplement that is the subject of the endorsement, and to pay $60,000 to the Commission.

Participants

For the Commission: *Tawana E. Davis, Shira D. Modell, Heather Hippsley, Mary K. Engle* and *Dennis Murphy.*

For the Respondents: *Robert Ullman, Ullman, Shapiro & Ullman LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Creative Health Institute, Inc., a corporation, and Kyl L. Smith, individually and as an officer of Creative Health Institute, Inc. ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Creative Health Institute, Inc. ("Creative Health") is a Texas corporation with its principal office or place of business at 4451 FM 2181, Suite 100-515, Corinth, Texas 76205.

2. Respondent Kyl L. Smith ("Smith") is an officer and sole director of respondent Creative Health. Individually or in concert with others, he formulates, directs, controls or participates in the policies, acts, or practices of Creative Health, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Creative Health.

3. Focus Factor is a dietary supplement containing more than forty (40) ingredients, including vitamins, minerals, dimethylaminoethanol, bacopa monnieri extract, huperzine, and phosphatidyl serine.

4. Respondents Creative Health and Smith developed, advertised, labeled, offered for sale, sold, and distributed Focus Factor from at least 1997 to 2000. Since 2000, Vital Basics, Inc., a Maine corporation, has advertised, labeled, offered for sale, sold, and distributed Focus Factor, and respondents Creative Health and Smith have participated in the advertising of Focus Factor.

5. Focus Factor is a "food" or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

7. Respondents Creative Health and Smith have participated in the advertising and promotion of Focus Factor, including, but not limited to, through the radio and television infomercials and commercials attached as Exhibits A through G. Those advertisements, which were aired on various broadcast and cable channels, contained the following statements:

Radio Advertising

a. "Smith: I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.

I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.

In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll feel more alert, more focused, and 'on task.'" [Exhibit A: "Kyl 2" (emphasis in original)]

b. "Smith: This is Dr. Kyl Smith. . . . My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy.

(Electronic voice mail 'beep')

Ware: This is Marlene Ware. I'm calling on behalf of my son. He's having a tough time at school, and this has made such a difference. He's remembering things. I can't believe

it! I wanted to tell you how much of a difference it's made for my son . . . Focus Factor. It has made a tremendous difference.

Smith: Focus Factor is safe, it's natural, and it works. Call now so you can immediately begin improving your memory, concentration, mood, focus and energy." [Exhibit B: "Donut Ware"]

c. "Smith: I'm Dr. Kyl Smith. I've seen first-hand how *frustrating* it can be when a child has trouble with focus and concentration. Parents come to me because their children are unfocused, distracted . . . and they just don't know what to do about it.

That's why I developed Focus Factor. It's an effective, all-natural supplement with one purpose: to give your child's brain the exact nutrients it needs to function at its very best.

Focus Factor is for students who need help with concentration and memory. In just a few days, your child will feel alert, focused, and mentally sharp.

And by the way, there's also an adult formula I created for <u>grown-ups</u> who want to improve memory, concentration, and mood." [Exhibit C: "School's in Session" (emphasis in original)]

d. "Host: Well hello again . . . welcome to the Vitalbasics radio program. We bring you vital health information on over 300 great radio stations covering all 50 states . . . and y'know what? I can count on two fingers – literally – the number of times I've actually invited a guest back on this program. Today is one of those times.

Dr. Kyl Smith is back with us at our invitation, and this time he's right here in the studio with us . . .

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So these are just a few of the phone messages we received, um . . . Here's a 65-year old woman. . . . She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic . . . she thought she was getting dimwitted . . . and she says 'Focus Factor started working almost immediately. I felt like a different person.' . . . Here's a woman from your stomping grounds, Texas. She says she's in the insurance industry . . . a very fast paced office. Lots of multi-tasking going on. She says 'I've been taking Focus Factor for a couple of weeks and saw a huge difference. Just unbelievable.' And I'm going to do one more here, because this shows how the product can help children as well. . .

Smith: Great . . ..

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Smith: Most seniors will tell me they've been taking nutritional supplements for maybe years, and never noticed a difference in how they feel. Can you imagine? Well, the thing that seniors tell me that Focus Factor does is it gives them that mental spark, that energy like they used to have. They feel like their memory is more on-task. They can recall things easier with less effort. And the thing I really like to hear is how it improves relationships.

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Host: Here's a letter from a 65-year old woman I spoke with. And she says 'I tried ginkgo biloba for months, and it didn't do anything for my memory. But my memory is now wonderful since I've started taking Focus Factor. I noticed the difference within a couple of days.'

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And I have some comments from some of the doctors we've spoken with. For example, this is a medical doctor. . . this is an M.D. named Lee Cowden, Dr. Lee Cowden. He's a cardiologist, and internist . . . and he says, uh . . . 'Compared to other supplements on the market, the nutrients in Focus Factor are present at better levels . . . and in the ideal forms more likely to enhance brain function. Taking Focus Factor

results in a significant improvement in memory, concentration, and overall well-being.' Pretty strong comment from a medical doctor.

Smith: Wonderful." [Exhibit D: "4600"]

e. "Host: Hi and welcome to the VitalBasics radio program. I'm Bill Begley. This is the health and wellness program you can hear on over 200 radio stations from coast to coast. We're in California, Massachusetts, Florida, Texas, Hawaii, Alaska . . . you name it, we're there, and we appreciate you tuning in today. Thank you very much for joining us.

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My guest, on the phone with us today is Dr. Kyl Smith. . . . Thousands and thousands of hours, folks, this man has put into this breakthrough, this secret that we're going to let you in on today. Dr. Smith, we have so much to talk about . . . it's a blessing to have you on the program. Welcome.

Kyl: Thank you, Bill. I'm honored to be here.

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Host: Anita Sohn is with us. She is a school administrator. And listen to this, this is an amazing story: She put her entire *class* on Focus Factor. Anita, welcome to the program. Can you tell us why you did that and what happened.

Anita: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say 'what can we do about this?' then I would start to tell them, 'Okay, this is what I would do in this situation. And it couldn't hurt, it can only help . . . try it.' So they started, one by one, each child started testing out the Focus Factor. And as a result, my entire class was on the

Focus Factor. We have just . . . we've had just a wonderful time on it.

Host: So you put 'em on the product . . . and what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely.

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Smith: [W]e see a noticeable improvement in the way a person feels it doesn't matter if it's a child, a teen or an adult, in 1 to 10 days. Now I typically tell people, stay on Focus Factor each and every day consistently and you'll notice a difference within 2 weeks. But I've got to tell you Bill that most people come back after the first day and they say, 'Wow, what did you put in this stuff? I haven't felt this good since I was a teenager.'

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Host: All right, we'll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks, these are people we spoke with earlier this week. First we're going to hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients – adults, children, seniors – some very interesting comments here. And Jon, if we could, let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about a year and a half ago. Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets. From that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue . . . poor focus and irritability . . . it helps to keep that under control.

I believe Focus Factor is the best supplement on the market for memory control and memory function – not just with children, not just with adults, and not just with seniors . . . it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it . . . everyone in my family is on Focus Factor. Number one, yes it has vitamins and minerals in it. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts, numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral [sic] has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

Host: So there you have just a few of the many doctors who recommend Focus Factor to their patients. These doctors were not paid in any way for their comments today.

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Host: And it is my great honor and pleasure right now to have on the phone with me Representative Rick Green. And Rick is with the state house in the State of Texas. And he uses Focus Factor himself and his family. Representative Green, welcome to the program. Thank you very much for joining us.

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Host: Now what's your story with Focus Factor?

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2

years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the times that you do get with the family . . . started taking [Focus Factor] about a year ago and found that was exactly the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of y'know, how . . . you'd be at lunch with one person meeting on one thing, you mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen.

***

Kyl: We're all having problems with memory today. It's not our fault. We have an innate ability to have an awesome memory. All we have to do is feed our brain the nutrients it's starving for to enhance energy production. And Focus Factor supplies those nutrients. . . .

Host: So it's kind of like memory in a bottle.

Kyl: Exactly.

***

Host: For over 5 years, Focus Factor has been available only through doctor's [sic] offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program when you order, and you can even get a 30-day supply absolutely *free*." [Exhibit E: "Bill #4400" (emphasis in original)]

f. "Host: This is an incredible story. And I want us to start at the very beginning. Tell us about what inspired you to create Focus Factor?

Smith: It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time. I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels?*. . . .And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, *Hey, what do you do when your patients ask this question? Did I miss something?*

***

Host: Now tell me this, in your experience, do you see improvements in kids' school work?

Smith: Absolutely. We've even seen dramatic improvements in academic performance. And let me give you an example. A child that comes to mind, his name is Brian. . . . Brian was a child that was kicked out of no less than 4 schools. He would not respond to his parents or any kind of authority outside like, like principals or teachers. After being on Focus Factor, in one year he was on the honor roll . . . and two years later he graduated from high school with honors.

***

Host: Now, earlier this week we spoke with several people who say Focus Factor has dramatically improved their quality of life. So if you or anyone in your family – anyone you know – could use some help with mood, energy, memory . . . y'know just clearing out those mental cobwebs, you need to listen to this.

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings. That it gives you a little pick-up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me – right there. I've attributed a lot of

mood swings or depression here and there, you know, to just the age I'm going through right now, you know being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. I notice right away when I don't take Focus Factor. It's hard to describe. You just have to try it. And everybody I've talked to that I've recommended it to has said the same thing.

Kristin Rister-Wheatley: My name is Kristin and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I am on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance, the way she felt in school – the way she'd concentrate. I've shared it with my friends. I've shared it with my family. They, everyone feels the same way. We all love Focus Factor. " [Exhibit F: "Leisa #4500" (emphasis in original)]

Television Advertising

g. "Host: Welcome to the Vitalbasics Health Show. . . . Several months ago . . . we interviewed a leading expert in nutrition who is generating controversy with his assertion that there's a nationwide epidemic called "Brain Starvation" that affects men, women and children alike in this country. According to Dr. Kyl Smith, memory loss, poor concentration, mood swings and fatigue are causing a dangerous drop in effectiveness in the workplace and a higher level of tension and even anger in the home. He also introduced a new dietary supplement called Focus Factor

that helps people with these everyday problems. Dr. Smith, welcome to the program again.

***

Host: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking Focus Factor and it was about the American revolution and I was able to remember all kinds of things. So I'll you what, let's roll the clip...

Host from previous show: "I started reading this 400 page book . . .very dense, very dry ...and what I found was, I'm remembering everything virtually in this book. I'm remembering the names of British Lords and generals and dukes and battle sites and chains of events that happened. This book literally came alive to me . . . not only as I was reading it, but after, my comprehension was extraordinary."

Host: And I have to say, since that program aired, things just seem to get better and better and better, its sort of a cumulative effect. A couple of things that I notice. First of all, my memory just seems to keep getting better. . . . So one thing I can do is visualize things better, which helps me to remember. The second big thing is multitasking. In the past, when I would get all different projects thrown at me at once, I would panic. Because it just seemed so overwhelming. Since taking Focus Factor what I find is I can more calmly prioritize things. I can focus on each task better,, which means I get it done more quickly generally. And I can just get the projects done faster. So that just eases all of that stress that normally would have come down on me."

Smith: That's great. [Exhibit G: "Bill's Case Studies"]

8. Through the means described in Paragraph 7, respondents Creative Health and Smith have represented, expressly or by implication, that:

(a) Focus Factor improves the focus, memory, and concentration of healthy adults;

(b) Focus Factor alleviates stress and combats the fatigue, irritability and mood swings that healthy adults experience;

(c) Focus Factor makes children and teenagers feel more alert, focused, and mentally sharp;

(d) Focus Factor improves students' ability to concentrate and their academic performance;

(e) Focus Factor improves senior citizens' memory, mental clarity, and energy;

(f) Focus Factor improves adults' ability to absorb information in books and to recall facts, figures and names; and

(g) Consumers who start taking Focus Factor regularly will feel its effects in as little as one to ten days.

9. Through the means described in Paragraph 7, respondents Creative Health and Smith have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents Creative Health and Smith did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. In the advertising and sale of Focus Factor, respondents Creative Health and Smith have represented, directly or by implication, that various individuals are endorsers of Focus Factor. Respondents have failed to disclose adequately that certain of those individuals had material connections with Focus Factor. Specifically, at the time of providing their endorsements:

a. Some of those endorsers were the principals in a public relations company that had been retained by Creative Health to promote Focus Factor, and their company earned a commission on sales resulting from its promotional work; and

b. One of the endorsers was Creative Health's attorney; and

c. Some of the endorsers were Focus Factor distributors who earned profits based on their sales of the product.

These facts would materially affect the weight and credibility given by consumers to the endorsements and would be material to consumers in their purchase or use of the product. Therefore, the failure to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this twenty-sixth day of April, 2004.

Focus Factor
:60 Radio
Kyl 2
(9/13/00)

ISCI code FF17
File name Focus Factor RS 17

Dr. Kyl Smith: Do you ever get the feeling you've misplaced your memory...and you can't remember where you put it?

I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.

I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.

In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll feel more alert, more focused, and "on-task."

Focus Factor has been a huge success for kids, teens, adults and seniors. And now you can try it yourself with absolutely no risk.

Tag (:18) Ask how you can get a free 30-day supply of Focus Factor with your order! Call 1-800-_____. That's 1-800-_____. Money back if you're not delighted. Call 1-800-_____.

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510 Congress Street
Portland, ME 04101
(207) 775-5007

Focus Factor
:60 Radio
Donut Ware
(2/12/01)

ISCI code FF49
File name Focus Factor RS 49

Dr. Kyl Smith: This is Dr. Kyl Smith. A doctor's true reward is helping people. My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy. Here's another message from our Focus Factor voice mail: **(:15)**

Electronic voice mail "Beep"

Marlene Ware—Mother [:20]
This is Marlene Ware. I'm calling on behalf of my son. He's having a tough time at school, ans this has made such a difference. He's remembering things. I can't believe it! I wanted to tell you how much of a difference it's made for my son...Focus Factor. It has made a tremendous difference.

Dr. Smith: Focus Factor is safe, it's natural, and it *works*. Call now so you can immediately begin improving your memory, concentration, mood, focus and energy. I'll even give you a free 30-day supply with your Focus Factor trial pack. **(:13)**

Announcer: Call 1-800-_____. That's 1-800-_____. Money back if you're not delighted. Call 1-800-_____. **(:12)**

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ocus Factor
;0 Radio
chool's in Session
/17/00)

ISCI code FF16
File name Focus Factor RS 16

)r. Kyl Smith (:48)— School's in session…and as a parent, more than anything else, you vant to see your child do their best.

'm Dr. Kyl Smith. I've seen first-hand how *frustrating* it can be when a child has rouble with focus and concentration. Parents come to me because their children are unfocused, distracted…and they just don't know what to do about it.

That's why I developed Focus Factor. It's an effective, all-natural supplement with one purpose: to give your child's brain the exact nutrients it needs to function at its very best.

Focus Factor is for students who need help with concentration and memory. In just a few days, your child will feel alert, focused, and mentally sharp.

And by the way, there's also an adult formula I created for grown-ups who want to improve memory, concentration, and mood.

Call now and *feel* the difference when you supercharge your brain…with Focus Factor.

Tag (:12) Ask how you can get a free 30-day supply of Focus Factor with your order! Call 1-800-_____. That's 1-800-_____.

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us Factor RI 5 THIRD EDIT...12/12/00 SHOW #4600

ro: Well hello again...welcome to the Vitalbasics radio program. We bring you vital health information on over great radio stations covering all 50 states...and y'know what? I can count on two fingers—literally—the number of es I've actually invited a guest back on this program. Today is one of those times.

Kyl Smith is back with us at our invitation, and this time he's right here in the studio with us...came all the way m Dallas, Texas. Dr. Smith is an expert in nutrition, pediatrics and anti-aging. He's the founder and president of the eative Health Institute in Texas. Now, his claim to fame...the reason he's here with us today...is his fascination with ur brain. Specifically, how it works, how it functions, and what we can do—all of us...men, women, kids, teenagers, nior citizens—to make it perform even better. What does that mean? It means improving your memory so you don't rget your wife's anniversary or where you left the car keys. It means better focus and concentration so you can get ur work done without distractions. And it means having lots of energy instead of feeling tired and drained all the ne.

oday Dr. Smith is back with some brand new information that will *shock* you—like, is your brain *shrinking*? We'll lk about that. Dr. Kyl Smith, welcome back.

Vell, thank you, Bill. Again, I'm honored to be here.

f you would, for the listeners who don't know you yet, who didn't catch you the last time you were on, give us a quick ummary of your background...how you got into this field...and where you're coming from.

Well, Bill, it all began when I graduated from my internship and started build my own practice. I noticed immediately that people were coming to me with similar types of questions, and they all had to do with brain function. Let me give you a good example...

Moms would come to me and they'd say, *Dr. Smith, my son or daughter suffers with poor focus or concentration. Is there anything we can do that's natural that can help?* Business professionals would say, *Dr. Smith, it seems like I wake up in the morning in a fog...I can't focus on demand. I'm drinking coffee to try to stay awake and alert. And, to be honest with you, I'm in my 30's or 40's, and I'm starting to notice my memory's not what it used to be, and I'm afraid this is affecting my job performance.* And another one that I heard quite commonly. Spouses would come to me—usually wives asking me about their husbands, but sometimes the other way around—they'd say, *Dr. Smith, my husband comes home from work and he is mentally drained. It's like he doesn't have any energy left for me or the family. And worse, he brings home irritability and mood swings. I know you're helping people with mental function, please help!* Well, these consistent questions, led me to do an exhaustive search of the medical and nutritional research at the time to find out, is there anything we can do to improve concentration? Can we have a better memory as we age...30, 40, and 50 years of age? So the technology that came back from this search was the original technology that's in Focus Factor today.

Now, we have spoken a few times since our last program, and what I found fascinating is that, as you were doing this search... there's like over 3,000 clinical studies that you have accessed in putting together this new supplement called Focus Factor. Is that correct?

Absolutely. We are in the information age, there's no doubt about it. And when it comes to medical studies and nutritional studies on the brain—how it works, and how diet and nutrition can affect brain function in a positive way—there's tons of information out there...literally over 3,000 research articles right now done on the link between diet, nutrition and the brain. And the stuff we're going to talk about today is fascinating. We really can take control of our destiny when it comes to how we focus, think, and our memory.

And what also struck me is that this is such a huge problem. You had mentioned that the #1 reason why people go to their doctors these days isn't for little aches and pains or the sniffles...it's for irritability, it's for mental fatigue...memory, things like that. Is that correct?

ental function...poor mental function...mental fatigue. These are the #1 types of complaints in doctors' actices across the country. I mean...give you a good example: people in their 30's, 40's, 50's. Most people are lying on note pads, Post-It pads and planners just to get through the day.

eah, yeah.

hey tell me if they lose their little note pad they are sunk. And how many people can relate to going to the rocery store...you got just 5 things to get, milk's on your list. You come home...you got no milk. Or ow...listen to this: listeners at home, think if you can relate to this: You're in a social situation—or maybe even 'orse, a business situation—you're meeting someone right now. This person's really important to you. You hake their hand. By the time your handshake breaks, it's like the name just falls to the floor.

'eah...

(ou're looking at him or her and you're thinking to yourself, *I was just introduced to them, and I can't even 'emember their name.*

.t's embarrassing.

In a *social* situation.

Yeah.

...that's embarrassing. But think of it in business. Poor memory, a sluggish memory, can cost you your job performance.

So these are huge problems, and you have created a supplement—it's called Focus Factor—the response has been absolutely tremendous to it. And I want to read a few of the phone messages that we got after the last program...and you would not believe how many of our affiliate stations—we're on over 300 stations—and how many stations called up and said, *Do you mind if we run that show again? We got such a huge response, people want to hear it again...*

That's great...

So these are just a few of the phone messages we received, um... Here's a 65 year-old woman. She didn't say where she was from, but she said her husband ordered Focus Factor. She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic...she thought she was getting *dimwitted*...interesting choice of words there, and she says, *Focus Factor started working almost immediately. I felt like a different person.* And I know results will vary from person to person, but I found these very interesting. Here's a woman from your stomping grounds, Texas. She says she's in the insurance industry...a very fast paced office. Lots of multi-tasking going on. She says, *I've been taking Focus Factor for a couple weeks and saw a huge difference. Just unbelievable.* And I'm going to do one more here, because this shows how the product can help children as well...

Great...

A teacher in New Jersey—and also a mother. She bought Focus Factor for her son, who had trouble with focus and concentration. And she says, *he had trouble concentrating on one thing at a time. And Focus Factor has helped him to sit down and concentrate on one activity at a time. He gets his work done on time now.* And this is interesting: He says, *He wants to do more work now...*

Wow.

So she says, *We've seen progress with Focus Factor and will continue to order it.* So when you get a child who actually *wants* to do his homework, I think that's pretty incredible.

Doctor, I want to talk about seniors for a moment, because I understand they can benefit enormously from Focus Factor And unfortunately, I think what happens is...when we see older folks in our lives—grandparents, aunts, uncles, even our parents—having trouble with memory or concentration, we tend to ignore them or brush them aside...or we even make fun of them...Y'know, *Gramps is just having a little slow today*. And You're saying if we were to just help them support their brain a little bit more, it could improve their memory and concentration a lot.

This is very true. As a matter of fact, seniors share with me that many times they're embarrassed because they do feel like they're a little slower. They many times have to ask their children or their grandchildren to slow down just a little bit...and that's embarrassing. I gotta tell you...speaking to seniors, when I do lectures across the country, or I do radio or television, seniors are one of my favorite groups to speak to. Why? Because they can be passionate about health. Many times, they want to make and improvement, and they want to make an improvement *now*.

Now. Yeah.

Most seniors will tell me they've been taking nutritional supplements for maybe *years*, and never noticed a difference in how they feel. Can you imagine? Well, the thing that seniors tell me that Focus Factor does is it gives them that mental spark , that energy like they used to have. They feel like their memory is more on-task. They can recall things easier with less effort. And the thing I really like to hear is how it improves relationships. And let me give you a good example: A lady comes up to me—an elderly lady—when we're filming a television program, and she says, *Dr. Smith, I gotta tell you about my husband. This man was the most cantankerous, irritable man you've ever met. All he ever wanted to do was sit in his armchair. But after taking Focus Factor, he gardens with me, we go on walks together...it's like I've got my sweetheart back.*

Hey, here's a letter from a 65 year-old woman I spoke with. And she says, *I tried ginkgo biloba for months, and it didn't do anything for my memory. But my memory is now wonderful since I've started taking Focus Factor. I noticed a difference within a couple of days.*

And I've got to answer a question here. Why does this happen? It happens because the brain needs much more than an herb or one nutrient to help it with cognitive function. You need protector nutrients—antioxidants that are shown to help protect brain function. You need nutrients that improve brain function, like the B vitamins. You need specific herbal extracts that may be precursors to neurotransmitters that science says improves focus, concentration and memory. You put these together in a comprehensive brain support product, and...what do you have? You have stories of better concentration...people going to work, getting more done in less time, coming home with energy to spare...instead of that old story of coming home and just being fatigued and lethargic.

Excellent. Well, uh, I can see we're running out of time here, so I have to take a quick break. We want to give you information on how you can get a hold of Focus Factor for yourself. So we're going to do that in just a moment. But right now I want you to listen to some of the people we spoke to recently, and how Focus Factor is affecting their lives. So take a listen to this, and we'll be right back.

Kelly Brown: My name is Kelly Brown and Focus Factor has been a wonderful product for us. It has tremendously helped my son with his schoolwork and at home also. The benefits that I have seen with Focus Factor for myself is...I'm a working mother—I'm very tired when I get home at night, I'm very stressed out. Focus Factor for me has just boosted my energy in the evenings to where I can keep going, I can keep up with my children. And afternoons at work, too, I don't get tired, I don't get irritable. I just...for some reason I'm just wide-eyed and ready to go!
Roger Thompson: My name is Roger Thompson. I've been taking Focus Factor for about 6 weeks now, and the results have been just phenomenal. My mood has improved dramatically. I'm better able to focus and to communicate with other people. I feel a lot better. Focus Factor has made a huge difference, and I would really love to thank Dr. Smith for coming up with this and making it available to the general public. It's a super product, and I'd recommend it to anybody who's busy, stressed-out or just needs a little boost in their lives. It's just great.

llie Hull: My name is Millie Hull, and I have tried Focus Factor after trying many other supplements which *never* rked for me. I thought they would just sit in my stomach and not even dissolve. Focus Factor is different. It *does* rk. It clears the 'foggies' from the mind and gives you the energy you need to go do what you need to do. I have › grandchildren that I take care of…I have the energy for them now, as well as working a full-time job. I can do all se things and have the energy to still have time for recreation. And I have the clearness of mind to get things done t I need to do and think clearly to do these things. I just love Focus Factor.

TA #1)

ıd we're back. Welcome back to the Vitalbasics radio program. This is Bill Begley, and my special guest today, back r an encore, is Dr. Kyl Smith, the founder and president of the Creative Health Institute in Texas, and the creator of is amazing supplement called Focus Factor. Recommended for seniors, students, men, women…and doctor, I've been king it myself. I've been taking it for about 6 months now. I'm going to tell my own story a little bit later on in the ogram, but it's helped me dramatically, so…

/onderful.

o…in your experience, who do you find benefits from Focus Factor? Any specific groups of people?

ıill, everyone…it doesn't matter if you're a business professional, a senior, a teen, or a child, you have a need to upport the most important organ in the brain. Focus Factor's perfect for that. It provides specific dietary upplements, or nutrients, that enhance the brain's ability to produce mental energy. We all need that. I mean, hink, today many adults are suffering with poor memory. And many times they don't notice it in the beginning. t sneaks up on them…

Yeah, yeah.

Meaning that we rely on Post-It pads all around the house. We gotta write things down to remember it. If you lose your planner you're lost.

Yeah.

Focus Factor's important for all of us. Some of the most touching stories I…come from parents who've given the product to their children, and they see what they call a *transformation* in their child. They seem interested in things in the past they weren't interested in, and one of the curious intangible things parents say is many a times they see an improvement in their child's self-esteem. That makes a world of difference to me. As the formulator of the product, that touches me 'cause that's exactly what I formulated the product to do. Seniors tell me they get that mental spark, that mental edge back that they've been looking for for so long and they feel like they've lost it…they've found it again…and business professionals. They tell me that they can go to work, they feel like get more done in less time and come home with energy to spare.

Well the big buzzword these days in business is *multitasking*…

Exactly.

…which basically means you have to do 3 people's jobs instead of just your own job. So I know we've spoken with a number of people who use that word…it's just a buzzword these days…multitasking. People are able to shift from one project to another very easily…

…and not lose the project.

Exactly…not lose the project. And be able to complete each project…or see each project through…finish it…and do a good job.

Exactly.

› I take it the reason this is so effective is because the ingredients are more easily absorbed by the brain?

xactly. Specific nutrients cross the blood/brain barrier readily. In other words, the brain accepts these ıtrients. It finds them as foodstuffs. These are the nutrients we've used in Focus Factor to enhance brain ınction.

ɔ if you're taking the wrong nutrients, it's kind of like putting a square peg in a round hole. It just can't go in. But if ɔu have the right nutrients, it's just a nice fit, and the brain gets it and...boom.

'ery close. If you're taking the wrong nutrients, quite frankly they pass in the stool, and they don't even absorb hrough the bloodstream. If you're taking the right nutrients...I guess your analogy is great...if you're taking he right nutrients they easily pass through the digestive system into the bloodstream, delivering their benefits to he cell, where you want them.

)kay. Now, this was originally only available through doctors' practices. What are...what's the medical community. aying about this?

Ve have had phenomenal success across the country. What we call it is a grassroots movement because ›riginally, Focus Factor started just by word of mouth referral from doctor to doctor...from patient to family. The reason I attribute that success is the fact that Focus Factor works. I mean, very quickly doctors realized they could take this product themselves, or recommend it to a patient, and that person would come back to the doctor in just a few days or weeks and say, *Hey Doc, what did you give me? It's like this cloud's been lifted off my head. I can focus, I can concentrate. I've got my memory back! Thanks, Doc!* Well, what's he going to do? He's going to recommend this product to virtually anyone in his practice that are suffering from poor mental function.

Sure.

He's taking it himself, he's recommending it to other doctors. I think this is why we've been so successful across the country today.

And I have some comments from some of the doctors we've spoken with. For example, this is a medical doctor...this is an M.D. named Lee Cowden, Dr. Lee Cowden. He's a cardiologist, and internist...and he says, uh..."Compared to other supplements on the market, the nutrients in Focus Factor are present at better levels (that's what we just talked about) and in the ideal *forms* more likely to enhance brain function. Taking Focus Factor results in a significant improvement in memory, concentration, and overall well-being." Pretty strong comment from a medical doctor.

Wonderful.

Here's a doctor, Gary Sconyers, who says, "I've seen Focus Factor firsthand as a doctor <u>and</u> as a parent. (I think that's important) When my son started taking it, he became more consistent, and his self-esteem improved by leaps and bounds." So a few powerful comments from the medical community. I think it's neat that it's been accepted, and I think it adds a lot of credibility to you and the product...the fact that is *started out* with doctors.

And I've got to tell you, in the beginning, doctors were skeptical. Now, this is an innovative product. It literally provides the nutrients the brain needs for enhanced mental function. Well, doctors first tried it on themselves and their children. Now this was neat because they became advocates for the product, recommending it to virtually everyone.

Okay, we have to take a quick break in just a moment. But very quickly I want you to listen to some more people in their own words and what they're saying about Focus Factor. And we'll give you the opportunity to call the 800 number—toll-free number—so you can get Focus Factor for yourself and for your family...and listen to this...

ula Clark: My name is Paula Clark and I live in New Jersey and I have a pretty hectic life. I'm a working Mom. I started :us Factor for my child who is 10 years old who was having a tough time focusing in school and staying on-task. I found t Focus factor...after one week I saw a noticeable difference. I saw that his homework assignments were being :omplished and being done. He has a happier feeling, a happier mood. So I then decided then, well, if it's working so well him, I'm going to try this also, seeing that I do I do have my mood swings. I tried it and it really has improved my life as :ll. Now my whole family is taking it—my 15 year old, my 10 year old, myself—I gave it to my husband and he loves it ;o.

ıck Huff: My name is Jack Huff. I'm in Lake Havasu City, Arizona. I've been taking Focus Factor for 4 months ɔw. And I really feel it's helped all areas of my life. Being able to focus, which is a great... Focusing, sometimes you ight not think it's that big of a deal, but it's really the key to a lot of things—focusing— and that'll lead you through ojects. It's helped my relationship with my wife, believe it or not, just by not being so down and in kind of a dark oud situation. Lots of energy to go do the things I want to do. If you want an extra boost—not just a little extra boost, 's a major turnaround contribution to your...being vital to feeling alive...being able to go do stuff without worrying ɔout being drained mentally or physically.

ally Nelson: My name is Sally Nelson and I've been taking Focus Factor for ten weeks now. The thing I found when first started taking it is my energy level in the afternoon gradually came up to the point where I feel very focused, I eel very energetic and I feel very excited about my life in general. I feel alive—that's really what I want to say. I feel ery alive, very energetic, very focused. And I feel very excited.

(CTA #2)

And welcome back to the Vitalbasics radio show. Bill Begley with our special guest...back for an encore appearance, Dr. Kyl Smith. He's the founder and president of the Creative Health Institute in Texas, and also the creator of Focus Factor. This is the supplement that is designed to literally supercharge your brain. And doctor, before we go, I want to bring this up. This really freaked me out. I gotta tell you...when I learned that, after the age of 30, the brain begins to shrink??

Exactly.

Tell us about that.

I hate to tell you it's true. After the age of 30, after we pass by that magical age where you notice that spare tires comes on easier, and our health starts to decline, one of the medical facts is the brain slowly begins to shrink in its size. In addition, between the age of 30 and 55, we'll lose about 25% of the synapses in the brain. In addition, about 80% of people above the age of 35 complain that they notice their memory is not what it used to be.

That makes sense.

But the good part is...science shows us today that there is a lot we can do to support normal mental function.

Now for folks who are just tuning in, give us a quick recap...20 seconds or less...what is Focus Factor and what does it do?

Focus Factor is a totally unique dietary supplement that feeds the brain. It does this by providing specific nutrients that enhance the brain's ability to produce mental energy. The second thing that Focus factor does is it provides nutrients your brain is starving for that enhances focus, concentration and memory by naturally enhancing neurotransmitters in the brain.

All right, I want to read a few more letters from people who have written us based on the last radio program that you did with us. Very quickly…"No more monthly highs and lows." A woman who's a business professional, a wife and mother who says, *I feel like my brain functions better. I have more energy. My mood swings are not the highs and lows that they used to be.* And one more. This is a woman in her 50's who's a registered nurse. And she says, *We interested in Focus Factor because of the natural help we thought it would bring to kids with poor focus and concentration. We've seen positive results with it. We've seen their ability to concentrate and improve the focus that they have on their work.* Now she says, *I have been taking Focus Factor myself. It worked for me within the first week. I've noticed that my thinking is more clear. I'm able to remember more, focus and get rid of "cloudy thinking"…*

Wonderful.

As she calls it. How does that make you feel when you hear all these positive stories about a product that you did the research on and created yourself from scratch?

Bill, I have to tell you: I never imagined that Focus Factor would provide the benefits for people that they're telling us it's providing for them. I mean, I created the product to enhance focus, concentration and memory for myself, for my patients and the people I was lecturing to. What I never, ever imagined are the stories that would come back. The life-enhancing stories. As seniors say, it gives them their mental spark back. It motivates them to do things that are actually good for them, like walk and garden. And to think now that the product is in the hands of artists, athletes, pro football players, actors…and now I'm being told that my product is being taken by a gentleman in NASCAR. Bill, this is like a dream come true for me.

That's tremendous, and if I may…do you mind if I share my story…

I'd love for you to.

…about Focus Factor? You gave me the product and I started taking it. And I gave it a good 30 days. And I was going to see the movie *The Patriot*—it was a big hit—and I just wanted to do a little homework, to kind of brush up on the revolution and learn a little bit more about it so I would understand the movie better and what was happening. So here I am taking Focus Factor, and I pulled out this great big 'coffee table book'—it's about 400 pages. It's a very dense book about the Revolution. And I'm reading and I'm reading…and it's coming to life for me. Even though it was written in a very dry way—it wasn't the most excitingly written book. But for me, I was absorbing it very well, and what's most remarkable, is when I was done reading, I kept the information…it was retained.

Wonderful.

I can still rattle off the names of British generals and Lords and prime ministers and where battles happened…and who's army did this and who's army did that and all that kind of stuff. And it was fascinating. And I found that Focus Factor really helped with my memory, with my ability to concentrate on the book, and my ability to comprehend it.

Wonderful.

It was tremendous.

Bill, why didn't we have this when we were in college?

I don't know! My grades would've been much better, I'm sure.

I wish I did…

…if we'd had it. So I personally want to thank you for introducing me to this product, because it certainly has had a profound effect, and not just with that one book, but I'm finding just in general I'm remembering things better…I'm comprehending…I'm *focusing* better. We mentioned earlier the term *multi-tasking*, having to do many things at once. When you're in radio, you're multi-tasking every single day. And I'm finding that it is, in fact, easier to do all these tasks and complete them and do them well.

ell thank you. That means a lot to me.

:y, we're just...we're outta time here. So Dr. Kyl Smith, thank you for joining us in the studio—flying here from ıllas, Texas to be my guest.

hank you. Bill, I appreciate so much all you've done in sharing this with other people.

'ell, when something works, you tell people about it, that's all. Folks, thanks for joining us folks here on the italbasics radio program. We will talk again soon. Thank you, and take care of yourself and God bless.

:TA #3)

:TA Copy: Hi, this is Bill Begley. I want you to think about the last time you really felt *good*. A time when you were nergetic, focused, and mentally sharp. Picture taking all that positive energy and putting it into a tablet—a tablet that's ll-natural, effective, and as easy to use as putting your shoes on in the morning. That's the best way I can describe ocus Factor. I take it every day to keep me focused and energetic, and countless people who have heard this program cross the country have called to say they love it, too. For more information on how you can try it risk-free, call this oll-free number. It's 1-800-_____. That's 1-800-_____.

:all now and mention the Vitalbasics program and you can even get a free 1-month supply to try with your order. Ask or details. Focus Factor is for senior citizens...working moms...students in every grade level...business rofessionals...anybody who wants and needs a natural boost in their memory, concentration, mood, and energy.

There's a 30-day money back guarantee. Call and ask about the doctor's special offer. It's 1-800_____. That's 1-800_____.

SHOW # 4400

ocus Factor radio infomercial "Bill"...version 2...7/11/00

ILL: Hi and welcome to the *VitalBasics* radio program. I'm Bill Begley. This is the health and wellness program ou can hear on over 200 radio stations from coast to coast. We're in California, Massachussetts, Florida, Texas, Iawaii, Alaska...you name it, we're there, and we appreciate you tuning in today. Thank you very much for joining is.

Today we're going to talk about the most important thing in your life..and, for that matter, the most important thing to your *children*. It's not your job, or your money, or your house or even your car. Y'know what it is...the most important thing? It's your *brain*. Yes it is. Because when your brain...or your mind...isn't working the way it should, nothing else matters...nothing seems to go right. It's like a dead battery. But think about it...and again, think of your children...when your brain *is* working the way it should...you're energetic, you're in a great mood, you get more done, you're more outgoing and likable...you stand out from everyone else...and it doesn't matter if you're 5 years old or 105! Now, grab a pencil and a piece of paper, because what we're going to do is give some incredibly useful information this half-hour on how you and your children can supercharge your brain. I'm telling you, it's easy, it's systematic...it's a technological breakthrough that's *sweeping the nation*. If your children have trouble behaving or concentrating in school...*or* if you have older relatives or friends who seem to be losing their mental edge...even if you're in business and you have trouble staying focused or "on task" during the day...please listen at least for a few minutes because you'll be able to help yourself and the ones you love. Okay? Okay.

My guest, on the phone with us today, is Dr. Kyl Smith. He's Founder and President of the Creative Health Institute in Texas. He's a recognized expert in the field of nutrition, pediatrics and anti-aging. He's Vice president of Education at the Texas Integrative Practitioner's Association—it's a non-profit agency that includes Medical Doctors and alternative health practitioners and so on. And he's also been a Senior Advisor of Research and Development for a major pharmaceutical company. *Thousands and thousands* of hours, folks, this man has put into this breakthrough, this *secret* that we're going to let you in on today. Dr. Smith, we have so much to talk about...it's a blessing to have you on the program. Welcome!

Kyl: Thank you, Bill. I'm honored to be here.

Thank you very much for joining us. Now, we *all* feel run down from time to time. We all get cranky and tired...we get that foggy feeling...sort of what we call mental fatigue. But lately it seems like it's reaching epidemic proportions. Would you agree with that?

Absolutely. I mean we see this in our children. We have obviously many children, several with lack of attentiveness; lack of ability to focus and concentrate, but this is permeating teens, adults, and senior citizens. Many people say that they come home and they just don't have the energy to give to their families—their husbands, wives, and spouses—what they need to after they get done with work. In other words, they are so drained; their mental batteries are so drained when they get home from work they just can't be the people they want to be.

I know you've done a tremendous amount of research behind this product...folks, it's called *Focus* Factor. Dr. Smith, what's the story behind Focus Factor?

It really all started when I was finishing my internship and starting my own practice. You see I was sitting there day after day in front of patients that had a similar complaint—and this is as true today as it was 7 years ago. Patients would come in and they would say, Dr., I'm tired. Like I said I have to drink coffee in the morning to wake up and I have to do something in the afternoon like caffeine to stay awake. Or they'd say, "My child has problems with attentiveness and focus and concentration in school." Or "My spouse is irritable when they get home from work. Is there anything we can do that's natural, that's good for them that can help them?" Well, Bill this question got under my skin. It really bothered me because I was suffering with the same exact thing.

So, you're in the same boat as the rest of us.

Exactly. We all were. So, of course the first thing I did is I did the easy search. I went out to doctor friends of mine, physicians, and asked them what do you say when your patients ask this question? And none of them had a good answer. They would say typical things like, "Tell them to reduce their caffeine intake 'cause caffeine kills your energy in the afternoon." But I'd say to them, "Well they're drinking caffeine like I am because they're tired in the first place. What do you do?"

It's a vicious cycle.

It's a vicious cycle. So I created this product for my own practice and it became so popular a USP pharmaceutical company picked me up and said, "Dr. Smith we want you to create a product specifically for kids." We did that and then they put me on my first tour and Bill I went out there and I was shocked. I was taken aback by the results people were getting in their lives. And they weren't the results I expected. Like, I built the product to help improve focus, concentration and memory.

Right.

But what happened is that people were coming to the lectures with stories about how it had transformed their child's self-esteem. Let me give you an example. This one lady stood up and it was I think, Rochester, Indiana. She stood up and she said, "The thing that touches me about Focus Factor is how it's changed my son's life." "My son was the child at school that nobody wanted to play with. He would throw temper tantrums and disrupt class if he didn't get his way. After giving him Focus Factor for just one week, the teacher wrote a note home and said what are you doing different? Your son is sitting still and he's completing his work."

Wow, so the teacher noticed this?

Exactly, in just one week. Now the Mom said...again, she was sitting there crying, and this really shook me too. She said, "The thing that touches me is my son is going to be a different man because of this product. Instead of being the boy that goes to school without interpersonal relationships, instead of being the child that no one seems to like, he's nurturing friendships and his self-esteem is improving. That's when I said to myself this has to be my God-given mission—to teach people about nutrition and the brain. It's important for kids because their every-day experience translates into who they feel like they are. But it's the same for us adults, too. If we have good days on top of good days, this compounds and it improves our self-esteem. And I picked up somewhere along the line in my lectures this statement: "To do really good in life, you've got to feel really good." And that's what Focus Factor is all about.

Well, and it's such a unique product, too. I mean, there are products out there...you hear about them all the time...for things like prostate health, and cardiovascular health and so on and so forth. But I have never ever ever heard of a breakthrough like this that specifically targets the most important part of our body—the brain.

The brain. The very organ that determines how we feel when we wake up in the morning and how we feel when we come home from work. The organ that's gonna determine what kind of day we're going to have this afternoon, and if I'm in a business where I have to talk to people, how I'm going to communicate with them. It's going to determine when I come home what kind of spouse I am and parent because of my mental energy reserves. If our mental batteries are drained, it's going to affect how we relate to our world.

Is there anything unique about the brain versus, say, other organs in the body in terms of what it needs to produce that energy?

Absolutely. The brain seeks specific forms of nutrients for energy production, and this is key. If you happen to find a magnesium from the wrong source, you're not going to produce mental energy from that magnesium, no matter how much you take. So we selected exactly the types, the sources of nutrients, that the research showed was necessary to improve brain function.

So it's kind of like putting a key in a lock. You know, if you have the wrong key, it's not going to open it up.

That's a great analogy, exactly.

In fact, we have someone who knows exactly what we're talking about. Anita Sohn is with us. She is a school administrator. And listen to this, this is an amazing story: She put her entire *class* on Focus Factor. Anita, welcome to the program. Can you tell us why you did that and what happened?

Anita Sohn: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say, 'what can we do about this?' then I would start to tell them, 'Okay, this is what I would do in this situation. And it couldn't hurt, it can only help...try it.' So they started, one by one, each child started testing out the Focus Factor. And, as a result, my entire class was on the Focus Factor. We have just...we've had just a wonderful time on it.

So you put 'em on the product...you talked to their parents first...but you put 'em on the product, and what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely. Now, I've been on the Focus Factor personally myself for 2 years. When I got on it and started finding the difference that the supplement makes on a daily basis...not just when I need it...I am the most awesome woman on Focus Factor, as well as my children.

So I think it would be safe to say you're a believer in this product.

Anita: Oh, *very* safe to say.

Well, Anita, it has really been an honor to talk to you. I know you're busy and I don't want to take up any more of your valuable time...you've obviously got more important people, your students, to spend some time with. But thank you for being with us today, and telling us this very amazing and important story.

Anita: No problem! Thank you. Bye-bye.

Bye bye. Now, back to you, Dr. Kyl Smith. Obviously some fantastic and life-changing results with children. And folks listening...imagine having the best of both worlds with *your* kids: Better behavior <u>and</u> better performance in school. That is something that's pretty much unheard of these days. But doctor, you say that men and women got hold of this stuff after the kids tried it and they love it too.

Absolutely. The typical story that we get is a parent, let's say a mom, would typically buy Focus Factor for their child because they wanted to enhance their ability to focus and concentrate in school. And pretty soon, their son would come home from school and say, "Mom, I had the best day. I aced my test and I finished my homework before I got home." And the mom would say to herself, "I need this stuff. I need to go to work and get my work done before I come home. I need to come home with energy to spare and have less irritability." So pretty soon the mom would start taking the product. She'd love it so much she'd tell the dad about it. Pretty soon you'd have family after family, doctor and physician after physician referring the product to more and more people.

Okay, we have to take a quick break. But coming up we'll talk with some doctors who recommend Focus Factor to their patients; as well as a member of the House of Representatives from the state of Texas. We'll hear how he's become a better lawmaker and a better husband and father because of Focus Factor—a very dramatic story. Right now, it's your chance to call our toll-free telephone number so you can get on a 30-day, risk-free trial of Focus Factor and try it for yourself. So let's take a moment and do that now.

CTA #1

nd welcome back to the VitalBasics radio program. I'm Bill Begley and our special guest today is Dr. Kyl Smith. le's the creator of a product called Focus Factor. Fascinating story behind it. It started out as supplement to help ids with learning and behavior problems—and I think we all know that can be such a nightmare...so it helped with at at sort of a grass-roots level, but then adults starting using it because they found that it had this amazing effect on heir own memory, energy, mood...and just their ability to stay "on-task. Earlier this week, I had the great pleasure to peak with some people who say that Focus Factor has dramatically improved the quality of their life. So folks, if ou or anyone in your family could use a little help with mood or energy, concentration or memory—just sort of learing out the mental cobwebs—please listen to this. Jon, if we could, let's roll the tape.

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings that...it gives you a little pick-up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me—right there. I've attributed a lot of mood swings or depression here and there, you know, to just the age I'm going through right now, y'know, being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. Everybody I've talked to that I've recommended it to that has taken it has said the same thing.

Kristin Rister-Wheatley: My name is Kristen and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I'm on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance the way she felt in school—the way she could concentrate. I've shared it with my friends. I've shared it with my family. Everyone feels the same way. We all love Focus Factor.

Dr. Smith did you have any idea when you created this product, Focus Factor, that it would have this kind of affect on peoples' lives?

No I didn't. And like I was saying previously, I developed Focus Factor to help enhance focus, concentration and memory. So as a doctor, I'm expecting to hear stories about focusing and concentrating. What I never imagined is how this would impact our lives, on a very personal level. For instance, when we were filming a television program around Focus Factor I had a wife say that she felt that this Focus Factor saved her marriage. She said that her husband and her both now come home from their work with more mental energy, less irritability, they can relate and communicate better and, maybe most importantly, they're patient with each other when they communicate. She said this literally saved her marriage. I hear stories from people constantly about the benefits that this product brings in their lives that I would have never imagined.

Well, I know that everybody's a little bit different and results will vary from person to person. But in your experience, how quickly does it work?

Focus Factor...we see a noticeable improvement in the way a person feels it doesn't matter if it's a child, a teen or an adult, in 1 to 10 days. Now I typically tell people, stay on Focus Factor each and every day consistently and you'll notice a difference within 2 weeks. But I've got to tell you Bill that most people come back after the first day and they say, "Wow, what did you put in this stuff? I haven't felt this good since I was a teenager." We've got senior citizens say, "Dr. Smith, you've given me my life back. I now have that energy—that mental energy—that I used to have when I was a child." Stories like this, it's just incredible.

And this is different from regular multi-vitamins in that you're going to actually feel this working pretty quickly, right?

There's a big key there, and that's another great question. It's very common when I'm in a live audience that I'll ask people to stand up if they are taking a multivitamin. Now, almost everyone stands up. But then I ask the people to sit down who are actually feeling a difference from that vitamin they are taking, in some way, shape or form, energy or they feel healthier. And the only people who sit down are the people that tell me they are taking Focus Factor. The rest of the people standing up, which is usually the majority of the people who haven't been introduced to the product yet, will tell me that they have been taking a vitamin for years and they have not noticed one benefit.

Yeah that's a really good point. I don't know anybody who says, "Oh, I take a multivitamin and I feel great." You know, they just kind of take it. It's just something they do, and they never feel any results from it.

Right. And my goal and my dream, my desire is to educate people that we should expect much more from our nutritional supplements.

All right, we'll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks, these are people we spoke with earlier this week. First we're going to hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients—adults, children, seniors—some very interesting comments here. And Jon, if we could, let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about a year and a half ago. Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets. From that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue...poor focus and irritability...it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function—not just with children, not just with adults, and not just with seniors...it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it...um...everyone in my family is on Focus Factor. Number one, yes it has vitamins and minerals in it. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

So there you have just a few of the many doctors who recommend Focus Factor to their patients. These doctors were not paid in any way for their comments today. Dr. Smith, there are obviously thousands and thousands of supplements out on the market. Out of all these products, why is Focus Factor getting all this attention?

I think the bottom line is Focus Factor works. Physicians recommend Focus Factor across the country because they realize very quickly it works for themselves and it's working for their patients. And it's helping improve lives in many different ways—from the improved focus and concentration to improved emotions, feeling like you're going to have a better day, feeling like your on you're game. And this results in referral after referral after referral. And as you know we have distributed this product throughout the US and Canada for five years now. The exciting thing is Focus Factor is now available direct from the manufacturer, so people can get a hold of Focus Factor and not have to pay that expensive office visit.

All right, I want to take another quick break here. Folks now you can try Focus Factor…I hope you will, for yourself, for your children, your spouse…absolutely risk-free—even the phone call is free, and we're going to give that number up in just a moment. And we'll be right back to talk some more with Dr. Kyl Smith right here on the Vitalbasics radio program.

CTA #2

And welcome back. Bill Begley talking with Dr. Kyl Smith about Focus Factor. This is a ground-breaking supplement sweeping the country right now that helps supercharge your mental edge—your brainpower. And we're talking about some incredible benefits here with memory, concentration, mood, energy—absolutely remarkable for children helping them overcome learning difficulties and behavioral challenges—seniors who are starting to feel the mental effects of getting older. Men and women who are trying to juggle family and work. Absolutely remarkable product. And it is my great honor and pleasure right now to have on the phone with me Representative Rick Green. And Rick is with the state house in the State of Texas. And he uses Focus Factor himself and his family. Representative Green, welcome to the program. Thank you very much for joining us.

Rep. Green: Glad to be here, thanks for having me.

Now, what's your story with Focus Factor?

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the time that you *do* get with the family and I wanted something that wouldn't just affect me physically...I mean, I've had vitamins before that I could tell a physical difference...but with this product I was looking for something that would give me the mental clarity to deal with all these different tasks at the same time...and that was what I had been told about Focus Factor...started taking it about a year ago and found that was *exactly* the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of, y'know, how you...you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen. I mean, I could...whatever the task at hand was, I could concentrate on getting that done knowing I had these other things to deal with…

Sounds to me like you give a whole new definition to the phrase multi-tasking.

Rep. Green: [laughs] If there's a multi-*multi*-tasking, then that would fit.

Now, it sounds to me like you've really personally benefited from this. Do you feel like your family has benefited as well?

Rep. Green: Well, my 4 year-old has been taking the chewable vitamin, which...I took the chewable Focus Factor for awhile myself before I got on the adult Focus Factor. And the great thing about it is, we've always tried to get him to take a vitamin of some kind, and when Dr. Smith came out with Focus Factor it was the only one that he'll say, 'I want to take my vities!'.

So he likes the taste.

Rep. Green: He likes the taste, so that's a significant advantage over most of the products that are out there.

What would you say to our listeners who might still be skeptical about Focus Factor?

Rep. Green: Well, I think, um, being someone...y'know, personally I've always been interested in taking supplements and vitamins and those kinds of things, so it was a lot easier, um, for me to make the decision to try something that I thought was gonna help what I was looking for. A lot of times we spend money on something that's supposed to be doing all these great things but you never feel it, you never notice if it did. With Focus Factor you're going to actually *know* that there's something different in the way that you are operating as a human being. Your brain's working better, your body's feeling better. I mean, with a product like that, what have you got to lose?

And your experience has been that it's really changed your life, helped your family, it's been good for your kids. Sounds like it's been great for you.

Rep. Green: And let me tell you, I can tell when I *don't* take it.

That's interesting. That's very interesting. Because, that's always an important test of a supplement, incidentally, is if you feel a difference when you *stop* taking it.

Rep. Green: Right.

Well, thank you very much for coming on the program today, Representative Rick Green. I know you're very busy and we appreciate you dropping by for a few minutes.

Rep. Green: You bet. Y'all have a great one.

Dr. Smith, what goes through your mind when you have a state representative tracking you down to tell you what a great product you have?

It's amazing to me. I never imagined that Focus Factor would enhance so many lives across the country. And I really love to hear testimonies from professionals like Representative Green who have the ability to really impact thousands of lives with what he does every day.

Well, I'm looking at the clock...we're almost out of time. Are there any final words of wisdom you want to leave our listeners with?

Absolutely. I want people to try this product because of what I've seen in my own life and I've seen across the country happen for people who take it. I mean think of how many times you've walked into a room in your house, you got there and you said to yourself, "What am I doing here?" How many times have you misplaced the car keys? Or, how many times have you gone through the embarrassing experience of meeting someone, you're being introduced right now someone from a friend, you meet them, by the time your hands part the name falls to the floor.

Happens all the time.

We're all having problems with memory today. It's not our fault. We have an innate ability to have an awesome memory. All we have to do is feed our brain the nutrients it's starving for to enhance energy production. And Focus Factor supplies those nutrients. And you have an opportunity to try this product and experience what it can do for you firsthand.

So it's kind of like memory in a bottle.

Exactly.

Folks, it has science behind it. It's recommended by doctors, parents, kids who say they can focus and concentrate better, seniors can benefit enormously...if you're in business, this is a must. A remarkable scientific breakthrough. The first of its kind. And Dr. Kyl Smith, thank you very much for coming on the program, being our guest and bringing us this information. I know you're a very busy man and we wish you all the best with Focus Factor.

Thank you Bill. I've enjoyed it.

Folks, we're simply out of time. I'd like to thank our engineer, Jon, today for all of his help and assistance. And definitely thanks to all of you for making this, once again, one of the most popular health and well-being programs in the country. We're on over 200 radio stations from coast-to-coast and it's all because of you. Thank you very much and we look forward to talking with you again very soon right here on the VitalBasics radio program. Til then, take care and God Bless.

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CTA copy: Hi, this is Bill Begley. If you would like more information about *Focus Factor*, the supplement that supercharges your brain, please call toll-free: 1-800-_____. That's 1-800-_____.

For over 5 years, Focus Factor has been available only through doctor's offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program when you order, and you can even get a 30-day supply absolutely *free*.

Focus Factor is effective, all-natural, and guaranteed to give you noticeable results *quickly* or your money back. There are two formulas: the berry-flavored chewables for children...and the easy-to-swallow tablets for grown-ups.

Call now and be sure to ask about the doctor's special offer. It's 1-800-_____. That's 1-800-_____.

Focus Factor radio infomercial...Leisa...version 2...7/10/00 SHOW #4500

Hi and welcome to the *VitalBasics* radio program. I'm Leisa Hart.

Are you under a lot of stress trying to juggle work and your family? Do you sometimes have mood swings or trouble remembering things? Or maybe your child has behavior problems or learning difficulties. Well, listen up, folks. We're going to discuss a revolutionary breakthrough that is literally sweeping the nation. It's helping countless people of all ages get back their mental edge. My guest today is Dr. Kyl Smith, founder and president of the Creative Health Institute in Texas. He's a recognized expert in the field of nutrition, pediatrics and anti-aging. He's Vice president of Education at the Texas Integrative Practitioner's Association—it's a non-profit agency whose members include Medical Doctors and alternative health practitioners. He's been Senior Advisor of Research and Development for several major health care and pharmaceutical companies. And what brings us to today's topic is he has conducted *thousands* of hours of research to create this new breakthrough called *Focus Factor*. Dr. Smith, we have so much to talk about...and I am so glad to have you on the *VitalBasics* program.

Thank you. I'm honored to be here.

This is an incredible story. And I want us to start at the very beginning. Tell us about what inspired you to create *Focus Factor*?

It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time. I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels?* Or they'd say something similar like, *Y'know, my son has problems with attentiveness in school. He can't focus and concentrate, and it's affecting his academic performance.* Or...or the best one: the wife would say, *Hey, my husband comes home from work and he's drained. He's irritable, he has mood swings...he's just, it's like his batteries in his brain are drained at the end of the day. Is there anything that we can do to boost his energy levels and get rid of those mood swings?* Well, the problem was, these questions, these constant questions, got under my skin because I was suffering with the same thing. I mean, *I* was that guy waking up in the morning and drinking coffee just to try to feel good, and I was drinking some kind of caffeine in the afternoon just to try to stay awake. And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, *Hey, what do you say when your patients ask this question? Did I miss something?* And they didn't have a good answer, either. They'd say something like, well, *cut your caffeine consumption out.* I'm thinking to myself, *well, that's why we're drinking caffeine! We feel tired in the first place, right?* So I looked for a solution, and ultimately this led me to do a medical and nutritional research search of all the nutritional information that's out there...regarding nutrition and the brain. This search resulted in the first technology that we put into Focus Factor. Pretty soon I was picked up by a pharmaceutical company that asked me to create a product specific for kids to enhance brain function—to increase focus and concentration. Well, this product was an outlandish success. And I'll never forget this one lecture that they sent me out to across the country. This lady stood up—and I'm telling you this because this is a moment that really changed my life—this lady stood up and she said, *Dr. Smith, the thing that touches me about Focus Factor is what it's done to my son's life. You see, before Focus Factor, my son was the boy at school that no one wanted to play with. He would throw temper tantrums and disrupt class if he didn't get his way. After 1 week of taking Focus Factor, his teacher wrote a note home that said, 'what are you doing different? Your son is sitting still, finishing his work in class...'* And the mom said this: *The thing that is most impressive is I'm watching his self-esteem grow.* Well, Leisa...as she's crying, I'm sitting there trying to fight back tears and I'm saying to myself, *This is a mission.* We've got children suffering with this today. We've got adults and senior citizens with problems with focus and concentration, and this can have a profound negative effect on our life. Somewhere along the line I picked up the saying, *In order to do really good in life, you've got to feel really good.* And that's what Focus Factor is all about.

Now, as I hear you saying this, it's a picture I see everyone that I'm relating to as you're saying these...y'know, inability to focus...and then you're talking about the mother saying she's having her child on Focus Factor. I've got family members, I've got myself, everyone that can relate to this...

Exactly.

Now tell me what is the principle behind Focus Factor?

There are really 2 underlying principles. Number 1...and this might seem simple on the surface but it's really important. We've gotta make up for the nutrition that's lacking in our diet today. ~~You see~~, it's virtually impossible to come out of the grocery store with nutritious food today. Most everything in our cart, even if we're trying to avoid junk food, has been processed. Like refined sugar, refined flour... We've gotta realize that most of the nutrients in our food have been milled and refined out. This means we're filling our body with foods that are void of nutrition. What does this mean to us in real life? It means we wake up in the morning and we feel lousy. We've slept 8 hours but we still feel fatigued and lethargic. You try to hit that 'snooze' button to get another 10 minutes of sleep, like that's going to make a difference. Then you go to work and you feel irritable. You can't get much done. You come home and you feel mentally drained. So the first principle...we've gotta make up for what's missing in our diets. The second principle...this is really profound and this is the technology behind Focus Factor: Is there are specific nutrients that feed the brain's ability to create mental energy. If these specific nutrients are missing in our diet, or the multi-vitamin that we happen to pick, we'll never feel an increase of energy. We can be taking a multi-vitamin and still feel sluggish and lethargic. Focus Factor makes up for that by supplying the specific nutrients the brain uses for energy production.

Now with that in mind, we've got a formula for kids and a formula for adults, right?

Right.

Now tell me this, in your experience, do you see improvements in kids' school work?

Absolutely. We've even seen dramatic improvements in academic performance. And let me give you an example. A child that comes to mind, his name is Brian. He's the son of a doctor in my area that's a huge advocate of Focus Factor, probably because of this, y'know, this result in his own life. Brian was a child that was kicked out of no less than 4 schools. He would not respond to his parents or any kind of authority outside like, like principals or teachers. After being on Focus Factor, in one year he was on the honor roll...and two years later he graduated from high school with honors. Now, the most impressive thing to me is not the academic performance...and let me say, that's an extraordinary result. That doesn't happen in every case. But to me the most impressive thing isn't the better grades. What's impressive is the fact that Brian's self-esteem went up. He feels better about himself. He communicates with his parents, with peers, with authority figures like teachers even better. And as a result, he, in my opinion's gonna accomplish more in life. Instead of graduating as that child that feels like a failure, he graduated with quite an achievement and feels better about himself. That, to me, is the magic and the difference that feeding the brain, feeding the batteries in our brain and recharging them, can do.

So how about home-schooling? It seems like Focus Factor could really be a benefit because at home there's a lot of distractions, there's a lot of challenges.

True. I think you're correct. And one of the things that I've noticed about home-schoolers as I travel across the country and do lectures, it seems that many of the lectures are filled with parents that have chosen to do home schooling. And it's my perception that these parents are more attuned to what's going on in their child's life. It's like they've taken responsibility for what's going on in their education, and they're very interested in what they can do nutritionally to help boost their child's performance. And the most common story that these home-schoolers tell me is, with Focus Factor, their child accomplishes more in less time with energy to spare...to go play and do the things they might want to do. So it's neat. They can be right there with their children and they see first-hand the experience of feeding the brain.

. I have with me now Anita Sohn. Anita is a school administrator, and she put her whole *class* on this amazing product. Anita, can you tell us why you did that and what happened?

Anita: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, or previously to that time, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say, 'what can we do about this?' then I would start to tell them, 'Okay, this is what I would do in this situation. And it couldn't hurt, it can only help...try it.' So they started, one by one, each child started testing out the Focus Factor. And, as a result, my entire class went on the Focus Factor. We have just...we've had a wonderful time on it.

And what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely.

That's just an unbelievable story. So they were really aware of the difference it makes. They can feel it.

Anita: They were *very* aware of it. Now, I've been on the Focus Factor personally myself for 2 years. When I got on it and started finding the difference that the supplement makes on a daily basis...not just when I need it. I am...I am the most awesome woman on Focus Factor, as well as my children.

So it would be safe to say that you're truly a believer in this product.

Anita: Oh, *very* safe to say.

Well, Anita, it has really been a pleasure talking to you. Thank you so much for being with us today.

Anita: Thank you. Bye-bye.

We're going to take a quick break. Coming up you'll hear from some doctors who recommend Focus factor to their patients. Right now it's your chance to call our toll-free telephone number so you can get a 30-day risk-free trial of Focus Factor. We'll be right back with Dr. Kyl Smith on the VitalBasics radio program.

CTA #1

Welcome back to the VitalBasics radio program. I'm Leisa Hart with special guest Dr. Kyl Smith, creator of *Focus Factor*. It started out as a supplement to help kids with learning and behavior challenges...but Doctor, you say that men and women got a hold of this stuff and they love it, too...

Well that's right, Leisa. The original formula for Focus Factor was a chewable for kids. But the interesting thing that happened was...the product would go into the typical household. The child would come home from school and say, *Mom, I had a great day! I aced my test and I finished my homework before I got home!* And the mom would notice that the child is less irritable...she can connect with him better. And then, of course, the mom started saying to herself, *Well, I need this stuff, too. I need to have a better day. I need to get more accomplished, and I certainly could use a lift in my mood.* This product went out into the field and it is an outlandish success. Because us adults realize that we need a mental boost...a natural mental boost every day.

So *that's* how you know whether a supplement really works. So it starts with the moms are giving it to the children...the children are performing wonderfully. And they'rekind of like, *I need this stuff, my husband needs this stuff...*

Right.

Y'know, friends are telling friends. School teachers are telling the parents about it. And then doctors are telling their patients...*you need to try this stuff.* I can't think of a single person on this planet that would not benefit from this...

It's true.

I mean, men, women, young old, children, seniors, everybody…

That's true.

It is fantastic. **[edit]** Now, earlier this week we spoke with several people who say Focus Factor has dramatically improved their quality of life. So if you or anyone in your family—anyone you know—could use some help with mood, energy, memory…y'know just clearing out those mental cobwebs, you need to listen to this:

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings. That it gives you a little pick-up, so to speak, during the day to where you don't get the doldrums in the afternoon. That really got my attention because that is me—right there. I've attributed a lot of mood swings or depression here and there, you know, to just the age I'm going through right now, you know being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. I notice right away when I don't take Focus Factor. It's hard to describe. You just have to try it. And everybody I've talked to that I've recommended it to has said the same thing.

Kristin Rister-Wheatley: My name is Kristen and since I've been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I am on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it's very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter's performance the way she felt in school—the way she'd concentrate. I've shared it with my friends. I've shared it with my family. They, everyone feels the same way. We all love Focus Factor.

Dr. Smith, did you have any idea when you were creating *Focus Factor* that it would have this kind of effect on so many people's lives?

I had no idea. Realize from a technical standpoint I created the product to enhance focus, concentration and memory…and even boost emotions like feeling better with a better mental state, mental attitude. I never expected, though, the real-world examples that come from people taking Focus Factor. I'm always surprised… I'll never forget, this one lady came up to me during filming a television program…she was an elderly lady…and she said, *Dr. Smith, I have to tell ya…before Focus Factor, my husband was the most irritable, cantankerous man you've ever met in your life. But after Focus Factor, we cut off the television now. We go on walks. I can get him to garden with me. We do hobbies like we used to. It's like I've got my old sweetheart back.*

Oh, that's wonderful. Imagine if she coulda had Focus Factor a long time ago…but better late than never.

Exactly.

I'm sure she was just elated.

Dr. Smith, in your experience how quickly does it take to work?

Well I generally tell people 10 days. Take Focus Factor consistently for 10 days. But what's really common is the fact that you're gonna notice a difference the first day you take it. I say 10 days to be conservative. I don't want anyone to be disappointed. And the thing that I always point out is there are absolutely no stimulants in Focus Factor. There's no caffeine. As a matter of fact, it's the nutrients that our brian needs for energy production so it's the best way we can supplement our diet and support our brain, which is obviously the most important organ in the body.

Now, for people out there are seniors today, what's this going to do for them?

Well, the most common thing seniors say, is they feel like they recaptured that energy that they had when they were younger. I mean, Focus Factor literally puts that spark back in their life where they feel like doing more. And let's talk about memory if we can. Because, again, like I say, seniors *worry* about their memory many times. I think the whole world, especially...let's just take this country...are suffering with memory problems. You've got children at school with problems focusing and concentrating and learning. You've got adults, you've got seniors. Now think about this: How many times have you been introduced to somebody...and, or let's say the person listening's been introduced to somebody...and by the time their handshake breaks their name falls to the floor. Or you go to the grocery store. And milk's on your list. You come home, you got 10 items...but no milk.

Where did the milk go?

Well, the bottom line is, we're all suffering with memory problems many times, if we'll be honest. It impairs our ability yo learn. For professionals it impairs their ability to provide a great living because, if they can't learn new tasks, chances are they're not performing to their optimal capacity. It affects kids, and believe me it affects your self-esteem. Focus Factor provides the nutrients necessary to enhance memory, which is a blessing to all of us.

And folks listening, do you remember what the doctor's name is? A little test. It's Dr. Kyl Smith. I'm Leisa Hart. You may have already forgotten that. But the information is there...we just need something to help us get it out.

Everybody has a natural ability to have an awesome memory. You just have to have it released. And Focus Factor provides the nutrients that's going to literally allow you to learn new tasks and access old memories.

Okay let's listen to what some doctors are saying about *Focus Factor*. First we'll hear from Dr. Sean Sieracki...and then from Dr. Jim Van Meter. Now, these are doctors who recommend *Focus Factor* to their patients. Let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about ...a year and a half ago Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets, and from that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue...poor focus and irritability...it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function—not just with children, not just with adults, and not just with seniors...it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it...um...everyone in my family is on Focus Factor. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

So there you have just a few of the many doctors who recommend *Focus Factor* to their patients. Now, Dr. Smith, there are obviously thousands and thousands of supplements out on the market today. Out of all those products, what is is about *Focus Factor* that is getting all this attention?

We've got this wonderful grass roots thing going on in doctor's practices and in families across the country. And I think it's because Focus Factor *works*. I mean, think of how many times people take a vitamin or nutritional supplement and they absolutely do not notice *any* difference in their health, their mental clarity, or anything. Focus Factor very rapidly feeds the brain so you feel like you've got better attentiveness. Increased focus, concentration, increased memory...better mood, y'know what I mean? A better spirit about you.

Does that just turn a light on for them?

That's a great example. Kinda like turning a light bulb on. I think a lot of people, at least in my practice, feel like the light above their head when it lights up when they get an idea, like in a cartoon, is a dull light. With Focus Factor you get a bright light above your head.

Well I'll tell you what, I'd like that bright light all the time. We're going to take another quick break here. Folks, now you can try *Focus Factor* for yourself...absolutely *risk-free*. Even the call is free. The telephone number's coming up. I'm Leisa Hart, and you're listening to the *VitalBasics* radio program.

CTA #2

Welcome back everyone. Leisa Hart talking with Dr. Kyl Smith about *Focus Factor*...a groundbreaking new supplement that helps improve your mental edge. Doctor, for people just tuning in, give us a quick re-cap of the concept behind *Focus Factor* and why our listeners should choose *this* over all the other supplements out there.

Well, Leisa, the concept is simple. Today people are waking up feeling lethargic, they lack energy, they experience mood swings and irritability, lack of focus...because, quite frankly, our diets are just not providing the brain-supporting nutrients that we need to feel great. So I designed Focus Factor to help both adults and children *supplement* their diet...add those brain-supporting nutrients back to the diet...what I never imagined, though, is the stories that come from this product. I mean, I created it to increase focus, concentration and memory. The stories that come back, though, are higher self-esteem. Parents feel like they're better parents because they go to work, they get more done in less time, they come home with energy to spare that they can give their children and their spouse. The stories are just wonderful, life-changing experiences and it's caused me to realize that we all need to support the most important organ in our body...and obviously, that's our brain.

And you're going to feel this pretty quickly, right?

Typical person says that they notice a difference in how they feel within just 1 to 10 days.

Absolutely fantastic.

Texas Rep testimonial: Now, it's my great honor and pleasure to have with me on the phone Representative Rick Green. He's a member of the House of Representatives in the state of Texas, an attorney, business owner and father of a two children. Obviously a very busy man. Representative Green, thank you for joining us.

Glad to be here, thanks for having me.

Now what's your story with *Focus Factor*?

Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the time that you *do* get with the family and I wanted something that wouldn't just affect me physically...I mean, I've had vitamins before that I could tell a physical difference...but with this product I was looking for something that would give me the mental clarity to deal with all these different tasks at the same time...and that's what I had been told about Focus Factor...started taking it about a year ago and found that was *exactly* the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of, y'know, how you...you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen. I mean, I could...whatever the task at hand was, I could concentrate on getting that done knowing I had these other things to deal with...

Sounds to me like you've given a whole new definition to the term *multi-tasking*.

[laughs] If there's a multi-*multi*-tasking, then that would fit.

Do you feel like your family has benefited as well?

Well, my 4 year-old has been taking the chewable vitamin, which...I took the chewable Focus Factor for awhile myself before I got on the adult Focus Factor. And the great thing about it is, we've always tried to get him to take a vitamin of some kind, and when Dr. Smith came out with Focus Factor it was the only one that he'll say, 'I want to take my vities!'.

So he likes the taste.

He likes the taste, so that's a significant advantage over most of the products that are out there.

What would you say to our listeners who might still be skeptical about Focus Factor?

Well, I think, um, being someone...y'know, personally I've always been interested in taking supplements and vitamins and those kinds of things, so it was a lot easier, um, for me to make the decision to try something that I thought was gonna help what I was looking for. A lot of times we spend money on something that's supposed to be doing all these great things but you never feel it, you never notice if it did. With Focus Factor you're going to actually *know* that there's something different in the way that you are operating as a human being. Your brain's working better, your body's feeling better. I mean, with a product like that, what have you got to lose?

And your experience has been that it's really changed your life, helped your family, it's been great for your kids. Sounds like it's been great for you.

And let me tell you, I can tell when I *don't* take it.

That's always an important test of a supplement. If you feel a difference when you *don't* take it!

Right.

Well, Representative Green, thank you so much for coming on the program today. I know you're very busy and we appreciate your time.

Y'all have a great one.

We're almost out of time. This is *your* chance for any final words to our listeners. Anything you want to say before you go?

Well Leisa, Focus Factor is so important to me...I wouldn't start a day without it. I wouldn't let my family go without it. I wouldn't imagine letting my little girl go through life without the nutrients she needs for a great day so she can focus and concentrate and feel good about herself. But maybe the most profound thing is what this does in also adults' and senior citizens' lives. Senior citizens who felt like they don't have that mental spark...they've got that spark back that they used to have when they were younger. People who feel like they're going through a drudgery, a treadmill every day of feeling lethargic and not getting anything done. They're reaching for caffeine and candy to try and mentally stimulate themselves, which, of course, doesn't work. Focus Factor feeds the brain so you literally have that energy back so you feel like you can do more in less time and come home with energy to spare and spend that wonderful energy and time with your family.

Dr. Kyl Smith...thank you so much for being my guest today here on VitalBasics.

Thank you so much, Leisa. I've enjoyed it.

Well, folks, we're out of time. I'm Leisa Hart. Thank you for joining us on the *VitalBasics* radio program.

CTA copy: . If you would like more information about *Focus Factor*, the supplement that supercharges your brain, please call toll-free: 1-800-_____. That's 1-800-_____.

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Call now and be sure to ask about the doctor's special offer. It's 1-800-_____. That's 1-800-_____.

Focus Factor TV Show "Bill's Case Studies" transcript—April 19, 2001

)pening disclaimer: The following is a paid program for Focus Factor, brought to you by Vitalbasics.

IMPORTANT NOTICE TO CONSUMERS

THIS PRODUCT IS A DIETARY SUPPLEMENT. IT NUTRITIONALLY SUPPORTS NORMAL BRAIN FUNCTION. T IS NOT A TREATMENT FOR DISEASE. This product is not intended to treat attention deficit hyperactivity disorder or any ›ther mental illness. If you or your child suffer from mental illness, consult a physician for proper treatment.

Title Screen up: "Brain Starvation"

Karen Newton: I kept thinking, it's just approaching middle age. I couldn't sit down and watch a TV show or read a book without falling asleep. Because I was just so tired.
Lois Miller: I didn't think of it as brain starvation. I thought of it as loss of energy...older age...being able to keep up.
Anthony Lazzaro: The most important part of your body is your brain. A lot of people forget to feed their brain the proper food.
Barbara Clemente: Actually I went to a doctor and said, "I'm tired all the time. I can't concentrate. I'm forgetting words." And he told me this was normal—that this was aging and that I should just get used to it.
Cheryl Lee: When a 7 year-old is concerned about his acceptance in class and feeling good about himself and not having any friends...and being separated from his friends in the lunch room, that, to me, is more of a concern than just being an active young boy.
Tom Newton: There's so many things about the brain that we don't understand...
Susette O'Neal: It's very important that you feed your brain—this is the thing that's going to carry you through the next 50 or 60 years.

Bill: Welcome to the Vitalbasics Health Show. These people and millions just like them have made a shocking discovery. Despite the abundance of food in this country, despite the fitness craze, people still feel tired and mentally drained. Several months ago on this program we interviewed a leading expert in nutrition who is generating controversy with his assertion that there's a nationwide epidemic called "Brain Starvation" that affects men, women and children alike in this country. According to Dr. Kyl Smith, memory loss, poor concentration, mood swings and fatigue are causing a dangerous drop in effectiveness in the workplace and a higher level of tension and even anger in the home. He also introduced a new dietary supplement called Focus Factor that helps people with these every day problems. Dr. Smith, welcome to the program again.

Dr. Smith: Thank you, Bill. Again, I'm very glad to be here.

Bill: What is brain starvation and what are the signs we might have it?

Dr. Smith: Brain starvation, basically, occurs to all of, I believe, us on a daily basis when we fail to consume the nutrients that our brain needs for optimal function. And the way we feel when this occurs is we feel sluggish and lethargic. The problem is, if we were organically farming in our backyard the fruits and the vegetables and growing poultry and cattle like they did in the early 1900's in the backyard of the farm, and we were producing the grain products ourselves—taking the raw wheat, grinding it up and making the bread—we would have all the nutrients we needed from our diet. But we don't live that way anymore. The way *we* live is we go to the supermarket and we buy processed foods...the processed grain examples that we used, where literally the magnesium, the Vitamin B6 and other neuro-factors have been removed from the grain and not added back after processing. Now, here's another key, we humans have been manipulating our brain for years, our whole lives to try to change how we feel. A good example is chocolate, caffeinated beverages, even candies and sugar will alter brain chemistry and enhance neurotransmitters. The problem is they do it artificially.

Bill: But it's not just you, you know, Dr. Smith saying this. This is being widely reported in the mainstream press. First one: *Pain and fatigue are the two most common health related problems that cause people to seek help from their health practitioners.* Words they use to describe their condition include: exhaustion, lethargy, inability to sleep at night combined with inability to stay awake during the day.

. **Smith:** Bad combination.

ll: Another one and this was a headline in USA Today, it was a cover story on it. It said, *our lives are all crumpled with stress, multi-tasking, high expectations, lack of manners. Now we're amid a new epidemic of anger, sometimes adly anger*. Now that we know that this is serious problem, tell us, what is Focus Factor and what does it do?

r. **Smith:** Focus Factor fills that huge gap of nutrients that's missing from every one of our diets. In other words, it lps to ensure that we consume the nutrients we need every day for healthy and optimal function for both the brain and e body. But Focus Factor actually goes one step beyond that. Focus Factor fills that gap with nutrients that have been own in science to be some of the best quality, both natural ingredients...ingredients that have a high absorption in the man body. This is very important. If we want to make an impact on our health, we need to consume natural gredients and ingredients that are very absorbable to the body.

ill: Recently we took our cameras out across the country. We went from the east coast to the west coast and back gain to find out how brain starvation affects people on a day to day basis, and how Focus Factor helps them get back to normal productive lifestyle. Our first stop was Cleveland, Ohio and this highlights the fact that Focus Factor really is supplement for the whole family. Tom Newton is the Midwest regional promotion's manager for Electra Records. His wife Karen is a medical transcriptionist and they have two school age daughters, Katie and Jackie. Take a look...

Newton family testimonial:
Tom Newton: One of things that really brought it home for me was, my boss called me out on a conference call and asked me a question. It was a simple question. And I wasn't paying attention. And, y'know, in front of all your peers, you're like, *what was the question? [laughs]*...and you just kind of see your career slowly slipping away.
Karen Newton: I'd find myself dozing off at the movie theatre because I was tired. But I thought, I have too much on my plate, I need more help at home...I'd be just yelling at the kids—they need to help me more and he needs to help me—and...so yeah, I was just running on empty for a couple of years there.
Tom/Karen Newton: Karen: One morning I just woke up and literally I felt good. And I thought, this has got to be Focus Factor working. **Tom:** Did you ever notice the difference in your mood from a Monday morning to a Friday afternoon? Well, I remember distinctly the first time I took it, because it was a Monday morning, and I remember taking the Focus Factor—doing my shower and all that. And then when I actually got to my office, it was like, *All right! I feel like Friday afternoon for some reason!* I couldn't figure that out. But, that was the beginning, and that's the kind of feeling I had a continue to have.
Karen Newton: You just find, like, that you're in a better mood, you have more enthusiasm, you have more patience. It just gets the cobwebs out and everything. You make the most of your day.
Katie Newton: When I'm on soccer field and taking Focus Factor I feel more confident and alert and energetic.
Jackie Newton: I have to get up and go to school every day. I have homework every day. I work almost every day. And Focus Factor just gives me enough energy to go on with my life, like, with a little bit more energy and not as tired as I used to be.

Bill: (Wonder Women introduction): One of the real tests of a product is how quickly the word gets around about it. If everybody's talking about something, it must be pretty good...and by all accounts, a lot of people are talking about Focus Factor, as in this next clip. Lois Miller is a professional real estate broker in Maryland, and she was feeling the effects of "brain starvation." Focus Factor worked so well for her, that she immediately gave some to her nieces.

is Miller: My ability to concentrate was…was non-existent. Practically non-existent. My focus was just horrible. I d very bad moods, and my energy level was drained.

ois Miller: I was seriously considering retiring.

idgett Steele: It's frustrating to not be able to take charge of how I feel. For example, late afternoon when I don't el like doing my work. I fought through it…I worked through it. But in hindsight, it's frustrating because I wasted so uch time.

oralie Miller: I was having a real problem with my energy level. Coming up on my 43rd birthday I just figured I'm tting old and I just can't keep this pace up anymore.

ois Miller: I heard about Focus Factor on Coast-to-Coast Radio. And it was, like I said, I was in my bed that orning. I was so tired I was thinking about not going in to work. And I heard about Focus Factor and I said, I think I ist have to order it.

ridgett Steele: As a family, we exercise together a tremendous amount. We walk the dogs, we run together, we erform all kinds of outdoor activities, and Focus Factor has been incorporated into that very busy, active life.

oralie Miller: One of the things you do when you are not able to focus is to stop and grab a snack or something to eep your energy level up. The side result is I'm finding it very easy to maintain not eating the office snacks and hereby keeping my weight off.

ois Miller: Since taking Focus Factor, my memory is better, my concentration is better, my energy level is better. My ibility to cope is better. My ability to endure…my endurance is better.

Bridgett Steele: By the end of the week I think you, as well as those around you, would notice that you can concentrate nore—you can block things that would otherwise be distracting, out. Impediments that kept you from performing efficiently are gone, because you somehow find the ability to focus on what you're doing. And your attention to detail will improve dramatically.

Coralie Miller: Of what I know, 3 different people—my aunt, my cousin, and myself—have tried it with 3 totally different body chemistries and have all, in our own way, had very successful results.

Bill: Can you talk a little bit about what's happening in the brain in terms of when our brain's working at full capacity and then when it's starving, as you say?

Dr. Smith: Absolutely, the best way we can do this is to actually take a look inside the brain. As you travel inside the brain you'll notice that tiny telephone lines called neurons carry nerve impulses. However, something unique happens. No two neurons actually connect to each other. They're separated by a gap called the synapse. Now the way the brain actually makes a connection is it makes a chemical connection with what's called a neurotransmitter. Neurotransmitters are formed from the nutrients that we consume from the foods that we eat. So, in our comparison of two neurons you'll see on the left side we have low production of neurotransmitters and on the right we have high production of neurotransmitters. This correlates quite frankly into how you feel. When production of neurotransmitters is high you have a great day. You feel like you can focus and concentrate on demand.

CTA #1 Bill: Folks, if you would like more information about Focus Factor. If you or your kids need help with focus, concentration, memory, energy or mood swings, please call the number at the bottom of you screen. Thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk free trial. Be sure to mention the Vital Basic's Health Show, and when you order you can even get a 30-day supply absolutely free. And we have a special bonus that we did not have available the last time we had Dr. Smith on this program – he has produced a special video that explains more about Focus Factor. This is such a remarkable, revolutionary dietary supplement, and it is so different from anything else out there, this video explains how to take it properly, more information about the ingredients and some fascinating facts on how it literally energizes your brain. This video is free with your order. Remember there are two formulas – there are berry-flavored chewables for children and the easy to swallow tablets for adults.

[Vitalbasics Health Show transition]

Bill: Right now, we are going to find out a little more about brain starvation in some very simply everyday terms, through the foods that we're eating here. And Doctor Smith, you have some surprises for us.

. Smith: We can not assume today that we receive all the nutrients we need from our diet for optimal brain ıction—for us to feel at our very best. Let's start out with breakfast. Because of the way grain products are refined lay in the milling process—from the grain to the refined flour, we can lose up to 90 percent of some nutrients. Let me ow you what that means to us. If you start out with simple toast for breakfast, you're gonna have to eat 10 slices to ake up for the loss of nutrition in your one or two slices. You can find this referenced in government studies, so it's lid information. Speaking of grain products...if we're looking at cereal (and I love cereal myself)...you'd have to eat) servings to make up for the nutrient losses in that cereal. Now, taking our example to lunch...using the same formation...there are nutrient losses in the luncheon meat and in the vegetables (as we're going to see). You'd have make three triple-decker sandwiches to make up for the nutrient losses in these foods.

ill: I hope you're hungry. That's just incredible

ır. Smith: Now, this is real information and it's not exaggerated. Notice we don't have junk food up here...we don't ave fast food. These are real foods.

ill: yeah, these look like wholesome foods like we're supposed to eat every day.

Dr. Smith: Exactly. Let me give you a real strong example...as if these weren't strong already. In the case of broccoli, asparagus and green beans, the American Medical Association Council on Food and Nutrition, they state that ıutrient losses can be so severe in vegetables, that by the time they get from the farm to the green grocer, they can lose ıp to 90% of some nutrients. Now, these are what we call "fresh" vegetables. In the case of canned peas, you can lose ıp to 75 percent of vitamins B5 and B6 which are both neuro nutrients—nutrients the brain uses. Let's bring it to dinner. Taking all this information we put together, you're gonna have to eat 5 servings of tomato sauce to make up for that loss. And then we're back to our grain example—10 servings of the pasta. Because of food storage and food processing, there are losses of nutrients. And if you don't make up for that by taking a good quality nutritional supplement, like Focus Factor, you're gonna suffer.

Bill: And folks, think about your own diet. Chances are you're *not* eating this healthy. Chances are you are sneaking in a lot of junk food...fast food...that kind of thing. So Focus Factor becomes really an essential supplement. I want to introduce to you right now a professional racecar driver named Anthony Lazzaro. Anthony is on the LeMans Series, which are races that last anywhere from three hours to twenty-four hours, and in his profession his mind, his brain is literally going at 180 miles per hour. So, you can really imagine how focused and alert his brain has to be and how he has to be. Now we caught up with him at a race in Sebring, Florida, and here's what he says about Focus Factor...

Anthony Lazzaro My career has been very, very good so far. I've won numerous championships in open-wheel cars. I've won races in sports cars. To get the pole positions, to get the fastest race laps, to get the race wins, you need that edge...and with Focus Factor I have that edge. Your reactions, and what you do in the race car—I mean, we're traveling at 180 miles per hour, we're making split second decisions—your reaction times are everything. And if you're not at the top of your game, and you're not mentally prepared for what you're about to do, you can get in big trouble. Right now, I'm taking Focus Factor about 30-45 minutes before I get in the car. It's part of my daily routine. A lot of people watch their diets, they watch what they eat, they work out, they have different activities that they do for their body, but a lot of people forget about the brain. Focus Factor is brain food. It's what your brain needs to think more clearly. Your brain's telling your body what kind of energy level you're going to have. Focus Factor helps that. The results speak for themselves.

Bill: Here's what I'm thinking with Anthony's story, is that if Focus Factor works for someone like him who is under incredible pressure. I mean he's going nearly 200 mph, I mean that's his job. He drives almost 200 mph for a living. I can only imagine what it would do for the rest of us who aren't perhaps under that kind of pressure all the time.

Dr. Smith: Anthony has taken Focus Factor to extremes that we'll never have in our lives.

ll (Al Demitri introduction):
Demitri lives in Florida, and he plays golf almost every single day. He has a tremendous swing, and take a look at s...

l Demitri: I had friends who would come down from up north, from Ohio, and down here to Florida on vacation and ıu stand there and you couldn't maybe remember his first name and here he was a chumming buddy all the way rough high school, y'know? And then, once I started taking Focus Factor, I noticed that names were easier... lon't walk into a room and forget what I was going into the room for. And I had problems before. I focus more on ırs, where I'm a better and safer driver. The word "Focus" for golf is important as it is for anything. And when I ɜard the words Focus Factor on the radio, it seemed like it would be something I would like to try. My putting is emendous now. My drives are going almost 30 yards farther. There's not a member I don't play with—and I play ·ith over a hundred here—that can't vouch for that. I can only say that Focus Factor has done tremendous stuff for me. mean, just generally...I don't know how to put it. I'm happy. You ever get so happy you're at a loss for words?

ɜill (Susette O'Neal intro): We spoke with Susette O'Neal in San Diego. She has a young son named Eric who was eally having a tough time focusing and staying on-task. She says it was really a challenge for her and her husband. 3ut because of Focus Factor, there's a happy ending. Take a look...

ɜusette O'Neal: We have a lot of different things that we do in our lives that we take pride in, and one of those things ıre our children. To me, there's nothing I wouldn't do for my kid. I want them to have every advantage that they can ɔossibly have. Prior to him taking the product, the other kids made fun of him. Y'know, that really made him feel like ıe wasn't good enough. But since he started taking that, now he can concentrate, he has confidence, he's able to do the work, he's able to learn, and that's something I feel really good about because I didn't think he could do it before. Really, you have to decide on what would you do to give your kid a better chance, better confidence, and better ability? I can't say enough about it...how it took a frustrated family—mother and father—and now we are just so happy. It's like the burden's off our back now, so we have been telling everybody about Focus Factor. And I hope that other people *use* it because it will make a difference in your life and your child's life.

CTA #2 Bill: And folks, I urge you to call right now and take advantage of Dr. Kyl Smith's special offer on Focus Factor. You can get a 30-day supply today with your order absolutely free, and if you call right now, you'll also get his new video. It explains more about Focus Factor, how to take it for best results, information about the ingredients and additional ways you can get the most out of your brain to improve focus, memory, mood, concentration and energy. There is a formula for kids and one for adults, and I really want to stress here that if you keep doing what you've always done, you're going to keep getting the same results. But this is your chance to do something different. To get your life back on track at work; this is also for your kids, to help them build brighter minds; and to our friends watching right now who are seniors, this can improve your quality of life so dramatically. So, call now and try Focus Factor. It's guaranteed safe and effective or your money back, and be sure to ask about that special offer. If the line is busy, keep trying, do make that call.

[Vitalbasics Health Show transition]

Bill: My guest is Dr. Kyl Smith who is an expert in nutrition, pediatrics and anti-aging and the creator of Focus Factor. We featured Dr. Smith on this program several months ago and the response has been nothing less than remarkable. Now, Dr. Smith, for viewers who are just tuning in, can you briefly explain, "What is Focus Factor?" and "What is it going to do for us?"

Dr. Smith: Focus Factor is basically nourishment for our brain, and what it does is it provides the nutritional factors that our brain needs to produce mental energy and neurotransmitters. Now what this means to us is Focus Factor essentially supports optimal focus, concentration, and memory in adults, teens and seniors.

Bill: And, again, this is natural?

Dr. Smith: This is a natural product, yes.

Bill (Barbara Clemente introduction): I want you to meet one more Focus Factor success story. This is Barbara Clemente. She lives in Maryland, and she's a health care consultant and also works with her husband in his accounting practice.

Barbara Clemente It was a very frustrating, hopeless situation, because I was in constant pursuit of trying to solve this problem—trying to figure out *why* I was tired...*why* I couldn't concentrate...*why* I couldn't get more things done during the day. At that point in time I was under the impression that I was just getting older, and this was the way it was to be. Although we did try every vitamin on the shelf—we pillaged the health food stores. I have yellow stickies everywhere. On cabinets in the kitchen, all over my desk, on the mirror in my bathroom. I mean, it was just...how I was going to get through was to post up what it was I was supposed to do or what I needed to remember. On a scale of one to ten, Focus Factor has helped me at 15. I have energy, I can concentrate. I can do multiple things at the same time and not get confused. I don't forget words anymore. The changes are amazing. We can spend more time now with our grandchildren, as well as the rest of our family, because we're not so tired. I'm not afraid of getting older, now that I have the Focus Factor. Because the decline was so great in terms of energy and memory, that I thought, surely within a couple years I will not remember anything, and be sitting in this chair, just sitting here. But now, the energy is back—the ability to go out and do things, stay up, keep all these balls in the air at the same time.

Bill: If you have a child who has trouble focusing and concentrating and you know that they're bright intelligent kids, I want you to meet Cheryl Leigh. During our road trip we went through Texas and visited Cheryl in her home. We were very moved by her story. Her son's name is Blake and he was having a lot of difficulty, even at home, and listen to Cheryl and see if you can relate to her frustration...

Cheryl Lee: It's a tremendous amount of strain and pressure...and just the guilt alone, as I mentioned earlier, can put a lot of stress on any kind of family. And it wasn't just the school. I mean, we couldn't go anywhere as a family. We didn't want to get sitters for him...we didn't want to go anywhere, we didn't want to go on family vacations because we were not sure at any point in time how Blake was going to react or respond to certain kind of other situations. So it really—"imprisoned" is a strong word, but it really imprisons your family until you understand what it is you're dealing with. Focus Factor is part of our family now because it has transformed my family into an environment that is joyful and peaceful and productive and smiling! About a week or ten days into Blake taking Focus Factor, he came home from school and he had a really good day at school. He talked about his friends. He talked about feeling like he belonged. Getting asked to play on certain sports at school. And that's when I knew we had our son back. And his life has changed. He went from saying, "I have no friends, I don't want to go back to school, I don't even know why you have a son like me..." to "Gosh, Mom, all the kids at school picked me first today, and I had so much fun today, and I got to sit with all my friends at the lunch table." Those are words of joy to a mother.
Blake Lee: I feel very happy...and I just think I'm a good boy and a smart boy.
Cheryl Lee: You want to believe in miracles, but you never really know. I mean...and I use the word miracle and I *mean* that. I really had never believed that something so miraculous could happen so quickly. And I didn't believe there was something out there that could make such dramatic changes in Blake and in our lives. My son has been given a second chance—and I feel like my prayers have been answered.

Bill: That is a tremendous story. And you know what I noticed about that, you know, Blake is such a cute kid but when you look into his eyes, you can really see that he's energetic, he's really focused now, and most importantly when it comes to kids, he's really happy. So this really does help people all across the spectrum – kids, men, women, baby boomers certainly who are starting to feel the affects of getting older, and seniors, at that end of the spectrum.

Dr. Smith: Everyone benefits when they feed their brain.

Bill: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking Focus Factory and it was about the American Revolution and I was able to remember all kinds of things. So I'll tell you what, let's roll the clip....

Bill from previous show: "I started reading this 400 page book...very dense, very dry...and what I found was, I'm remembering everything virtually in this book. I'm remembering the names of British Lords and generals and dukes and battle sites and chains of events that happened. This book literally came alive to me...not only as I was reading it, but *after*, my comprehension was extraordinary."

Bill: And I have to say, since that program aired, things just seem to get better and better and better, it's sort of a cumulative affect. A couple of things that I notice. First of all, my memory just seems to keep getting better. And just a very small example is, I was listening to talk radio the other day and someone mentioned a web address, and Internet address, one time. I got into work the next morning, opened my computer, and I knew that web address. It was right there. So one thing I can do is visualize things better, which helps me to remember. The second big thing is multitasking. In the past, when I would get all different projects thrown at me at once, I would panic. Because it just seemed so overwhelming. Since taking Focus Factor what I find is I can more calmly prioritize things. I can focus on each task better, which means I get it done more quickly generally. And I can just get the projects done faster. So that just eases all of that stress that normally would have come down on me.

Dr. Smith: That's great.

Bill: I want to thank you very much for coming back on the program today and allowing us to share these dramatic stories with you.

Dr. Smith: I thank you and I thank you for sharing your story.

CTA #3 Bill: We're simply out of time. If you'd like more information about trying Focus Factor for yourself, it's a 30-day risk free trial. If you or your kids need help with focus, concentration, memory, energy or mood swings, please call the number at the bottom of your screen right now. Focus Factor's unique and natural blend of vitamins, minerals, botanicals and special cutting edge nutrients, help to energize and revitalize tired brain cells. **[cut to brain animation]** Let's go inside the brain to show you what happens. These are brain cells that need to be energized to keep you mentally sharp. And these pulses of neurotransmitters are what feed the cells their energy. On the left is sluggish neurotransmitter activity. On the right is energized activity. As you heard Dr. Smith say, when you feed your brain the right nutrients, you naturally energize it. Focus Factor feeds the brain in a big way. The 5 benefits most often reported are better focus, memory, mood, concentration, and energy. way You'll feel refreshed, mentally sharp, alert, focused and energetic and that's guaranteed or you get your money back. **[back to Bill]** So call now and be sure to ask about the Dr.'s special offer. If the line's busy, please keep trying, but do make that phone call. Thanks for watching the Vital Basics health program. I'm Bill Begley...take good care of yourself and God Bless.

Closing disclaimer: The preceding was a paid program for Focus Factor, brought to you by Vitalbasics.

IMPORTANT NOTICE TO CONSUMERS

THIS PRODUCT IS A DIETARY SUPPLEMENT. IT NUTRITIONALLY SUPPORTS NORMAL BRAIN FUNCTION. IT IS NOT A TREATMENT FOR DISEASE. This product is not intended to treat attention deficit hyperactivity disorder or any other mental illness. If you or your child suffer from mental illness, consult a physician for proper treatment.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Creative Health Institute, Inc. (“Creative Health”) is a Texas corporation with its principal office or place of business at 4451 FM 2181, Suite 100-515, Corinth, Texas 76205.

2. Respondent Kyl L. Smith ("Smith") is an officer and sole director of respondent Creative Health. Individually or in concert with others, he formulates, directs, controls or participates in the policies, acts, or practices of Creative Health, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Creative Health.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondents" shall mean Creative Health Institute, Inc. and its respective successors and assigns, and officers, agents, representatives, and employees, and Kyl L. Smith, his respective agents, representatives and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

5. "Substantially similar product" shall mean any ingestable dietary supplement containing one or more of the following ingredients: phosphatidyl serine; Dimethyl-aminoethanol

(DMAE); docosahexaenoic acid (DHA); L-glutamine, L-pyroglutamic acid; pyridoxal alpha ketoglutarate, –acetyl-tyrosine, GABA, inositol, bilberry, pine bark; bacopa monnieri, Coenzyme Q-10, huperzine, choline, vinpocetine; boron; or vanadium.

I.

IT IS ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Focus Factor or any substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements, that:

a. Such product improves the focus, memory, and concentration of healthy adults;

b. Such product alleviates stress, fatigue, irritability and mood swings in healthy adults;

c. Such product makes children and teenagers feel more alert, focused, and mentally sharp;

d. Such product improves students' ability to concentrate and their academic performance;

e. Such product improves senior citizens' memory, mental clarity, and energy;

f. Such product improves adults' ability to absorb information in books and to recall facts, figures and names; or

g. Consumers who start taking such product regularly will feel its effects in as little as one to ten days;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, or dietary supplement, as "food" and "drug," are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements, about the benefits, performance or efficacy of such product for:

a. The brain or any mental functions or processes (including, but not limited to cognitive function, memory, focus, learning or concentration);

b. Stress, anxiety, energy, mood or behavior;

c. Academic or business performance;

d. Longevity, age-related memory impairment or dementia; or

e. The treatment, cure, mitigation, alleviation of the symptoms, prevention, or reduction in the risk of any mental, brain, or central nervous system disease or disorder;

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any partnership, corporation, subsidiary, division, or other

device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, drug, or dietary supplement, as "food" and "drug," are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any product, and any respondent, or any individual or entity labeling, advertising, promoting, offering for sale, selling, or distributing such product. For purposes of this Part, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement.

IV.

Nothing in this order shall prohibit respondents from making any representation:

A. For any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

B. For any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

Nothing in this order shall be constituted as a waiver of respondents' right to engage in speech protected by the First Amendment to the Constitution of the United States.

VI.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of sixty thousand dollars ($60,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than fifteen (15) days after the date that this order becomes final.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Focus Factor in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

D. Respondents relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of either respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VII.

IT IS FURTHER ORDERED that respondents Creative Health Institute, Inc. and Kyl L. Smith, their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation including videotape recordings of all such broadcast advertisements;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

IT IS FURTHER ORDERED that respondent Creative Health Institute, Inc. and its successors and assigns, and respondent Kyl L. Smith, for a period of ten (10) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Creative Health Institute, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent Creative Health Institute, Inc. learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Kyl L. Smith, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that may affect his compliance obligations arising out of this Order. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XI.

IT IS FURTHER ORDERED that respondent Creative Health Institute, Inc. and its successors and assigns, and respondent Kyl L. Smith shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

XII.

This order will terminate on April 26, 2024, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Creative Health Institute, Inc., and Kyl L. Smith, individually and as an officer of the corporation.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves practices relating to the advertising and promotion of Focus Factor, a dietary supplement containing, among other things, vitamins, minerals, botanicals, and amino acids. Marketing materials for Focus Factor claimed that the product enhanced brain function and improved the focus, memory, mood, concentration, and energy of children, adults, and seniors.

According to the FTC complaint, the respondents failed to have substantiation for their claims that Focus Factor: (a) improves the focus, memory, and concentration of healthy adults; (b) alleviates stress and combats the fatigue, irritability and mood swings that healthy adults experience; (c) makes children and teenagers feel more alert, focused, and mentally sharp; (d) improves students' ability to concentrate and their academic performance; (e) improves senior citizens' memory, mental clarity, and energy; (f) improves adults' ability to absorb information in books and to recall facts, figures and names; and (g) works in as little as one to ten days.

The complaint also alleges that the respondents failed to disclose that certain of the endorsers who appeared in advertising for Focus Factor had material connections with the product.

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Part I of the order prohibits claims that Focus Factor or any substantially similar product (defined as any ingestable dietary supplement containing one or more specified ingredients): (a) improves the focus, memory, and concentration of healthy adults; (b) alleviates stress, fatigue, irritability and mood swings in healthy adults; (c) makes children and teenagers feel more alert, focused, and mentally sharp; (d) improves students' ability to concentrate and their academic performance; (e) improves senior citizens' memory, mental clarity, and energy; (f) improves adults' ability to absorb information in books and to recall facts, figures and names; or (g) works in as little as one to ten days, unless the claims are substantiated by competent and reliable scientific evidence.

Part II requires that the respondents possess competent and reliable scientific evidence to support any future claims about the benefits, performance, or efficacy of any food, drug, or dietary supplement for: (a) the brain or any mental functions or processes (including, but not limited to cognitive function, memory, focus, learning or concentration); (b) stress, anxiety, energy, mood or behavior; (c) academic or business performance; (d) longevity, age-related memory impairment or dementia; or (e) the treatment, cure, mitigation, alleviation of the symptoms, prevention or reduction in the risk of any mental, brain, or central nervous system disease or disorder.

Part III requires disclosure of any material connection that exists between an endorser and the respondents or any other person or entity involved in marketing or selling the food, drug or dietary supplement that is the subject of the endorsement.

Part IV permits any representation for any product that is permitted in labeling for such product by the FDA pursuant to the Nutrition Labeling and Education Act of 1990, and any

representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the FDA or under any new drug application approved by the FDA.

Part V states that nothing in the order shall be constituted as a waiver of the respondents' rights to engage in speech protected by the First Amendment to the Constitution.

Part VI provides for the payment of $60,000 to the Commission.

Part VII requires the respondents to retain certain records for five (5) years after the last date of dissemination of any representation covered by the order: (1) all advertisements and promotional materials containing the representation; (2) all materials relied upon in disseminating the representation; and (3) all evidence in respondents' possession or control that contradicts, qualifies, or calls into question the representation or the basis for the representation.

Part VIII requires the respondents for ten (10) years to provide copies of the order to personnel having responsibilities relating to the subject matter of the order, and to obtain signed copies acknowledging receipt of the order.

Part IX requires that the Commission be notified of changes in corporate structure that might affect compliance obligations arising under the order. Part X requires that the individual respondent notify the Commission for five (5) years of any changes in employment that might affect his compliance obligations arising under the order.

Part XI requires the respondents to file compliance reports with the Commission.

Part XII provides that the order will terminate after twenty (20) years under certain circumstances.

Analysis

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

CALIFORNIA PACIFIC MEDICAL GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9306; File No. 0210143
Complaint, July 8, 2003--Decision, May 10, 2004

This consent order addresses practices used by Respondent California Pacific Medical Group, Inc., doing business as Brown and Toland Medical Group, an independent physician practice association ("IPA") doing business both as a risk-sharing IPA in its contracts with health maintenance organizations ("HMO") and as a non-risk-sharing IPA in its contracts to provide a preferred physician network ("PPO") to payors. Its PPO members include approximately 600 physicians who provide physician services in San Francisco to PPO enrollees who live or work in San Francisco, California. The order, among other things, prohibits the respondent from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving the respondent. The order also prohibits the respondent from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physicians is willing to deal, and from attempting to engage in – or encouraging, suggesting, advising, pressuring, inducing, or attempting to induce anyone to engage in – any action prohibited by the order. In addition, the order requires the respondent, for five years after the order becomes final, to notify the Commission at least sixty days prior to entering into any arrangement with physicians -- under which the respondent would act as a messenger or agent on behalf of any physician for any qualified risk-sharing joint arrangement with payors regarding contracts or the terms of dealing with the physicians and payors -- and at least sixty days prior to negotiating or entering into any agreement with payors regarding contracts or the terms of dealing on behalf of any physician in a clinically-integrated joint arrangement. The order also requires the respondent to terminate, without penalty, any payor contracts that it had entered into during the period at issue, at any such payor's request.

Participants

For the Commission: *John Wiegand, Sylvia Kundig, Gwen Fanger, Norris Washington, Lauren Kearney, Pamela Timus, Jeffrey A. Klurfeld, Jerome Swindell, Anne R. Schenof, Daniel P. Ducore, D. Bruce Hoffman, Thomas R. Iosso,* and *Mary Coleman.*

For the Respondent: *Janet E. Shestakov, General Counsel, California Pacific Medical Group, Inc.,* and *Richard A. Feinstein, Boies, Schiller & Flexner, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that California Pacific Medical Group, Inc., dba Brown and Toland Medical Group ("Brown & Toland"), has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns a horizontal agreement organized by Brown & Toland among competing physicians to agree collectively on the prices and other competitively significant terms on which they would enter into contracts with health plans or other third-party payors ("payors"). In furtherance of this illegal agreement, Brown & Toland directed its physicians to terminate pre-existing contracts with payors. Brown & Toland also approached other physician organizations and invited them to enter into horizontal agreements regarding prices or other elements of competition. Brown & Toland's conduct had the purpose and effect of raising prices for physician services in San Francisco, California.

RESPONDENT

2. Brown & Toland is a for profit corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business

located at 100 Van Ness Avenue, 28th Floor, San Francisco, California 94102.

JURISDICTION

3. The general business practices of Brown & Toland, including the acts and practices alleged herein, are in commerce or affect commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. At all times relevant to this Complaint, members of Brown & Toland were physicians engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as alleged herein, members of Brown & Toland have been, and are now, in competition with each other for the provision of physician services.

BACKGROUND

5. Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significantly terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs"). Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with the enrollees. These contracts may reduce the payors' costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenditures, for enrollees.

6. Physicians organize their practices under several models, including but not limited to, sole proprietorships, partnerships, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payor's enrollees, and on what prices and other terms and conditions they will accept under such contracts.

7. Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in independent practice associations ("IPAs"). Some physician entities participating in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed anticipated levels ("risk-sharing IPA"). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

8. In order to be competitive in the San Francisco metropolitan area, a payor's health plan should include in its physician network a large number of primary care physicians and specialists who practice in San Francisco. A substantial number of the primary care physicians and specialists who practice in San Francisco are members of Brown & Toland.

FORMATION OF BROWN & TOLAND'S PPO NETWORK

9. Brown & Toland is a risk-sharing IPA in its contracts with HMOs to provide services to HMO enrollees who live or work in San Francisco, California. Approximately 1,500 physicians who provide physician services in San Francisco participate in, or have contracts with, Brown & Toland to provide services to the HMO enrollees under Brown & Toland's contracts with HMOs.

10. Beginning in 2000, Brown & Toland observed that its revenues from HMOs were declining. Brown & Toland believed this was, in part, the consequence of HMO enrollees switching to other types of health plans, such as PPOs, for the payment of physician fees and other medical costs. To capture revenue from the PPO market segment, Brown & Toland formed a PPO physician network. The Brown & Toland PPO network comprises approximately one-third of the Brown & Toland HMO physician members.

11. Brown & Toland PPO network physicians provide services to PPO enrollees on a fee-for-service basis. To receive compensation for services, the PPO network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor. The Brown & Toland PPO network physicians do not share financial risk in connection with the provision of services to PPO enrollees.

12. The Brown & Toland PPO network physicians have not integrated their practices through the PPO network in any significant respect. To the extent that the Brown & Toland physicians may have achieved clinical efficiencies regarding the provision of services under Brown & Toland's risk-sharing contracts, Brown & Toland has no ongoing mechanism to ensure that those potential efficiencies are replicated in services provided by its PPO network. Brown & Toland does not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network. Brown & Toland's PPO network physicians are required to abide by the utilization management guidelines established by payors, not by Brown & Toland's risk-sharing contracts, and, as more fully alleged below, it negotiates fees for its PPO network physicians that are different from the fee schedules Brown & Toland employs for its risk-sharing contracts.

THE PPO NETWORK'S JOINT AGREEMENTS ON PRICES AND TERMS

13. Brown & Toland formed the PPO network to promote, among other things, the collective economic interests of the PPO network physicians by increasing their negotiating leverage with health plans. In connection with the formation of its PPO network, Brown & Toland organized meetings among its physician members to agree upon the financial and other competitively significant contractual terms the physicians would like Brown & Toland to achieve on their behalf. Brown & Toland represented to its physician members that the activities in which they were engaging were legal.

14. When Brown & Toland solicited physicians to join its PPO network, it provided them with at least two fee schedules from which to choose (collectively "Brown & Toland fee schedules"). Brown & Toland represented to prospective PPO network physicians that the Brown & Toland fee schedules represented appropriate compensation for physicians providing services to PPO enrollees in San Francisco. Brown & Toland informed the physicians that by choosing one of the Brown & Toland fee schedules, the physician would be agreeing to be a PPO network physician for fees at or above the specified rate. Brown & Toland also informed its physicians that it is usually a prudent business practice to choose a higher fee schedule. Both Brown & Toland fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees.

15. When physicians joined Brown & Toland's PPO network they chose the Brown & Toland fee schedule under which they wanted to be paid. When Brown & Toland negotiated contracts with payors on behalf of its PPO network physicians, it presented a collective rate to payors.

16. Brown & Toland's PPO network physicians agreed with Brown & Toland to refuse to contract individually, or through an

agent, with any payor with which Brown & Toland was negotiating. Under the provider agreement that Brown & Toland had its PPO network physicians sign, the physicians also are prohibited from contracting with any payor for less than the Brown & Toland fee schedule that the physician chose.

17. After Brown & Toland formed its PPO network, it began negotiating contracts with health plans on behalf of the physicians in its PPO network. At times, when Brown & Toland believed the negotiations were proceeding unfavorably, it directed the physicians in its PPO network to cancel individual contracts the physicians may have had with the health plan. Most of the PPO network physicians, when directed, did in fact terminate individual contracts. Brown & Toland collected the physician termination letters and forwarded them to the payors. The purpose of the collective terminations was to increase Brown & Toland's negotiating leverage to obtain higher fees and other favorable competitively significant terms for physician services.

ATTEMPTS TO INDUCE COMPETING PHYSICIAN GROUPS TO JOIN IN BROWN & TOLAND'S COLLECTIVE NEGOTIATION

18. During Brown & Toland's negotiations with at least one payor, Brown & Toland learned that the payor was simultaneously using a competing IPA to obtain contracts for the competing IPA's member physicians. Brown & Toland further learned that the contract many members of the competing IPA were likely to accept provided for lower fees for physician services than the contract that Brown & Toland was trying to negotiate with that payor.

19. Brown & Toland contacted the IPA referenced in Paragraph 18 and invited that IPA to work with Brown & Toland to devise a strategy whereby Brown & Toland and the other IPA would not compete on price or other elements or terms of competition.

20. Brown & Toland also contacted other competing IPAs and integrated medical groups and offered to negotiate with payors on behalf of those competitors or their member physicians for fee-for-service contracts at collectively determined rates.

ANTICOMPETITIVE EFFECTS

21. As a consequence of Brown & Toland's conduct, payors agreed, among other things, to compensate Brown & Toland PPO network physicians at a higher rate than they would have compensated them absent the conduct.

22. The purpose, effects, tendency, or capacity of the conduct are, and have been, to restrain trade unreasonably and hinder competition in the provision of physician services in San Francisco, California, in the following ways, among others:

A. Price and other forms of competition among Brown & Toland's PPO network physicians have been unreasonably restrained;

B. Prices for physician services have increased; and

C. Health plans, employers, and consumers have been deprived of the benefits of competition in the purchase of physician services.

23. Brown & Toland's joint negotiations on price and other competitively significant terms for PPO contracts were not reasonably necessary to achieve potential clinical efficiencies for Brown & Toland's PPO network, nor to achieve or to maintain any clinical efficiencies which Brown & Toland's PPO network members may have realized as a consequence of participating in Brown & Toland's risk-sharing HMO products.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

24. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. These acts and practices, or their effects, will continue or recur in the absence of the requested relief.

NOTICE

Notice is hereby given to the Respondent that the eighth day of October, 2003, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which

the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that Respondent California Pacific Medical Group, Inc., dba Brown and Toland Medical Group ("Brown & Toland") is in violation of Section 5 of the FTC Act as alleged in the complaint, the Commission may order

such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order to cease and desist from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians: (a) to negotiate on behalf of any physician with any payor; (b) to deal, refuse to deal, or threaten to refuse to deal with any payor; (c) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (d) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Brown & Toland.

2. An order to cease and desist from exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

3. An order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.

4. An order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1-3, above.

5. A requirement that, for a period of five (5) years, Brown & Toland notify the Commission prior to entering into any arrangement with any physicians under which Brown & Toland would act as a messenger or as an agent, on behalf of any physicians, regarding contracts with payors concerning the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.

6. An order requiring Brown & Toland to terminate any contract, in compliance with any applicable laws of the State of California, which it has entered into with any payor since January 1, 2001, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate.

7. An order to cease and desist from engaging in, attempting to engage in, or encouraging others to engage in illegal horizontal agreements with competitors.

8. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by Brown & Toland.

9. A requirement that Brown & Toland distribute a copy of the Order and Complaint, within thirty (30) days after the Order becomes final, to: (a) each physician who is participating, or has participated, in Brown & Toland since January 1, 2001; (b) each officer, director, manager, and employee who had any responsibility regarding Brown & Toland's PPO network; (c) each payor whom Brown & Toland has contacted, or been contacted by, since January 1, 2001, regarding contracting for the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.

10. A requirement that for five (5) years after the Order becomes final, Brown & Toland must distribute a copy of the Order and Complaint to: (a) each newly participating physician in Brown & Toland for the provision of physician services; (b) each person who becomes an officer, director, manager, or an employee with any responsibility regarding a PPO network of Brown & Toland; and (c) each payor whom Brown & Toland contacts, or is contacted by, regarding the provision of physician services, except for those contracts under which Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor.

11. A requirement that for five (5) years after the Order becomes final, Brown & Toland must annually publish in any official annual report or newsletter sent to all physicians who participate in Respondent Brown & Toland, and on Brown & Toland's website, a copy of the Order and the accompanying Complaint, with such prominence and identification as is given to regularly featured articles.

12. Requirements that periodic compliance reports be filed with the Commission by Brown & Toland, and that it notify the Commission of any changes that may affect compliance obligations.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of July, 2003, issues its complaint against Brown & Toland.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its Complaint charging California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, a corporation, hereinafter sometimes referred to as "Respondent," with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of the Commission's Rules, 16 C.F.R. § 3.25(c), and the Commission having considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having carefully considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f) the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, is a for profit professional medical corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its

principal address located at 153 Townsend, San Francisco, California 94107.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent Brown & Toland" means California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Payor" means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, sells, or leases access to networks of physicians.

C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

D. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

E. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This

definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

F. "Preexisting contract" means a contract that is in effect on the date this Order becomes final.

G. "Principal Address" means either (1) primary business address, if there is a business, or (2) primary residential address, if there is no business address.

H. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

   a. the provision of physician services to payors at a capitated rate,

   b. the provision of physician services for a predetermined percentage of premium or revenue from payors,

   c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or

   d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice,

complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, these physicians, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent Brown & Toland, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:

1. to negotiate on behalf of any physician with any payor;

2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or

4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent Brown & Toland;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;

C. Attempting to engage in any action prohibited by Paragraph II.A. or II.B. above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A-II.C. above.

PROVIDED, HOWEVER, that nothing in Paragraph II shall prohibit any agreement involving, or conduct by, Respondent Brown & Toland that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. In any proceeding to enforce this Order, Respondent Brown & Toland shall bear the burden of proof with regard to demonstrating that the challenged agreement or conduct is reasonably necessary to any formation, participation, or action.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years after the date this Order becomes final, Respondent Brown

& Toland shall notify the Secretary of the Commission in writing ("Notification") at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondent Brown & Toland would act as a messenger, or as an agent on behalf of any physicians for any qualified risk-sharing joint arrangement, with payors regarding contracts or terms of dealing involving the physicians and payors, except for those contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor. The Notification shall include the identity of each proposed physician participant; the proposed geographic area of operation; a copy of any proposed physician participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Receipt by the Commission from Respondent Brown & Toland of any Notification, pursuant to Paragraph III of this Order, is not to be construed as a determination by the Commission that any action described in such notification does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall:

A. For five (5) years after the date this Order becomes final, pursuant to each qualified clinically-integrated joint arrangement with any physician in which Respondent Brown & Toland is a participant ("Arrangement"), notify the Secretary of the Commission in writing ("Notification") at least sixty (60) days prior to Respondent Brown & Toland contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER, that Notification shall not be required for subsequent contacts with any payors pursuant to any Arrangement for which Notification has been given pursuant to this Paragraph IV.A.

B. With respect to any Arrangement, Respondent Brown & Toland shall include the following information in the Notification:

1. for each physician participant, the name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;

2. a description of the Arrangement and its purpose, function, and geographic area of operation;

3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;

4. if the Arrangement in any way restricts the ability, or facilitates the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement, an explanation of the relationship of that restriction or facilitation to the efficiencies resulting from the Arrangement.

5. an explanation of how any agreement on prices (or on contract terms related to price) furthers the integration and achieves the efficiencies of the Arrangement;

6. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and

7. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician or hospital services in any area, including, but not

limited to, the market share of physician services in any area or the market share of hospital services in any area.

C. If, within sixty (60) days from the Commission's receipt of the Notification, a representative of the Commission makes a written request for additional information to Respondent Brown & Toland, Respondent Brown & Toland shall not engage in any conduct described in Paragraph IV.A. of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent Brown & Toland of any Notification of an Arrangement is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall:

A. Within thirty (30) days after the date this Order becomes final:

1. send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each physician who participates, or has participated, in Respondent Brown & Toland since January 1, 2001;

2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to each of its officers, directors, managers, and employees who had any

responsibility regarding Respondent Brown & Toland's PPO network;

3. send by first class mail, return receipt requested, a copy of this Order, the Complaint, and the letter, attached as Exhibit A, to the chief executive officer of each payor with whom Respondent Brown & Toland has been in contact since January 1, 2001, regarding contracting for the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor; *provided, however*, that a copy of Exhibit A need not be included in mailings to those payors with whom Respondent Brown & Toland has not entered into or renewed (including any automatic renewal of) a contract since January 1, 2001;

B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor, except those contracts under which Respondent Brown & Toland is paid a capitated (per member per month) rate by the payor for the provision of physician services, at the earlier of:

1. receipt by Respondent Brown & Toland of a written request from a payor to terminate such contract; or

2. the earliest termination date, renewal date (including any automatic renewal date), or anniversary date of such contract, unless the payor provides Respondent Brown & Toland with written affirmation of the contract prior to such termination date, renewal date, or anniversary date and Respondent Brown & Toland has determined not to exercise any right to terminate under the terms of the contract;

C. Within ten (10) days from receiving a written request from a payor to terminate, pursuant to Paragraph V.B. of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician who participates in

Respondent Brown & Toland, except for those physicians who participate only in contracts under which Respondent Brown & Toland is, or will be, paid a capitated (per member per month) rate by the payor; and

D. For a period of five (5) years after the date this Order becomes final:

1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

   a. each physician who begins participating in Respondent Brown & Toland for the provision of physician services, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;

   b. each payor that contacts Respondent Brown & Toland regarding the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland will be paid a capitated (per member per month) rate by the payor, and who did not previously receive a copy of this Order and the Complaint from Respondent Brown & Toland, within thirty (30) days of such contact; and

   c. each person who becomes an officer, director, manager, or employee, with any responsibility regarding a PPO network, of Respondent Brown & Toland, and who did not previously receive a copy of this Order and the Complaint from Respondent Brown & Toland, within thirty (30) days of the time that he or she assumes such status with Respondent Brown & Toland;

2. notify the Commission at least thirty (30) days prior to any proposed change in Respondent Brown & Toland, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in

Respondent Brown & Toland that may affect compliance obligations arising out of this Order; and

E. For a period of five (5) years after the date this Order becomes final, maintain on Respondent Brown & Toland's website a copy of this Order and the accompanying Complaint, with such prominence and identification as is given to regularly featured articles; and

F. Publish in the first official annual report after the date this Order becomes final, a copy of this Order and the accompanying Complaint, and in each subsequent annual report, for five (5) years after the date this Order becomes final, a description of this matter and a link to the copy of this Order and the accompanying Complaint maintained on Respondent Brown & Toland's website.

VI.

IT IS FURTHER ORDERED that Respondent Brown & Toland shall file verified written reports within sixty (60) days after the date this Order becomes final, and annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth:

A. In detail, the manner and form in which Respondent Brown & Toland has complied and is complying with this Order;

B. The name, address, and telephone number of each payor with which Respondent Brown & Toland has had any contact regarding the provision of physician services, except for those contacts regarding contracts under which Respondent Brown & Toland will be paid a capitated (per member per month) rate by the payor;

C. Copies of the delivery confirmations required by Paragraph V.A.1 of this Order; and

D. Copies of the signed return receipts required by Paragraph V.A.2 & 3, C and D.1.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Brown & Toland shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and

B. Upon five (5) days' notice to Respondent Brown & Toland, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent Brown & Toland.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 10, 2024.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with California Pacific Medical Group, Inc., dba Brown and Toland Medical Group ("Brown & Toland"). The agreement settles charges that Brown & Toland's preferred provider organization ("PPO") physician network violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among Brown & Toland members on price and other competitively significant terms; refusing to deal with payors except on collectively agreed-upon terms; and negotiating uniform fees and other competitively significant terms in payor contracts and refusing to submit to members payor offers that do not conform to Brown & Toland's standards for contracts.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final. The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Brown & Toland that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Commission issued its complaint and notice of contemplated relief in this matter on July, 8, 2003, and the matter was assigned to the agency's Chief Administrative Law Judge, Stephen J. McGuire. During discovery, complaint counsel and counsel for respondent executed a proposed consent agreement. On December 30, 2003, this matter was withdrawn from litigation

so that the Commission could consider the proposed consent agreement.

The Complaint

As alleged in the Commission's complaint, Brown & Toland is a risk-sharing independent practice association ("IPA") in its contracts with health maintenance organizations ("HMOs") to provide services to HMO enrollees who live or work in San Francisco, California. Approximately 1,500 physicians who provide physician services in San Francisco participate in, or have contracts with, Brown & Toland to provide services to the HMO enrollees under Brown & Toland's contracts with HMOs.

Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, HMOs and PPOs. Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with the enrollees. These contracts may reduce the payors' costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenditures, for enrollees.

Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payor's enrollees, and what prices and other terms and conditions they will accept under such contracts.

Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in IPAs. Some physician entities participating in IPAs share the risk of financial loss with

other participants if the total costs of services provided to health plan enrollees exceed anticipated levels ("risk-sharing IPA"). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

In order to be competitive in the San Francisco metropolitan area, a payor's health plan should include in its physician network a large number of primary care physicians and specialists who practice in San Francisco. A substantial number of the primary care physicians and specialists who practice in San Francisco are members of Brown & Toland.

In 2001, Brown & Toland formed a PPO physician network to capture revenue from the PPO market segment. The Brown & Toland PPO network comprises approximately one-third of the Brown & Toland HMO physician members. These PPO network physicians do not share financial risk in connection with the provision of services to PPO patients. Rather, the Brown & Toland PPO network physicians provide services to PPO enrollees on a fee-for-service basis. To receive compensation for services, the PPO network physicians directly bill, and get paid by, the PPO enrollee or the PPO payor.

In addition to the lack of financial risk sharing by the PPO network physicians, the Brown & Toland PPO network lacks any significant degree of clinical integration. To the extent that the Brown & Toland physicians may have achieved clinical efficiencies regarding the provision of services under Brown & Toland's risk-sharing contracts, Brown & Toland has no ongoing mechanism to ensure that those potential efficiencies are replicated in services provided by its PPO network. Brown & Toland does not monitor practice patterns and quality of care, or enforce utilization standards regarding services provided by its PPO network. Brown & Toland's PPO network physicians are required to abide by the utilization management guidelines established by payors, not by the guidelines in Brown & Toland's risk-sharing contracts. Brown & Toland also negotiates fees for

its PPO network physicians that are different from the fee schedules Brown & Toland employs for its risk-sharing contracts.

Brown & Toland formed the PPO network to promote, among other things, the collective economic interests of the PPO network physicians by increasing their negotiating leverage with health plans. In connection with the formation of its PPO network, Brown & Toland organized meetings among its physician members to agree upon the financial and other competitively significant contractual terms the physicians would like Brown & Toland to achieve for them.

Brown & Toland presented physicians with a choice of two fee schedules when it solicited physicians to join the PPO network. Brown & Toland informed the physicians that by choosing one of the Brown & Toland fee schedules, the physician would be agreeing to be a PPO network physician for fees at or above the specified rate. Both Brown & Toland fee schedules generally represented a significant increase over the rates that physicians were currently receiving for services provided to PPO enrollees.

Once physicians joined the Brown & Toland PPO network and chose a fee schedule, Brown & Toland then began negotiating contracts with health plans on behalf of its PPO physicians. Brown & Toland presented the collective rates to the health plans. To further the contracting efforts, Brown & Toland's PPO network physicians agreed with Brown & Toland to refuse to contract individually, or through an agent, with any payor with which Brown & Toland was negotiating. Under the provider agreement that Brown & Toland's PPO network physicians signed, the physicians also were prohibited from contracting with any payor for less than the Brown & Toland fee schedule that the physician chose.

Brown & Toland directed the physicians in its PPO network to cancel individual contracts the physicians may have had with the health plan when it believed the negotiations were proceeding unfavorably. Most of the PPO network physicians, when directed,

did in fact terminate individual contracts. The purpose of the collective terminations was to increase Brown & Toland's negotiating leverage to obtain higher fees and other favorable competitively significant terms for physician services.

Brown & Toland also attempted to devise a strategy where Brown & Toland and another San Francisco IPA would not compete on price or other elements or terms of competition. Brown & Toland contacted this IPA when it learned that the IPA was simultaneously negotiating with at least one payor for rates that were lower than Brown & Toland's PPO rates.

The complaint alleges that as a consequence of Brown & Toland's conduct, payors agreed, among other things, to compensate Brown & Toland PPO network physicians at a higher rate than they would have compensated them absent the conduct. Accordingly, Brown & Toland's acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in San Francisco, California, in the following ways, among others: price and other forms of competition among Brown & Toland's PPO network physicians were unreasonably restrained; prices for physician services increased; and health plans, employers, and consumers were deprived of the benefits of competition in the purchase of physician services.

Further, the complaint alleges that Brown & Toland's joint negotiations on price and other competitively significant terms for PPO contracts were not reasonably necessary to achieve potential clinical efficiencies for Brown & Toland's PPO network, nor to achieve or to maintain any clinical efficiencies which Brown & Toland's PPO network members may have realized as a consequence of participating in Brown & Toland's risk-sharing HMO products.

Thus, Brown & Toland's conduct has harmed patients and other purchasers of medical services by increasing the price of physician services.

The Proposed Consent Order

The proposed consent order is designed to prevent the continuance and recurrence of the illegal concerted actions alleged in the complaint while allowing Brown & Toland and its members to engage in legitimate joint conduct.

Paragraph II.A prohibits Brown & Toland from entering into or facilitating agreements among physicians: (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Brown & Toland.

Paragraph II.B prohibits Brown & Toland from exchanging or facilitating the transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physicians is willing to deal.

Paragraph II.C prohibits Brown & Toland from attempting to engage in any action prohibited by paragraph II.A or II.B. Paragraph II.D prohibits Brown & Toland from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by paragraphs II.A-II.C.

Paragraph II contains a proviso that allows Brown & Toland to engage in conduct that is reasonably necessary to the formation or operation of a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." Paragraph II concludes with a provision that Brown & Toland has the burden of proof to demonstrate that the conduct that would otherwise be prohibited is reasonably necessary to the qualified joint arrangement.

Analysis

Paragraph III requires Brown & Toland, for a period of five years after the order becomes final, to notify the Commission at least sixty days prior to entering into any arrangement with physicians under which Brown & Toland would act as a messenger or agent on behalf of any physicians for any qualified risk-sharing joint arrangement with payors regarding contracts or the terms of dealing with the physicians and payors. This provision will allow the Commission to review any future Brown & Toland policy or practice that Brown & Toland plans to implement with payors before it implements such a policy or practice with respect to any particular payor.

Paragraph IV requires Brown & Toland, for a period of five years after the order becomes final, to notify the Commission prior to negotiating or entering into any agreement relating to price or other terms of dealing with any payor on behalf of any physician in a Brown & Toland qualified clinically-integrated joint arrangement. Under this provision, Brown & Toland may be required to submit various types of information relevant to an assessment of whether the arrangement is likely to be anticompetitive.

Paragraph V.A requires Brown & Toland to distribute copies of the complaint and order to its past and present members, its officers, directors, managers, and employees who had any responsibility regarding Brown & Toland's PPO network, and all payors with whom it has been in contact, since January 1, 2001, regarding contracting for the provision of physician services, other than those under which it is paid a capitated (per member per month) rate by the payor.

Paragraph V.B requires Brown & Toland to terminate, without penalty, any payor contracts that it had entered into during the collusive period, at any such payor's request. This provision intends to eliminate the effects of Brown & Toland's joint, price setting behavior. Paragraph V.C requires Brown & Toland to send a copy of any payor's request for termination to each physician who participates in Brown & Toland, except for those

physicians who participate only in contracts under which Brown & Toland is paid a capitated (per member per month) rate by the payor.

Paragraphs V.D-V.F require Brown & Toland, for a period of five years after the order becomes final, to make the existence of the complaint and order known through several methods. Brown & Toland must distribute copies of the complaint and order to each physician who subsequently begins participating in Brown & Toland, each payor who subsequently contacts Brown & Toland regarding the provision of physicians services, except for those contacts regarding contracts under which Brown & Toland is paid a capitated (per member per month) rate by the payor, and each person who subsequently becomes an officer, director, manager, or employee of Brown & Toland with any responsibility regarding a PPO network. Brown & Toland must also maintain copies of the complaint and order on its website for five years after the order becomes final and publish, for five years after the order becomes final, copies of the complaint and order in each annual report.

The remaining provisions of the proposed order impose reporting and compliance-related requirements. Paragraph VI requires Brown & Toland to file periodic reports with the Commission detailing how it has complied with the order. Paragraph VII authorizes Commission staff to obtain access to Brown & Toland's records and officers, directors, or employees for the purpose of determining or securing compliance with the order. Paragraph VIII mandates that the order shall terminate twenty years from the date it becomes final.

Complaint

IN THE MATTER OF

MTS, INC., d/b/a TOWER RECORDS/BOOKS/VIDEO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4110; File No. 0323209
Complaint, May 28, 2004--Decision, May 28, 2004

This consent order addresses the manner in which Respondents MTS, Inc., doing business as Tower Records/Books/Video, and Tower Direct, LLC – ("Tower") – which together sell music and video recordings, books, and other entertainment products through retail stores and their Web site, TowerRecords.com.– handle the security of personal information collected online through their online store. The order, among other things, prohibits Tower – in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service – from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers. The order also requires Tower to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. In addition, the order requires Tower to obtain, within one year and on a biannual basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that (1) Tower has in place a security program that provides protections that meet or exceed the protections required by this order, and (2) Tower's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Participants

For the Commission: *Laura Mazzarella, James Silver, Jessica L. Rich,* and *Joel Winston.*

For the Respondents: *Alan R. Malasky, Porter Wright Morris & Arthur LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that MTS, Inc., and Tower Direct, LLC, corporations ("Respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent MTS, Inc., is a California corporation doing business as Tower Records/Books/Video with its principal office or place of business at 2500 Del Monte, West Sacramento, California 95691.

2. Respondent Tower Direct, LLC, is a Delaware limited liability company doing business as TowerRecords.com and is a subsidiary of Respondent MTS, Inc. Its principal office or place of business is also at 2500 Del Monte, West Sacramento, California 95691.

3. On February 9, 2004, Respondents and related entities filed voluntary petitions for relief under the reorganization provisions of Chapter 11 of the Bankruptcy Code, Title 11 U.S.C. 101 et seq., in the United States Bankruptcy Court for the District of Delaware, Case Nos. 04-10393-PJW through 04-10398-PJW, 04-10400-PJW, and 04-10403-PJW through 04-10410-PJW. On February 10, 2004, the bankruptcy cases were consolidated for administration, and a confirmation hearing was set for March 15, 2004. Pursuant to 11 U.S.C. §§ 1106 and 1107, the Respondents remain in possession of their business and property as debtors-in-possession.

4. The acts and practices of respondents as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have marketed and sold music and video recordings, books, and other entertainment products through the Internet at their Web site, www.TowerRecords.com (the

"Tower Web site") since at least 1996. Respondents collect personal information from consumers who visit the Tower Web site and purchase Tower products online. This personal information includes name, billing address, shipping address, email address, telephone number, and all Tower products purchased online – such as music and video recordings, books, and other entertainment products – since 1996.

6. Consumers who purchase products on the Tower Web site are assigned an order number and interact with Respondents' Web site using a software program called an "application." One of these applications is the Order Status application, which allows consumers to use their order number to view their purchase history.

7. Since at least 1997, Respondents have disseminated or have caused to be disseminated various privacy policies on the Tower Web site, including but not necessarily limited to the attached Exhibit A, containing the following statements regarding the privacy and confidentiality of personal information collected through Respondents' Web site:

Security & Privacy Information

* * *

Your privacy is important to us. TowerRecords.com is committed to safeguarding your privacy online. We will never share your personal information with anyone for any reason without your explicit permission.

* * *

How does TowerRecords.com protect my personal information?

We use state-of-the-art technology to safeguard your personal information. All TowerRecords.com

> employees are required to acknowledge that they understand and will comply with this privacy policy. Employees who violate this policy will be subjected to disciplinary action, up to and including termination.
>
> * * *
>
> **What security precautions are in place to protect the loss, misuse, or alteration of my information?** Your TowerRecords.com Account information is password-protected. You and only you have access to this information . . . TowerRecords.com takes steps to ensure that your information is treated securely and in accordance with the relevant Terms of Service and this Privacy Policy. Unfortunately, no data transmission over the Internet can be guaranteed 100% secure. While we strive to protect your personal information, TowerRecords.com cannot ensure or warrant the security or services, and you do so at your own risk. Once we receive your transmission, we make our best effort to ensure its security on our systems.

Exhibit A, Tower Web Site Privacy Policy, December 2002 (emphasis in original).

8. In November and December 2002, Respondents redesigned the "check out" portion of their Web site and rewrote the software code for the Order Status application. In rewriting the code, Respondents failed to ensure that all of the code from the original version had been rewritten and included, as appropriate, in the new version. As a result, the rewritten version of the Order Status application failed to include any "authentication code" to ensure that the consumer viewing purchase history information was the consumer to whom such information related. The rewritten code generated an email to consumers confirming their order and providing a URL that they could use to check the status of their order online (the

"Order Status URL"). The Order Status URL contained the order number in clear text.

9. The omission of authentication code and the inclusion of the order number in the Order Status URL created a commonly known and reasonably foreseeable vulnerability in the Order Status application often referred to as "broken account and session management." Any visitor to the Tower Web site who entered a valid order number in the Order Status URL could view certain personal information relating to other Tower consumers, specifically, the consumer's name, billing and shipping addresses, email address, phone number, whether the product purchased was a gift, and all Tower products purchased online. The vulnerability lasted for eight days and was exploited by a number of visitors to the site. In December 2002, personal information relating to approximately 5,225 consumers was accessed by unauthorized users, and at least two Internet chat rooms contained postings about the vulnerability as well as comments about some consumers' purchases.

10. Respondents created this vulnerability by failing to implement procedures that were reasonable and appropriate to detect and prevent vulnerabilities in their Web site and applications, including reasonable and appropriate procedures for writing and revising Web-application code. Among other things, Respondents failed to: implement appropriate checks and controls on the process of writing and revising Web applications; adopt and implement policies and procedures regarding security tests for its Web applications; and provide appropriate training and oversight for their employees regarding Web application vulnerabilities and security testing.

11. The security risks associated with broken account and session management are widely known in the information technology industry, as are simple, publicly available measures to prevent such vulnerabilities. Security experts

have been warning the industry about these vulnerabilities since at least 2000, when at least one security organization also developed and made freely available security education materials which could alert industry about how to prevent such vulnerabilities.

12. Through the means described in Paragraph 7, Respondents have represented, expressly or by implication, that they implemented measures reasonable and appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through the Tower Web site.

13. In truth and in fact, Respondents did not implement measures reasonable and appropriate under the circumstances to maintain and protect the privacy and confidentiality of personal information obtained from or about consumers through the Tower Web site. In particular, as set forth in Paragraph 10, Respondents failed to implement procedures that were reasonable and appropriate to detect and prevent vulnerabilities in their Web site and applications, including reasonable and appropriate procedures for writing and revising Web-application code. Therefore, the representation set forth in Paragraph 12 was false or misleading.

14. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, on this twenty-eighth day of May, 2004, has issued this complaint against Respondents.

Exhibit A

Security & Privacy Information

Return to Main Help Page

TowerRecords.com Commitment to Safe Internet Shopping

We guarantee that every order you place with TowerRecords.com will be safe and secure. We offer 128-bit SSL encryption, which encrypts your personal and credit card information as it is transferred over the Internet.

We electronically verify each order with the credit company at the moment it is placed, returning an order confirmed message **only** if the issuing bank authorizes it. Our experienced staff then manually checks all orders which still appear unusual, canceling any we feel are not valid.

In the event of unauthorized use of your credit card, federal law states that you will not be liable for more than $50 of fraudulent charges. TowerRecords.com will cover this liability, up to $50, as long as the following is true:

1. You have reported the fraudulent use to the issuing bank of your credit card according to their reporting rules and procedures.
2. The unauthorized use of your credit card resulted through no fault of your own.
3. The credit card number was obtained from purchases made at TowerRecords.com while using our secure server.

Shopping online with TowerRecords.com is perfectly safe. Give it a try!

Return To the Top

Cookies

Cookies are small files containing alphanumeric identifiers that we transfer through your web browser to your computer's hard drive in order for our systems to recognize your browser. We use cookies to enhance your browsing and shopping experience on the TowerRecords.com site. The

information captured makes it possible for us to:

- Keep track of items in your shopping bag during current and future visits to TowerRecords.com
- Remember information so you don't have to re-enter it each time you visit the TowerRecords.com site
- Speed navigation
- Provide you with custom tailored content
- Monitor the effectiveness of our marketing email campaigns
- Monitor total number of visitors, pages viewed, and other aggregate metrics
- Track your entries, submissions, and status in some of our promotions, sweepstakes and contests

Most browsers automatically accept cookies, but you can choose to have your browser warn you every time a cookie is being sent to you, or you can disable cookies altogether. It is possible to shop our site without enabling cookies on your browser. The "help" portion of the toolbar on most browsers will tell you how to modify your cookie settings. Please note: If you turn off the cookies feature, you will not be able to take advantage of all the special features that TowerRecords.com offers.

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Your Personal Information

- What personal information do we collect?
- How is your personal information used?
- Who is collecting your personal information?
- With whom is your personal information shared?
- What choices do I have on the collection, use and distribution of my personal information?
- How can I access, update or delete my personal information?
- How does TowerRecords.com protect your personal information?
- What kind of security precautions are in place to protect the loss, misuse, or alteration of your personal information?
- What else you should know about your online privacy?

Your privacy is important to us. TowerRecords.com is committed to safeguarding your privacy online. We will never share your personal information with anyone for any reason without your explicit permission.

Please read the following policy to understand how your personal information will be treated as you make full use of our many offerings.

What personal information do we collect?

You will be asked to provide your email, billing and shipping addresses during

registration.

In addition to registration we may ask you for personal information at other times, including (but not limited to) when you enter a sweepstakes, contest or promotion sponsored by TowerRecords.com and/or our many partners; and when you report a problem with one of our sites or services.

If you contact TowerRecords.com, we may keep a record of that correspondence. Occasionally we ask users to complete surveys used for research purposes to improve and enhance TowerRecords.com. Wherever TowerRecords.com collects personal information, we make an effort to include a link our Privacy Policy.

Return To Questions

How does TowerRecords.com use my information?
The primary goal in collecting personal information is to provide you with personalized services and interactive communications.

Who is collecting information?
When asked for personal information at TowerRecords.com, you are sharing that information with TowerRecords.com alone. However, some data collected during a promotion may be shared with the sponsor. If data will be shared, you will be notified prior to the time of data collection or transfer. You can decide not to participate in the promotion if you don't want your data to be shared.

With whom does TowerRecords.com share my information?
TowerRecords.com does not sell, trade or rent your personal information to others. We will not disclose any of your personally identifiable information except when we have your permission or under special circumstances, such as when we believe in good faith that the law requires it. The exception: TowerRecords.com may share your personal information with our contractors to improve services to you, but only if the contractor agrees to keep such information confidential.

Return To Questions

What choices do I have on the collection, use, and distribution of my personal information?
You can instruct us to have your name and address removed from our mailing list at any time.

How can I access, update or delete my personal information?
You may edit your TowerRecords.com Account information at any time by using your email address and password. Your TowerRecords.com Account can be deleted or deactivated, but doing so will result in not being able to access any members-only areas of TowerRecords.com.

How does TowerRecords.com protect my personal information?
We use state-of-the-art technology to safeguard your personal information. All TowerRecords.com employees are required to acknowledge that they understand and will comply with this privacy policy. Employees who violate this policy will be subjected to disciplinary action, up to, and including termination.

Return To Questions

What security precautions are in place to protect the loss, misuse, or alteration of my information?
Your TowerRecords.com Account information is password-protected. You and only you have access to this information. You may edit your TowerRecords.com Account information by using your email address and password.

TowerRecords.com takes steps to ensure that your information is treated securely and in accordance with the relevant Terms of Service and this Privacy Policy. Unfortunately, no data transmission over the Internet can be guaranteed to be 100% secure. While we strive to protect your personal information, TowerRecords.com cannot ensure or warrant the security or services, and you do so at your own risk. Once we receive your transmission, we make our best effort to ensure its security on our systems.

What else should I know about my privacy?
Please keep in mind that whenever you voluntarily disclose personal information online (message boards, email, chat areas, etc.) - that information can be collected and used by others. You are solely responsible for maintaining the secrecy of your passwords and/or any account information. Please be careful and responsible whenever you are online.

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Password Protection

If you forget the password you created for your TowerRecords.com Account and the "hint" feature doesn't help you remember it, you can request that your password be emailed to you by typing your username in here. Your password can only be sent to the email address you provided on your account.

If you receive a password reminder via email and you have not requested it, another customer may have made a typographical error when trying to sign in to their account. In such a situation, your password can only be sent to you, and never another user.

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Pricing Policy | Return Policy | Privacy Policy | Shipping Rates | Jobs @ Tower Affiliate Program | Corporate Gifts | Tower Franchises | Site Map | Help | Contact Us

Choose your currency:

USD United States Dollars Go!

Bottom of Form

Music | Classical | DVD/VHS | Discover | Toys | Accessories | Sale! | Gifts | Stores

Order by Phone: 1-800-ASK-TOWER **Order by Fax:** 1-800-538-6938 **Shop AOL:** Keyword: Tower
Phone Outside USA: 916-373-3050 **Fax Outside USA:** 916-373-2930

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Tower, Tower Records, TowerRecords.com, Tower CD Listening Station, Tower Outlet, Tower Records Videos Books, Tower Essentials, Tower Gift Card, Pulse! and associated logos are trademarks and/or registered trademarks of MTS, Incorporated in the United States and other countries.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq;

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent MTS, Inc., d/b/a Tower Records/Books/Video, is a California corporation with its principal office or place of business at 2500 Del Monte, West Sacramento, California 95691.

2. Respondent Tower Direct, LLC, d/b/a TowerRecords.com, is a Delaware limited liability company and a subsidiary of Respondent MTS, Inc. Its principal office or place of business is also at 2500 Del Monte, West Sacramento, California 95691.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security number; (f) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (g) any other information from or about an individual consumer that is combined with (a) through (f) above.

2. Unless otherwise specified, "Respondents" shall mean MTS, Inc., and its successors and assigns (including the reorganized debtor or any entity in which property of the bankruptcy estate vests pursuant to any confirmed plan) officers, agents, representatives, and employees; Tower Direct, LLC, and its successors and assigns (including the reorganized debtor or any entity in which property of the bankruptcy estate vests pursuant to any confirmed plan), officers, agents, representatives, and

employees; and both of them and their successors and assigns, officers, agents, representatives, and employees.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which Respondents maintain and protect the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program.

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

D. the evaluation and adjustment of Respondents' information security program in light of the results of the testing and monitoring required by subparagraph C, any material changes to Respondents' operations or business arrangements, or any other circumstances that Respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

III.

IT IS FURTHER ORDERED that Respondents obtain an assessment and report (an "Assessment") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biannually thereafter for ten (10) years after service of the order that:

A. sets forth the specific administrative, technical, and physical safeguards that Respondents have implemented and maintained during the reporting period;

B. explains how such safeguards are appropriate to Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about consumers;

C. explains how the safeguards that have been implemented meet or exceed the protections required by Paragraph II of this order; and

D. certifies that Respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biannual reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP) or holding Global Information Assurance Certification from the SysAdmin, Audit, Network, Security Institute, or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondents shall provide the first Assessment, as well as all: plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relied upon to prepare such Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biannual Assessments shall be retained by the Respondents until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that Respondents shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance, including but not limited to:

A. for a period of five (5) years:

1. a sample copy of each different print, broadcast, cable, or Internet advertisement, promotion, information collection form, Web page, screen, email message, or other document containing any representation regarding Respondents' online collection, use, and security of personal information from or about consumers. Each Web page copy shall be dated and contain the full URL of the Web page where the material was posted online. Electronic copies shall include all text and graphics files, audio scripts, and other computer files used in presenting the information on the Web. *Provided, however*, that after creation of any Web page or screen in compliance with this order, Respondents shall not be required to retain a print or electronic copy of: (1) any amended Web page or screen to the extent that the amendment does not affect Respondents' compliance obligations under this order; or (2) any Web page or screen that contains a hypertext link to Respondents' privacy policy, but otherwise does not relate to Respondents' compliance obligations under this order.

2. any documents, whether prepared by or on behalf of Respondents, that contradict, qualify, or call into question Respondents' compliance with this order; and

B. for a period of three (3) years after the date of preparation of each biannual Assessment required under Paragraph III of this order: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of Respondents, relating to Respondents' compliance

with Paragraphs II and III of this order for the compliance period covered by such biannual Assessment.

V.

IT IS FURTHER ORDERED that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having managerial responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any change in either corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition following the dismissal or closing of the current bankruptcy cases; or a change in either corporate name or address. *Provided, however*, that, with respect to any proposed change in either corporation about which either Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that Respondents shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission an initial report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on May 28, 2024, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Paragraph in this Order that terminates in less than twenty (20) years;

B. this Order's application to any Respondent that is not named as a defendant in such complaint; and

C. this Order if such complaint is filed after the Order has terminated pursuant to this Paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Paragraph as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted a consent agreement, subject to final approval, from MTS, Inc., and Tower Direct, LLC ("Tower"). Tower sells music and video recordings, books, and other entertainment products through retail stores and its Web site, TowerRecords.com.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns alleged representations about the security of personal information collected online through TowerRecords.com, Tower's online store. According to the Commission's complaint, Tower offers its online customers an order status page that allows customers to confirm their orders and view their order information. In December 2002, Tower redesigned the "check out" portion of its Web site, including the order status page. As alleged in the Commission's complaint, the redesigned version of the order status page contained a security flaw that allowed any user of the site that entered a valid order number to view the personal identifying information and order history of the Tower customer who placed the order, including name, email address, billing address, shipping address, telephone number, and items ordered since 1996.

The complaint charges that Tower falsely represented that it implemented reasonable and appropriate measures to protect the privacy and confidentiality of personal information. In particular, the complaint alleges that Tower failed to implement procedures that were reasonable and appropriate to detect and prevent vulnerabilities in its Web site, including reasonable and

appropriate procedures for writing and revising Web-application code.

The proposed order applies to Tower's collection and storage of personal information from or about consumers in connection with its online business. It contains provisions designed to prevent Tower from future engagement in practices similar to those alleged in the complaint. The proposed order is substantially similar to the orders obtained by the Commission in the cases of *Eli Lilly, Inc*., FTC Docket No. C-4047 (May 8, 2002); *Microsoft Corp*., FTC Docket No. C-4069 (Dec. 20, 2002); and *Guess, Inc*., FTC Docket No. C-4091 (July 30, 2003).

Part I of the proposed order prohibits Tower, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

Part II of the proposed order requires Tower to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Tower's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. Specifically, the order requires Tower to:

- Designate an employee or employees to coordinate and be accountable for the information security program;

- Identify material internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in

place to control these risks. At a minimum, this risk assessment must include consideration of risks in each area of relevant operation.

- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.

- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that Tower knows or has reason to know may have material impact on its information security program.

Part III of the proposed order requires that Tower obtain within one year, and on a biannual basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Tower has in place a security program that provides protections that meet or exceed the protections required by Part II of this order; and (2) Tower's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information has been protected.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires Tower to retain documents relating to compliance. For most records, the order requires that the documents be retained for a five-year period. For the assessments and supporting documents, Tower must retain the documents for three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Tower submit compliance reports to the FTC. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

AMERICAN AIR LIQUIDE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4109; File No. 0410020
Complaint, April 29, 2004--Decision, June 29, 2004

This consent order addresses the acquisition by Respondent L'Air Liquide, S. A., a world leader in industrial and medical gases and related equipment, of Messer Griesheim GmbH ("MGI") – which produces and sells industrial gases in the United States – and the subsequent transfer of MGI to L'Air Liquide's wholly-owned subsidiary, Respondent American Air Liquide, whose own United States subsidiary produces and supplies oxygen, nitrogen, argon, and many other industrial gases to customers for numerous applications in the petrochemical, manufacturing, and fabrication industries and the medical field. The order, among other things, requires Respondent American Air Liquide to divest the air separation units and related assets currently owned and operated by MGI in Vacaville, California; Irwindale, California; San Antonio, Texas; Westlake, Louisiana; DeLisle, Mississippi; and Waxahachie, Texas to an acquirer approved by the Commission. An accompanying Order to Hold Separate requires American Air Liquide to preserve the air separation units as viable, competitive and ongoing operations until the divestiture is achieved.

Participants

For the Commission: *Christina R. Perez, James E. Southworth, Tammy L. Imhoff, Richard A. Levy, Eli Barach, Joseph Eckhaus, Michael R. Moiseyev, Elizabeth A. Piotrowski, Charlotte Wojcik, Jeffrey H. Fischer* and *Mark W. Frankena.*

For the Respondent: *George Cary* and *Brian Byrne, Cleary, Gottlieb, Steen & Hamilton.*

COMPLAINT

Pursuant to the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that the proposed acquisition by L'Air Liquide, Sociéte

Anonyme à Directoire et Conseil de Surveillance pour L'Etude et L'Exploitation des Procédés George Claude ("L'Air Liquide") of Messer Griesheim GmbH, a subsidiary of Messer Grieshem Group GmbH & Co. KGaA and subsequent transfer of Messer Griesheim Industries, Inc. ("MGI") to Respondent American Air Liquide, Inc., a corporation subject to the jurisdiction of the Commission, is in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent American Air Liquide, Inc. is a wholly-owned subsidiary of L'Air Liquide, and is a corporation existing under and by virtue of the laws of the United States, with its principal executive offices located at 46409 Landing Parkway, Fremont, California, 94538. American Air Liquide operates in the United States both directly and through its wholly-owned subsidiary, Air Liquide America L.P.

2. Respondent, through its subsidiary Air Liquide America L.P., is engaged in, among other things, the production and sale of industrial gases including, but not limited to, liquid oxygen, liquid nitrogen and liquid argon.

3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. ACQUIRED COMPANY

4. Messer Griesheim GmbH is a wholly-owned indirect subsidiary of Messer Griesheim Group GmbH & Co. KGaA ("Messer Griesheim Group"). Messer Griesheim Group is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany. Messer Griesheim Group operates in the United States through MGI, a wholly-owned subsidiary existing under and by virtue of the laws of the United States and with its principal executive offices located at 3 Great Valley Parkway, Malvern, Pennsylvania, 19355.

5. Messer Griesheim Group and MGI are engaged in, among other things, the production and sale of industrial gases including, but not limited to, liquid oxygen, liquid nitrogen, and liquid argon.

6. MGI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

7. Pursuant to a sale and purchase agreement dated January 19, 2004, L'Air Liquide agreed to acquire the entire share capital of Messer Griesheim GmbH for an aggregate purchase price of approximately $3.5 billion and subsequently transfer MGI to Respondent American Air Liquide.

IV. THE RELEVANT MARKETS

8. For purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the manufacture and sale of:

a. liquid nitrogen;

b. liquid oxygen; and

c. liquid argon.

9. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the acquisition on the liquid oxygen and liquid nitrogen markets are:

a. Northern California;

b. Southern California;

c. Southern Texas;

d. Western Louisiana; and

e. the Central Gulf Coast.

10. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the acquisition on the liquid argon market is the United States, and narrower markets contained therein, including the Western United States.

V. THE STRUCTURE OF THE MARKETS

11. The relevant markets are highly concentrated whether measured by Herfindahl-Hirschman Indices ("HHI") or two-firm and four-firm concentration ratios. In addition, the closest competing facilities, geographically, to MGI's San Antonio, Texas plant are Respondent's Ingleside and Victoria, Texas plants, and MGI's Westlake plant is the closest competing facility, geographically, to Respondent's Beaumont, Texas plant.

12. Respondent and MGI are actual competitors in the relevant markets.

VI. BARRIERS TO ENTRY

13. New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the adverse competitive effects of the acquisition because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact. These steps include planning, designing and building a new air separation plant, as well as securing contracts with enough customers to justify the investment.

14. Entry into the relevant markets is costly, difficult and unlikely because of, among other things, the time and cost required to construct the air separation units that produce liquid oxygen, liquid nitrogen, and liquid argon. Constructing one air separation unit large enough to be viable in the market would cost at least $30 to $40 million, most of which is sunk. Moreover, it is not economically justifiable to build an air separation unit unless a sufficient amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to liquid customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably.

VII. EFFECTS OF THE ACQUISITION

15. The effects of the acquisition may be to substantially lessen competition and to tend to create a monopoly in the relevant markets as set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the following ways, among others:

a. By eliminating direct actual competition between Respondent and MGI;

b. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in the Northern California, Southern California, and Central Gulf Coast liquid oxygen and liquid nitrogen markets;

c. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in the liquid argon market;

d. By eliminating competition between the two closest competitors, geographically, in the Southern Texas and Western Louisiana liquid oxygen and nitrogen markets;

e. By increasing the likelihood that Respondent would unilaterally exercise market power in the Southern Texas and Western Louisiana liquid oxygen and nitrogen markets; and

f. By increasing the likelihood that consumers would be forced to pay higher prices for liquid oxygen, liquid nitrogen and liquid argon in the relevant geographic areas.

VIII. VIOLATIONS CHARGED

16. The Acquisition agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of April, 2004, issues its Complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by L'Air Liquide, Société Anonyme à Directoire et Conseil de Surveillance pour L'Etude et L'Exploitation des Procédés Georges Claude ("L'Air Liquide") of Messer Griesheim GmbH, a subsidiary of Messer Griesheim Group GmbH & Co. KGaA, and the subsequent transfer of Messer Griesheim Industries, Inc. to Respondent American Air Liquide, Inc. and Respondent having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets ("Hold Separate") and accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby

makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent American Air Liquide, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 46409 Landing Parkway, Fremont, California 94538.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "American Air Liquide" or "Respondent" means American Air Liquide, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its controlled joint ventures, subsidiaries, divisions, groups and affiliates, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Messer" means Messer Griesheim Group GmbH & Co. KGaA, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany, and its controlled joint ventures, subsidiaries, divisions, groups and affiliates, including, but not limited to, Messer Griesheim GmbH and Messer Griesheim Industries, Inc.

C. "MGI" means Messer Griesheim Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3 Great

Valley Parkway, Malvern, Pennsylvania 19355, and its controlled subsidiaries, divisions, groups and affiliates.

D. "Acquirer" means the entity who acquires the Atmospheric Gases Divestiture Assets and Businesses pursuant to Paragraph II. or Paragraph III. of this Order.

E. "Acquisition" means the acquisition by L'Air Liquide of the entire share capital of Messer Griesheim GmbH, as described in the Sale and Purchase Agreement dated as of January 19, 2004, between Messer Griesheim Holding AG, Messer, Messer Griesheim GmbH, Messer Industrie GmbH, Air Liquide International S.A. and L'Air Liquide ("Acquisition Agreement"), including the subsequent transfer of MGI to American Air Liquide.

F. "Atmospheric Gases" means oxygen, nitrogen, and argon.

G. "Atmospheric Gases Divestiture Assets and Businesses" means the Divested Atmospheric Gases Plants, and includes all of Messer's interests in all tangible and intangible assets, business and goodwill used at or directly associated with the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including, but not limited to:

1. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;

2. all inventory; supplies; machinery; equipment; fixtures; furniture; tools and other tangible personal property, including vehicles and other distribution equipment (including trucks, tractors, trailers, rail cars and ISO containers); dispatch facilities and equipment (including, at the option of the Acquirer, the Planning and Logistics facility located in Chattanooga, Tennessee); storage tanks, vessels and cylinders; and equipment located at the facilities of customers whose supply agreements are divested to the Acquirer, including but not limited to

storage tanks, vessels and cylinders;

3. all spare parts located at the Divested Atmospheric Gases Plants; and, at the option of the Acquirer, any shared critical spare parts for any of the Divested Atmospheric Gases Plants that are stored at any other location;

4. all customer lists and customer databases; *provided, however,* that Respondent may redact such customer lists and customer databases to retain information regarding customer supply arrangements not divested to the Acquirer;

5. on a non-exclusive basis, all vendor lists, catalogs, sales promotion literature and advertising materials;

6. non-exclusive rights and licenses to, and copies of, all research materials, inventions, technology and intellectual property, including but not limited to, patents, trade secrets and know-how, necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;

7. at the option of the Acquirer, non-exclusive rights to all management information systems software, supply chain management software, dispatch, logistics and production software and any other software or proprietary information necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;

8. non-exclusive rights to and copies of all technical information, specifications, designs, drawings, processes and quality control data;

9. rights to or in any or all existing Atmospheric Gases customer supply agreements for which the customer has been ordinarily supplied by one or more of the Divested Atmospheric Gases Plants from July 1, 2003, to the Effective Date of Divestiture; *provided, however,* that, at the option of the Acquirer and with the prior approval of the Commission, the Acquirer may substitute an alternative package of customer supply agreements;

10. to the extent transferable or assignable, and, in the case of company-wide contracts, divisible, rights to and in all contracts and agreements, other than customer supply agreements, related to the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including but not limited to dealer, distributor, supply, power and utility contracts;

11. all customer and governmental approvals, consents, licenses, permits, waivers or other authorizations held by Messer for the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants;

12. all rights under warranties and guarantees, express or implied;

13. all books, records and files; *provided, however,* that if such books, records and files also contain information relating to the production, refinement, distribution, marketing or sale of products at plants other than the Divested Atmospheric Gases Plants, then only those portions of the books, records and files relating to the Divested Atmospheric Gases Plants shall be included; and, *provided further,* that Respondent may retain a copy of any books and records that it is required by law to retain; and

14. all items of prepaid expense.

Provided, however, "Atmospheric Gases Divestiture Assets and Businesses" does not include:

a. Messer's proprietary trade name and trademarks and any other rights to distribute or sell any items containing Messer's name or logo;

b. any Atmospheric Gases Plant or production facility other than the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant;

c. any computers, servers, or telecommunications equipment shared through local and/or wide area telecommunications systems that are not physically located at the facilities associated with the Atmospheric Gases Divestiture Assets and Businesses;

d. the offices located at the Malvern, Pennsylvania headquarters;

e. the Planning and Logistics facility located in Richmond, Virginia;

f. Messer's specialty gases plant located in Houston, Texas;

g. Messer's interest in the San Diego, California storage depot formerly served by Cryoinfra's Atmospheric Gases plant in Tijuana, Mexico;

h. contractual rights to supply products other than those products produced at the Divested Atmospheric Gases Plants; and

i. contractual rights to supply oxygen, nitrogen and other products to customers ordinarily supplied with argon, but not oxygen or nitrogen, by one or more of the Divested Atmospheric Gases Plants from July 1, 2003, to the Effective Date of Divestiture.

H. "Atmospheric Gases Plant" means a facility that produces Atmospheric Gases.

I. "Commission" means the Federal Trade Commission.

J. "De Lisle Plant" means Messer's Atmospheric Gases Plant located in De Lisle, Mississippi.

K. "Divested Atmospheric Gases Plants" means the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant.

L. "Effective Date of Divestiture" means the date on which the mandated divestiture of the Atmospheric Gases Divestiture Assets and Businesses occurs.

M. "Held Separate Business" means the Atmospheric Gases Divestiture Assets and Businesses and all Held Separate Business Employees.

N. "Held Separate Business Employees" means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture, as well as all of the employees listed in Confidential Appendix A attached to this Order.

O. "Irwindale Plant" means Messer's Atmospheric Gases Plant located in Irwindale, California.

P. "Key Divestiture Employees" means those Employees identified in Confidential Appendix B attached to this Order.

Q. "San Antonio Plant" means Messer's Atmospheric Gases Plant located in San Antonio, Texas.

R. "Vacaville Plant" means Messer's Atmospheric Gases Plant located in Vacaville, California.

S. "Waxahachie Plant" means Messer's Atmospheric Gases Plant located in Waxahachie, Texas.

T. "Westlake Plant" means Messer's Atmospheric Gases Plant located in Westlake, Louisiana.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest, within six (6) months from the date this Order becomes final, the Atmospheric Gases Divestiture Assets and Businesses to a single Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price.

B. Respondent shall:

1. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all Held Separate Business Employees; (b) allow the Acquirer to interview any Held Separate Business Employees; and (c) subject to compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees;

2. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Held Separate Business Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees;

3. not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Held

Separate Business Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any of the Held Separate Business Employees to decline employment with the Acquirer;

4. irrevocably waive any legal or equitable right to deter any Held Separate Business Employee from accepting employment with Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondent that relate to Atmospheric Gases;

5. not interfere with the employment by the Acquirer of any Held Separate Business Employee;

6. continue employee benefits to Held Separate Business Employees until the Effective Date of Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated Messer employees that become employees of the Respondent after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;

7. provide a retention incentive bonus to Key Divestiture Employees who accept employment with the Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Acquirer after the Effective Date of Divestiture;

8. subject to the provisions of Paragraph II.B.9. below, for a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees who have accepted offers of employment with the Acquirer to terminate their employment with the Acquirer; *provided, however,* a

violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph; and

9. notwithstanding the provisions of Paragraph II.B.8. above, for a period of six (6) months from the Effective Date of Divestiture, Respondent shall not employ or make offers of employment to any Held Separate Business Employees who have accepted offers of employment with the Acquirer unless any such individual's employment with the Acquirer has been terminated by the Acquirer.

C. In the event that Respondent is unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license, or right granted by any governmental authority, Respondent shall provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain a comparable permit, license or right. In the event that Respondent is unable to satisfy all conditions necessary to divest any other intangible asset (including a contractual right), Respondent shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

D. The purpose of the divestiture of the Atmospheric Gases Divestiture Assets and Businesses, and of the other provisions of this paragraph, is to ensure the continued operation of the Atmospheric Gases Divestiture Assets and Businesses as a viable, ongoing business by an Acquirer that has the ability and incentive to invest and compete in the production, distribution, marketing and sale of

Atmospheric Gases sold in liquid form, and to remedy the lessening of competition resulting from the Acquisition as alleged in Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested the Atmospheric Gases Divestiture Assets and Businesses as required by Paragraph II. of this Order, the Commission may appoint a trustee to divest ("Divestiture Trustee") the Atmospheric Gases Divestiture Assets and Businesses in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request

and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph III. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the

Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent 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 for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may

appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph III.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. and III. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate when all of the obligations of the divestitures required in Paragraph II. or Paragraph III. of this Order have been accomplished.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by L'Air Liquide, Société Anonyme à Directoire et Conseil de Surveillance pour L'Etude et L'Exploitation des Procédés Georges Claude ("L'Air Liquide") of Messer Griesheim GmbH, a subsidiary of Messer Griesheim Group GmbH & Co. KGaA, and the subsequent transfer of Messer Griesheim Industries, Inc. to Respondent American Air Liquide, Inc. and Respondent having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets ("Hold Separate"):

1. Respondent American Air Liquide, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 46409 Landing Parkway, Fremont, California 94538.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate, the following definitions shall apply:

A. "American Air Liquide" or "Respondent" means American Air Liquide, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its controlled joint ventures, subsidiaries, divisions, groups and affiliates, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Messer" means Messer Griesheim Group GmbH & Co. KGaA, a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Fuetingsweg 34, 47805 Krefeld, Germany, and its controlled joint ventures, subsidiaries, divisions, groups and affiliates, including, but not limited to, Messer Griesheim GmbH and Messer Griesheim Industries, Inc.

C. "MGI" means Messer Griesheim Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3 Great Valley Parkway, Malvern, Pennsylvania 19355, and its controlled subsidiaries, divisions, groups and affiliates.

D. "Acquirer" means the entity who acquires the Atmospheric Gases Divestiture Assets and Businesses pursuant to Paragraph II. or Paragraph III. of this Order.

E. "Acquisition" means the acquisition by L'Air Liquide of the entire share capital of Messer Griesheim GmbH, as described in the Sale and Purchase Agreement dated as of January 19, 2004, between Messer Griesheim Holding AG, Messer, Messer Griesheim GmbH, Messer Industrie GmbH, Air Liquide International S.A. and L'Air Liquide ("Acquisition Agreement"), including the subsequent transfer of MGI to American Air Liquide.

F. "Atmospheric Gases" means oxygen, nitrogen, and argon.

G. "Atmospheric Gases Divestiture Assets and Businesses" means the Divested Atmospheric Gases Plants, and includes all of Messer's interests in all tangible and intangible assets, business and goodwill used at or directly associated with the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including, but not limited to:

1. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;

2. all inventory; supplies; machinery; equipment; fixtures; furniture; tools and other tangible personal property, including vehicles and other distribution equipment (including trucks, tractors, trailers, rail cars and ISO containers); dispatch facilities and equipment (including, at the option of the Acquirer, the Planning and Logistics facility located in Chattanooga, Tennessee); storage tanks, vessels and cylinders; and equipment located at the facilities of customers whose supply agreements are divested to the Acquirer, including but not limited to storage tanks, vessels and cylinders;

3. all spare parts located at the Divested Atmospheric Gases Plants; and, at the option of the Acquirer, any shared critical spare parts for any of the Divested Atmospheric Gases Plants that are stored at any other location;

4. all customer lists and customer databases; *provided, however,* that Respondent may redact such customer lists and customer databases to retain information regarding customer supply arrangements not divested to the Acquirer;

5. on a non-exclusive basis, all vendor lists, catalogs, sales promotion literature and advertising materials;

6. non-exclusive rights and licenses to, and copies, of all research materials, inventions, technology and intellectual property, including but not limited to, patents, trade secrets and know-how, necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;

7. at the option of the Acquirer, non-exclusive rights to all management information systems software, supply chain management software, dispatch, logistics and production software and any other software or proprietary information necessary to service customers as currently served or operate the Atmospheric Gases Divestiture Assets and Businesses at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Divestiture;

8. non-exclusive rights to and copies of all technical information, specifications, designs, drawings, processes and quality control data;

9. rights to or in any or all existing Atmospheric Gases customer supply agreements for which the customer has been ordinarily supplied by one or more of the Divested Atmospheric Gases Plants from July 1, 2003 to the Effective Date of Divestiture; *provided, however,* that, at the option of the Acquirer and with the prior approval of the Commission, the Acquirer may substitute an alternative package of customer supply agreements;

10. to the extent transferable or assignable, and, in the case of company-wide contracts, divisible, rights to

and in all contracts and agreements, other than customer supply agreements, related to the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants including but not limited to dealer, distributor, supply, power and utility contracts;

11. all customer and governmental approvals, consents, licenses, permits, waivers or other authorizations held by Messer for the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Divested Atmospheric Gases Plants;

12. all rights under warranties and guarantees, express or implied;

13. all books, records and files; *provided, however,* that if such books, records and files also contain information relating to the production, refinement, distribution, marketing or sale of products at plants other than the Divested Atmospheric Gases Plants, then only those portions of the books, records and files relating to the Divested Atmospheric Gases Plants shall be included; and, *provided further,* that Respondent may retain a copy of any books and records that it is required by law to retain; and

14. all items of prepaid expense.

Provided, however, "Atmospheric Gases Divestiture Assets and Businesses" does not include:

a. Messer's proprietary trade name and trademarks and any other rights to distribute or sell any items containing Messer's name or logo;

b. any Atmospheric Gases Plant or production facility other than the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant;

c. any computers, servers, or telecommunications equipment shared through local and/or wide area telecommunications systems that are not physically located at the facilities associated with the

Atmospheric Gases Divestiture Assets and Businesses;

d. the offices located at the Malvern, Pennsylvania headquarters;

e. the Planning and Logistics facility located in Richmond, Virginia;

f. Messer's specialty gases plant located in Houston, Texas;

g. Messer's interest in the San Diego, California storage depot formerly served by Cryoinfra's Atmospheric Gases plant in Tijuana, Mexico;

h. contractual rights to supply products other than those products produced at the Divested Atmospheric Gases Plants; and

i. contractual rights to supply oxygen, nitrogen and other products to customers ordinarily supplied with argon, but not oxygen or nitrogen, by one or more of the Divested Atmospheric Gases Plants from July 1, 2003 to the Effective Date of Divestiture.

H. "Atmospheric Gases Plant" means a facility that produces Atmospheric Gases.

I. "Commission" means the Federal Trade Commission.

J. "Decision and Order" means:

1. until the issuance and service of a final Decision and Order by the Commission, the proposed Decision and Order contained in the Consent Agreement in this matter; and

2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.

K. "De Lisle Plant" means Messer's Atmospheric Gases Plant located in De Lisle, Mississippi.

L. "Divested Atmospheric Gases Plants" means the Waxahachie Plant, the Westlake Plant, the San Antonio Plant, the De Lisle Plant, the Vacaville Plant and the Irwindale Plant.

M. "Effective Date of Divestiture" means the date on which the mandated divestiture of the Atmospheric Gases Divestiture Assets and Businesses occurs.

N. "Held Separate Business" means the Atmospheric Gases Divestiture Assets and Businesses and all Held Separate Business Employees.

O. "Held Separate Business Employees" means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture, as well as all of the employees listed in Confidential Appendix A attached hereto.

P. "Hold Separate Period" means the time period during which the Hold Separate is in effect, which shall begin on the date the Hold Separate becomes final and terminate pursuant to Paragraph V. hereof.

Q. "Hold Separate Trustee" means the individual appointed to act as the Hold Separate Trustee pursuant to Paragraph II.D. hereof.

R. "Irwindale Plant" means Messer's Atmospheric Gases Plant located in Irwindale, California.

S. "Key Divestiture Employees" means those Employees identified in Confidential Appendix B attached hereto.

T. "Material Confidential Information" means competitively sensitive or proprietary information including, but not limited to, all customer lists, price lists, and marketing methods; *provided*, *however*, Material Confidential Information does not include information in the public domain or independently known to a Person from sources other than the Person to which the information pertains for this purpose.

U. "Person" means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.

V. "San Antonio Plant" means Messer's Atmospheric Gases Plant located in San Antonio, Texas.

W. "Vacaville Plant" means Messer's Atmospheric Gases Plant located in Vacaville, California.

X. "Waxahachie Plant" means Messer's Atmospheric Gases Plant located in Waxahachie, Texas.

Y. "Westlake Plant" means Messer's Atmospheric Gases Plant located in Westlake, Louisiana.

II.

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Decision and Order, and all applicable laws.

B. Respondent shall:

1. During the Hold Separate Period, take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear; and

2. From the date Respondent executes the Agreement containing Consent Orders until the Hold Separate Period begins, take such actions as are necessary to assure that

Messer maintains the viability, marketability, and competitiveness of the Held Separate Business to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

C. The purpose of this Hold Separate is to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestitures required by the Decision and Order are achieved; (2) assure that no Material Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate; and (3) prevent interim harm to competition pending the relevant divestitures and other relief.

D. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. Richard M. Klein shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Respondent and attached as Confidential Appendix C to this Hold Separate ("Trustee Agreement").

a. The Trustee Agreement shall require that, no later than five (5) days after this Hold Separate becomes final, Respondent shall transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order.

b. No later than five (5) days after this Hold Separate becomes final, Respondent shall, pursuant to the Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order.

c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the

Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Respondent's compliance with its obligations pursuant to this Hold Separate and the Decision and Order.

d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business and to any other relevant information as the Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Held Separate Business. Respondent shall develop such financial or other information as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee. Respondent shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent's compliance with this Hold Separate and the Decision and Order or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.

e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.

g. Respondent may require the Hold Separate Trustee to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his/her role as Hold Separate Trustee to anyone other than the Commission.

h. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold

Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the Held Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.

2. No later than one (1) day after the Acquisition is consummated, Respondent shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, James Charles Doerr, Jr. ("Manager").

a. In the event that James Charles Doerr, Jr. ceases to act as Manager, then Respondent shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.

b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondent.

The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.

c. The Manager shall have no financial interests affected by Respondent's revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate.

d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission.

e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove employees of the Held Separate Business and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Trustee, may request Respondent to, and Respondent shall, appoint a substitute Person, which Person the Manager shall have the right to approve.

f. In addition to the Held Separate Business Employees employed as of the date the Consent Agreement is signed by Respondent, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing the Held Separate Business.

g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.D.2. of this Hold Separate.

3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability, marketability, and competitiveness of the Held Separate Business. To the extent that any employees of the Held Separate Business leave or have left the Held Separate Business prior to the Effective Date of Divestiture, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with Persons who have similar experience and expertise or determine not to replace such departing or departed employees.

4. In connection with support services not included within the Held Separate Business that are being provided by Respondent or Messer, or which Respondent or Messer has contracted to provide to the Held Separate Business by third parties, Respondent shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to the Held Separate Business by Respondent, Messer, or third parties as of the date the Consent Agreement is signed by Respondent. For services that Respondent or Messer previously provided to the Held Separate Business, Respondent may charge the same fees, if any, charged by Respondent or Messer for such support services as of the date the Consent Agreement is signed by Respondent. For any other services or products that Respondent or Messer may provide the Held Separate Business, Respondent may charge no more than the same price it charges others for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Material Confidential Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such Persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any Person whose employment relates to any of Respondent's businesses, other than the Held Separate Business. Such personnel who have or may have access to Material Confidential Information shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.

a. Respondent shall offer to the Held Separate Business any services that Messer provides to its other businesses directly or through third party contracts, or that Messer has provided

directly or through third party contracts to the Atmospheric Gases Divestiture Assets and Businesses at any time since January 1, 2003. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Trustee, obtain such services and products from Respondent. The services that Respondent shall offer the Held Separate Business shall include, but shall not be limited to, the following:

(1) federal and state regulatory policy development and compliance;

(2) human resources administrative services, including but not limited to procurement and administration of employee benefits;

(3) environmental health and safety services, including, but not limited to, services to develop corporate policies and insure compliance with federal and state regulations and corporate policies;

(4) financial accounting services;

(5) preparation of tax returns;

(6) audit services;

(7) technical support and engineering services;

(8) information technology support services;

(9) processing of accounts payable and accounts receivable;

(10) billing and collection services;

(11) payroll processing;

(12) maintenance and repair of facilities;

(13) procurement of goods and services used in the ordinary course of business;

(14) procurement of insurance, including, but not limited to, general and product liability insurance; and

(15) legal services.

b. The Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products, including, but not limited to, those listed in Paragraph II.D.4.a. above, from third parties unaffiliated with Respondent.

5. Respondent shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such individuals shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing, directly or indirectly, any such information to or with any other Person whose employment relates to any of Respondent's businesses other than the Held Separate Business. These individuals shall not be involved in any way in Respondent's businesses that compete with the Held Separate Business.

6. No later than ten (10) days after the date this Hold Separate becomes final, Respondent shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.

7. No later than five (5) days after the date this Hold Separate becomes final, Respondent shall circulate to employees of the Held Separate Business and to Respondent's employees who are responsible for or engaged in financial, management, production, distribution, sales or marketing functions relating to products or services that compete with product or services offered by the Held Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Attachment A.

8. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.

9. Respondent shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts or omissions, or bad faith by the Hold Separate Trustee or the Manager, or their respective agents.

10. Respondent shall provide the Held Separate Business with sufficient financial resources:

a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business at no less than current rates of operation and at no less than historical the rates of operation;

b. to perform all reasonable maintenance to, and replacements of, the assets of the Held Separate Business;

c. to carry on all existing and planned capital projects and business plans for the Held Separate Business;

d. to carry on existing and planned bid and proposal plans for the Held Separate Business; and

e. to maintain the viability, marketability, and competitiveness of the Held Separate Business.

f. Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital; and (iv) reimbursement for any operating losses, capital losses, or

other losses; *provided, however,* that, consistent with the purposes of the Decision and Order, the Manager may substitute any capital or research and development project for another of the same cost.

11. Respondent shall:

a. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Acquirer a list of all Held Separate Business Employees; (b) allow the Acquirer to interview any Held Separate Business Employees; and (c) in compliance with all laws, allow the Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees;

b. not later than thirty (30) days before the Effective Date of Divestiture, provide an opportunity for the Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the Held Separate Business Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees;

c. not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the Held Separate Business Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees to decline any offer of employment from the Acquirer, and not offer any incentive to any of the Held Separate Business Employees to decline employment with the Acquirer;

d. irrevocably waive any legal or equitable right to deter any Held Separate Business Employee from accepting employment with Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondent that relate to Atmospheric Gases;

e. not interfere with the employment by the Acquirer of any Held Separate Business Employee;

f. continue employee benefits to Held Separate Business Employees until the Effective Date of Divestiture consistent with the requirements of the Sale and Purchase Agreement

by and between Air Liquide and Messer dated January 19, 2004, and the employee benefits provided to other similarly situated Messer employees that become employees of the Respondent after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses; and

g. provide a retention incentive bonus to Key Divestiture Employees who accept employment with the Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Acquirer after the Effective Date of Divestiture.

12. Subject to the provisions of Paragraph II.D.13. below, for a period of one (1) year from the Effective Date of Divestiture, Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees who have accepted offers of employment with the Acquirer to terminate their employment with the Acquirer; *provided, however,* a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer; (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this paragraph.

13. Notwithstanding the provisions of Paragraph II.D.12. above, for a period of six (6) months from the Effective Date of Divestiture, Respondent shall not employ or make offers of employment to any Held Separate Business Employees who have accepted offers of employment with the Acquirer unless any such individual's employment with the Acquirer has been terminated by the Acquirer.

14. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Respondent shall not permit any other of its

employees, officers, or directors to be involved in the operations of the Held Separate Business.

15. Respondent's employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive, have access to, or use or continue to use any Material Confidential Information of the Held Separate Business except:

a. as required by law; and

b. to the extent that necessary information is exchanged:

(1) in the course of consummating the Acquisition;

(2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;

(3) in complying with the Hold Separate or the Consent Agreement;

(4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;

(5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or

(6) in obtaining legal advice.

Nor shall the Manager or employees of the Held Separate Business receive, have access to, or use or continue to use, any Material Confidential Information about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Respondent to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information

that is obtained pursuant to this paragraph shall be used only for the purposes set forth in this paragraph.

16. Respondent and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.

III.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondent relating to compliance with this Hold Separate; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the last of the divestitures required by the Decision and Order is completed; provided, however, that when an asset that is included within the Held Separate Business is divested pursuant to the Consent Agreement, that asset shall cease to be held by the Held Separate Business.

ATTACHMENT A

NOTICE OF DIVESTITURE AND

REQUIREMENT FOR CONFIDENTIALITY

American Air Liquide, Inc., hereinafter referred to as "Respondent," has entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets and other relief in connection with Respondent's acquisition of Messer Griesheim Industries, Inc.

As used herein, the term "Held Separate Business" means the Atmospheric Gases Divestiture Assets and Businesses and personnel as defined in Paragraph I.N. of the Order to Hold Separate and Maintain Assets (the "Hold Separate") contained in the Consent Agreement. Under the terms of the Decision and Order (the "Order") contained in the Consent Agreement, Respondent must divest certain assets, which are included within the Held Separate Business, within six (6) months of the date the Order becomes final.

During the Hold Separate Period (which begins after the Hold Separate becomes final and ends after Respondent has completed the required divestitures), the Held Separate Business shall be held separate, apart, and independent of Respondent's businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondent, until Respondent has completed the required divestiture. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other of Respondent's businesses, except as otherwise provided in the Hold Separate. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the management, production, distribution, sales, marketing, or financial operations of Respondent relating to competing products. Similarly, persons involved in similar activities in Respondent's businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other

person whose employment involves the Held Separate Business, except as otherwise provided in the Hold Separate.

Until the Held Separate Business is divested, Respondent must take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Held Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

Any violation of the Consent Agreement may subject Respondent to civil penalties and other relief as provided by law.

Analysis of Agreement Containing Consent Orders to Aid Public Comment-*4109*

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from L'Air Liquide, S.A., which is designed to remedy the anticompetitive effects resulting from L'Air Liquide, S.A.'s acquisition of the entire share capital of Messer Griesheim GmbH ("Messer') and the subsequent transfer of Messer Griesheim Industries, Inc. ("MGI") to its wholly-owned subsidiary American Air Liquide.

Under the terms of the Consent Agreement, American Air Liquide is required to divest the air separation units ("ASUs") and related assets currently owned and operated by MGI in the following six locations: (1) Vacaville, California; (2) Irwindale, California; (3) San Antonio, Texas, (4) Westlake, Louisiana; (5) DeLisle, Mississippi; and (6) Waxahachie, Texas. The divestiture will take place no later than six months from the date the Consent Agreement becomes final. The Consent Agreement also includes an Agreement to Hold Separate that requires American Air Liquide to preserve the ASUs as viable, competitive and ongoing operations until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a sale and purchase agreement dated January 19, 2004, L'Air Liquide, S.A. agreed to acquire the entire share capital of Messer. The aggregate purchase price of the transaction is approximately $3.5 billion and includes $1.3 billion of Messer's

debt that L'Air Liquide, S.A. has agreed to assume. As a result of this agreement, L'Air Liquide, S.A. will immediately transfer MGI, a wholly-owned subsidiary of Messer, which produces and sells industrial gases in the United States, to American Air Liquide. The Commission's complaint alleges that the proposed acquisition and subsequent transfer of MGI, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for liquid argon in the continental United States and certain regional markets in the United States for liquid oxygen and nitrogen.

II. The Parties

L'Air Liquide, S.A. is a world leader in industrial and medical gases and related equipment. American Air Liquide is the parent corporation of the United States subsidiary that produces and supplies oxygen, nitrogen, and argon as well as many other industrial gases to customers for numerous applications in a variety of industries, including the petrochemical, manufacturing and fabrication industries as well as the medical field. American Air Liquide's subsidiary is the fourth largest supplier of industrial gases in the United States, with twenty seven (27) ASUs throughout the United States, most of which are in Texas and the Gulf Coast region.

Messer's U.S. subsidiary, MGI, is currently the fifth largest producer of liquid atmospheric gases (oxygen, nitrogen and argon) in the United States. MGI owns and operates twenty four (24) ASUs, including several located in Texas and the Gulf Coast region, as well as in northern and southern California.

III. Liquid Oxygen, Liquid Nitrogen, and Liquid Argon

Both American Air Liquide and MGI own and operate ASUs in the United States to provide customers with liquid atmospheric gases, including liquid oxygen, liquid nitrogen, and liquid argon.

Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no substitute for the use of oxygen, nitrogen, or argon. Customers would not switch to another gas or product even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent.

Additionally, customers have three distinct distribution methods to choose from in receiving oxygen, nitrogen, or argon. These gases are available in cylinders, in liquid form, and through an on-site ASU or a pipeline. Customers choose a distribution method based on the volume of gas required. Customers who use liquid oxygen, liquid nitrogen, or liquid argon generally require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. In fact, even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, liquid oxygen and liquid nitrogen may only be purchased economically from a supplier with an ASU located within one hundred and fifty (150) to two hundred and fifty (250) miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition using local geographic markets for liquid oxygen and liquid nitrogen. The relevant local markets in which to analyze the effects of this proposed acquisition are: Southern California, Northern California, Southern Texas, Western Louisiana, and the Central Gulf Coast. Because liquid argon is a more rare and more expensive gas than liquid oxygen and liquid nitrogen, it may be economically transported much greater distances.

Therefore, the continental United States and regions of the United States are the appropriate geographic markets in which to analyze the competitive effects of the proposed acquisition for liquid argon.

Analysis

The markets for liquid oxygen and liquid nitrogen are highly concentrated. In three of the five relevant geographic markets (Southern California, Northern California, and the Central Gulf Coast) American Air Liquide and MGI are two of only five companies supplying liquid oxygen and liquid nitrogen to customers. Additionally, MGI has been an aggressive participant in the market for these gases, offering low prices to customers and serving as a price restraint on the other suppliers. As a result, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market. Furthermore, in the Southern Texas and Western Louisiana markets, MGI and American Air Liquide are the only producers capable of supplying liquid oxygen and liquid nitrogen to customers in those markets economically. By eliminating competition between these two suppliers in these areas, the proposed acquisition would allow American Air Liquide to exercise market power unilaterally, thereby increasing the likelihood that purchasers of liquid oxygen or liquid nitrogen would be forced to pay higher prices in these areas.

The market for liquid argon is also highly concentrated, with only five suppliers producing sufficient amounts of liquid argon to supply customers around the United States. The remaining firms are very small and local in nature, and produce liquid argon primarily to meet internal needs. Additionally, the five large suppliers of liquid argon all transport the product from ASUs in the middle and eastern part of the United States to customers on the West Coast, where the ASUs owned and operated by these suppliers do not produce enough argon to meet customers' demands. Over the past few years, MGI has had excess capacity in liquid argon which it has used to win new customers by offering low prices, especially to customers in Texas, Gulf Coast and California. By eliminating MGI as a competitor in the liquid argon market, particularly on the West Coast, the proposed acquisition would enhance the likelihood of coordinated action or collusion between or among the remaining firms, and could result in customers paying higher prices for liquid argon.

Significant impediments to new entry exist in the markets for liquid oxygen, liquid nitrogen, and liquid argon. In order to be cost competitive in these markets, an ASU must produce at least two hundred and fifty (250) to three hundred (300) tons per day of liquid product. The cost to construct a plant of this size can be thirty ($30) to forty ($40) million, most of which is sunk and cannot be recovered. While an ASU can theoretically be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's daily capacity, either to an on-site customer or to several liquid customers. On-site customers normally sign long-term contracts, and as such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise at any time in the near future in any of the areas affected by the acquisition. It is even more difficult and time-consuming for a potential new entrant to try to contract with enough liquid gas customers to justify building a new ASU in a market. These customers are generally locked into contracts with existing suppliers that typically last between five (5) and seven (7) years. Even if the new entrant was able to contract with enough liquid customers to justify constructing a new ASU in any of the affected markets, the new entrant would still need to rely on suppliers already in the market to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entering the market, it is unlikely that new entry could be accomplished in a timely manner in any of the markets for liquid oxygen or liquid nitrogen, and even more unlikely that entry would occur in a timely manner in all of the relevant markets. Additionally, as an ASU must produce large amounts of oxygen and nitrogen in order to produce any argon, a new entrant into the liquid argon market would not be able to economically build an ASU to produce only liquid argon, rather it would need to find customers to purchase all three gases. Therefore, it is unlikely that new entry would occur in the liquid argon market absent concurrent new entry in the liquid oxygen and nitrogen markets.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the markets for liquid oxygen, liquid nitrogen and liquid argon. Pursuant to the Consent Agreement, American Air Liquide will divest the six (6) air separation units listed in Section I to a single purchaser that will operate the ASUs as a going concern. The Consent Agreement provides that American Air Liquide must find a buyer for the assets, at no minimum price, that is acceptable to the Commission, no later than six (6) months from the date the Consent Agreement becomes final. If the Commission determines that American Air Liquide has not provided an acceptable buyer within this time period or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee will have the exclusive power and authority to accomplish the divestiture.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. Numerous entities are interested in purchasing the divested assets, including industrial gas suppliers that currently have a regional presence in the industry, but do not compete in the areas affected by the acquisition, as well as entities in related fields that are interested in entering into the production and sale of industrial gases. The Commission is therefore satisfied that sufficient potential buyers for the divested assets exist.

The Consent Agreement also contains an Agreement to Hold Separate. This will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until it is divested to a buyer approved by the Commission. The Agreement to Hold Separate became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until American Air Liquide

successfully divests the divestiture asset package according to the terms of the Decision and Order.

The Consent Agreement contains a provision for the Commission to appoint a monitor-trustee to oversee the management of the divestiture asset package until the divestiture is complete, and for a brief transition period after the sale. In order to ensure that the Commission remains informed about the status of the asset package pending divestiture, about the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period, the Consent Agreement requires the monitor-trustee to file periodic reports with the Commission until the divestiture is accomplished and the transition period has ended.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

ORDER SETTING ASIDE ORDER

On September 8, 2003, Wright Medical Technology, Inc. ("Wright"), the respondent in the above-referenced order ("Order"), filed its Petition to Reopen and Modify Order ("Petition") in this matter. Wright asks that the Commission reopen and modify the Order pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Policy Statement").[1] The Petition requests that the Commission reopen and modify the Order to eliminate the prior approval provision in Paragraph IV of the Order. The thirty-day comment period on the Petition ended October 15, 2003. No comments were received. For the reasons discussed below, the Commission has determined to grant Wright's Petition. Because there would remain no further affirmative obligations under the Order, the Commission has determined to set aside the Order in its entirety.

The Complaint in this matter alleges that Wright's acquisition of Orthomet violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by lessening competition in the United States in the market of orthopaedic implants used or intended for use in the human hand.

The Order required Wright to transfer or license the Orthomet/Mayo Orthopaedic Finger Implant Research Assets ("Assets"), as defined by the Order, to the Mayo Foundation for Medical Education and Research ("Mayo"), within 5 days after the Order becomes final. See Order ¶ 2. The Order permitted Wright initially to grant Mayo a non-exclusive license to the

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[1] 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Assets, but required Wright to terminate all of its rights to the Assets if Mayo were unable to find a second licensee within six months. See Order ¶ 3.

Wright delivered the Assets to Mayo and granted to Mayo a perpetual non-exclusive license to those Assets with a full right of sublicense. Mayo was unable to find a non-exclusive licensee, and Wright divested its remaining interest in the Assets to Mayo.

Paragraph IV of the Order prohibits Wright for ten years from the date the Order became final from acquiring any stock or other equity interest in any company that has filed an Application with the FDA relating to Orthopaedic Finger Implants, that has announced an intent to submit an application to the FDA, or that has received FDA approval relating to Orthopaedic Finger Implants, without the Commission's prior approval.

The Commission, in its Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," because the pre-merger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, protected the public interest in effective merger law enforcement.[2] The Commission announced that it will "henceforth rely on the HSR process as its principle means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."[3]

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[2] Policy Statement at 2.

[3] *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger, would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[4] As explained in the Policy Statement, the need for a prior approval notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors.

The Commission also announced, in its Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[5] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to ...[the Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Policy Statement.[6]

The presumption is that setting aside the general prior approval requirement of Paragraph IV of the Order is in the public interest.

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[4] *Id.* at 3.

[5] *Id.* at 4.

[6] *Id.*

There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers would be HSR reportable. Wright completed the divestiture required by the Order. Nothing to overcome the presumption having been presented, and because the only remaining obligation under the Order is the prior approval requirement in Paragraph IV, the Commission has determined to reopen the proceeding in File No. C-3564 and set aside the Order.

Accordingly, IT IS HEREBY ORDERED that this matter be, and it hereby is, reopened, and that the Commission's order issued on April 4, 1995, be, and it hereby is, set aside as of the effective date of this order.

January 7, 2004

Jason P. Hood, Esq.
Vice President, General Counsel and Secretary
Wright Medical Technology, Inc.
5677 Airline Road
Arlington, TN 38002

Re: *In the Matter of Wright Medical Technology, Inc.*
Docket No. C-3564

Dear Mr. Hood:

This letter responds to the September 8, 2003, Petition ("Petition") of Wright Medical Technology, Inc. ("Wright") requesting that the Commission Reopen and Modify the Order and Eliminate the Prior Approval Provision of the Order. The application was placed on the public record for comments until October 15, 2003, and no comments were received.

After consideration of the Petition and other available information, the Commission has determined to approve the Petition. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Wright's Petition, and has assumed them to be accurate and complete. Because there remain no obligations on the part of Wright after the Commission reopened and eliminated the prior approval provision, the Commission also set aside the order.

By direction of the Commission.

Donald S. Clark
Secretary

Enclosure