

## IN THE MATTER OF

TRAUMA ASSOCIATES OF NORTH BROWARD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3541. Complaint, Nov. 1, 1994--Decision, Nov. 1, 1994*

This consent order requires, among other things, Dr. Johnson, the president of a Florida corporation, to dissolve Trauma Associates within 180 days. Prior to its dissolution, Trauma Associates is required to give copies of the settlement to any entity with whom it has entered into contract negotiations for trauma surgical services since its inception. In addition, the order prohibits the ten surgeons from entering into, organizing, or implementing any agreement to: refuse to provide surgical services in connection with any effort to fix the prices for such services; prevent the offering or delivery of surgical services; deal on collectively determined terms with any provider of health care services; or encourage anyone to engage in an activity prohibited by the settlement.

*Appearances*

For the Commission: *Mark J. Horoschak, Markus H. Meier and Mary Lou Steptoe.*

For the respondents: *Pro se and Donald Korman, Korman, Schorr & Wagenheim, Fort Lauderdale, FL., for respondent Santiago Triana, M.D.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 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 the respondents named in the caption hereof have violated and are violating the provisions of 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 its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Trauma Associates of North Broward, Inc. (hereinafter "Trauma Associates") is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida.

The individual respondents named in the caption above (hereinafter "surgeon respondents") are general surgeons, licensed to practice medicine in the State of Florida, and are engaged in the business of providing surgical services to patients for a fee in Broward County, Florida. Their respective business addresses are:

Carl Amko, M.D., 412 Southeast 17th Street, Fort Lauderdale, Florida;  
Lucien Armand, M.D., 4330 West Broward Boulevard, Suite 308, Plantation, Florida;  
Frantz Chery, M.D., 4101 Northwest 4th Street, Suite 302, Plantation, Florida;  
William Cohen, M.D., 8251 West Broward Boulevard, Suite H, Plantation, Florida;  
Sergio Gallenero, M.D., 9750 Northwest 33rd Street, Coral Springs, Florida;  
Kwang-Jae Joh, M.D., One West Sample Road, Suite 207, Pompano Beach, Florida;  
Richard A. Johnson, M.D., 1625 Southeast 3rd Avenue, Suite 721, Fort Lauderdale, Florida;  
J.R. Nabut, M.D., 1500 Hillsboro Boulevard, Suite 207, Deerfield Beach, Florida;  
Aiden O'Rourke, M.D., 315 Southeast 13th Street, Fort Lauderdale, Florida;  
Santiago Triana, M.D., Medical Building, 150 Northwest 70th Avenue, Suite 7, Plantation, Florida.

PAR. 2. The acts and practices of Trauma Associates and the surgeon respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 3. Except to the extent that competition has been restrained as alleged herein, the surgeon respondents have been, and are now, in competition among themselves and with other providers of general surgical services in Broward County, Florida.

PAR. 4. The North Broward Hospital District (hereinafter "the District") is a tax-supported hospital authority, with its principal

offices located at 1625 Southeast Third Avenue, Fort Lauderdale, Florida. Broward General Medical Center (hereinafter "Broward General") and North Broward Medical Center (hereinafter "North Broward") are District hospitals located at 1600 South Andrews Avenue, Fort Lauderdale, Florida, and 201 Sample Road, Pompano Beach, Florida, respectively.

PAR. 5. On or about March 25, 1992, the District's Board of Commissioners officially resolved to seek a license from the State of Florida to operate state-approved trauma centers at Broward General and North Broward. State regulations governing trauma centers include the requirement that a hospital have a minimum of five general surgeons committed to covering the trauma center on a round-the-clock or short-notice basis.

PAR. 6. Each respondent surgeon signed, on an individual basis, the District's applications to operate state-approved trauma centers, thereby committing himself to participate in the District's trauma program.

PAR. 7. During April, 1992, Dr. Richard A. Johnson, the surgeon respondents, leader, entered into contract negotiations with District officials, on behalf of the surgeon respondents. The purpose of these negotiations was to secure a single contract for the surgeon respondents to staff the Broward General and North Broward trauma centers. District officials wished to enter individual contracts with each of the surgeon respondents, but the surgeon respondents said that they would only agree to work at the trauma centers under a single contract that included all of the surgeon respondents.

PAR. 8. During contract negotiations, Dr. Johnson made a number of proposals to the District calling for the payment of various sums of money necessary to cover the costs of the surgeon respondents' services and expenses. The surgeon respondents agreed to these price proposals prior to their submission to the District.

PAR. 9. On May 1, 1992, the surgeon respondents began providing trauma services to the District. On May 5th the District and Dr. Johnson signed a letter of intent ("LOI") outlining the terms under which the surgeon respondents would work, until a more formal contract could be agreed upon. Dr. Johnson signed the LOI on behalf of the surgeon respondents.

PAR. 10. The LOI explicitly omitted any financial terms, as these were still being negotiated. Despite this fact, Dr. Johnson reached an understanding with the District that the District would pay

each surgeon respondent \$100 per hour for in-house service (where the surgeon is present in the trauma center) and \$50 per hour for on-call coverage (where the surgeon is available to respond to a "trauma alert" within twenty minutes). The District also agreed to pay most of the surgeon respondents, and Trauma Associates, costs, which included malpractice liability insurance, office rent, staff, telephones, and other such items.

PAR. 11. Dr. Johnson incorporated Trauma Associates as a for-profit Florida corporation on or about May 7, 1992. Dr. Johnson is Trauma Associates' only director, officer and owner. None of the other surgeon respondents have any ownership interest in, or any other legal relationship with, Trauma Associates. Trauma Associates was intended to function as the "administrative arm" of the surgeon respondents, and it has served as a vehicle for Dr. Johnson and the other surgeon respondents to engage in collective negotiations on fees and other contract terms to be sought from the District and others.

PAR. 12. The surgeon respondents did not integrate their surgical practices in any legally significant way, nor did they create any efficiencies that justify their agreement to act collectively vis-a-vis the District. The surgeon respondents provided the District with little more than a fixed price for their individual services.

PAR. 13. The District made lump-sum payments, totaling around \$600,000, to the surgeon respondents, through Dr. Johnson and Trauma Associates, in May and June, 1992.

PAR. 14. In July, 1992, the District decided not to enter a contract with the surgeon respondents as a group. Instead, the District announced its intention to contract with the surgeon respondents individually. In response, the surgeon respondents refused to deal with the District individually. Additionally, the surgeon respondents sent the District a letter with a list of demands, including price and price-related terms, that had to be included in any final contract, and they threatened to cease providing trauma services at the Broward General and North Broward trauma centers unless all of their demands were met. Respondent Drs. Amko, Armand, Chery, Cohen, Gallenero, Joh, Johnson, O'Rourke, and Triana signed this letter.

PAR. 15. One week after the surgeon respondents threatened to cease providing trauma services, respondent Drs. Amko, Armand, Chery, Cohen, Gallenero, Joh, Johnson, Nabut, O'Rourke, and Triana walked out of the District's trauma centers. As a result of the

walkout, the District was forced to shut down the North Broward trauma center.

PAR. 16. By engaging in the acts or practices herein alleged, the surgeon respondents have acted as a combination or conspiracy to fix or increase the fees received from the District for the provision of trauma surgical services, and to otherwise restrain competition among general surgeons in Broward County, Florida.

PAR. 17. Trauma Associates has conspired with the surgeon respondents, and has acted to implement an agreement among the surgeon respondents to restrain competition among general surgeons, by, among other things, facilitating, entering into, and implementing an agreement, express or implied, that respondent Trauma Associates would negotiate the terms and conditions of agreements between surgeon respondents and the District and others, including the prices to be paid for the surgeon respondents' services.

PAR. 18. The acts and practices of Trauma Associates and the surgeon respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among general surgeons in Broward County, Florida;

B. By fixing or increasing the prices that are paid to general surgeons who provide trauma surgical services in Broward County, Florida;

C. By raising the cost, lowering the quality, and reducing access to and the quality-adjusted output of the District's trauma services; and

D. By depriving the District and its patients of the benefits of competition among general surgeons in Broward County, Florida.

PAR. 19. The combination or conspiracy and the acts and practices of Trauma Associates and the surgeon respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof, as herein alleged, are continuing and will continue or recur in the absence of the relief herein requested.

## 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 Competition 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 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 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, 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 sixty (60) days, now in further conformity with the procedure prescribed 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 Trauma Associates of North Broward, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida.

Respondent surgeons are Carl Amko, M.D., Lucien Armand, M.D., Frantz Chery, M.D., William Cohen, M.D., Sergio Gallenero, M.D., Kwang-Jae Joh, M.D., Richard A. Johnson, M.D., J. R. Nabut, M.D., Aiden O'Rourke, M.D., and Santiago Triana, M.D., each of whom is a general surgeon licensed to practice medicine in the State of Florida, and is engaged in the business of providing surgical services to patients for a fee in Broward County, Florida.

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

### I.

*It is ordered*, That, for purposes of this order, the following definitions shall apply:

A. "*Trauma Associates*" means Trauma Associates of North Broward, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2170 Southeast 17th Street, Suite 305, Fort Lauderdale, Florida, its Board of Directors, committees, officers, members, representatives, agents, employees, successors, and assigns.

B. "*Surgeon respondents*" means Carl Amko, M.D., Lucien Armand, M.D., Frantz Chery, M.D., William Cohen, M.D., Sergio Gallenero, M.D., Kwang-Jae Joh, M.D., Richard A. Johnson, M.D., J. R. Nabut, M.D., Aiden O'Rourke, M.D., and Santiago Triana, M.D., each of whom is a general surgeon licensed to practice medicine in the State of Florida, and is engaged in the business of providing surgical services to patients for a fee in Broward County, Florida.

C. "*The District*" means the North Broward Hospital District, a tax-supported hospital authority, with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, Florida, its subsidiaries, affiliates, commissioners, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

D. "*Broward General*" means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, Florida, its subsidiaries, affiliates, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

E. "*North Broward*" means the North Broward Medical Center, one of the hospitals of the North Broward Hospital District, located at 201 Sample Road, Pompano Beach, Florida, its subsidiaries, affiliates, officers, administrators, directors, committees, agents, employees, representatives, successors, and assigns.

F. "*Integrated joint venture*" means a joint arrangement to provide health-care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share a substantial risk of loss from their participation in the venture.

## II.

*It is further ordered,* That each surgeon respondent directly or indirectly, or through any corporate or other device, in connection with the provision of health-care services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue any combination, agreement, or understanding, express or implied, for the purpose or with the effect of:

A. Preventing the offering or delivery of surgical services by the District, Broward General, North Broward, or any other provider of health-care services, including, but not limited to, any agreement to refuse to deal or threaten to refuse to deal with the District, Broward General, North Broward, or any other provider of health-care services;

B. Dealing with the District, Broward General, North Broward, or any other provider of health-care services on collectively determined terms; or

C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order.

Provided that nothing in this order shall be construed to prohibit any individual surgeon respondent from:

1. Entering into an agreement or combination with any other physician with whom the surgeon respondent practices in partnership or in a professional corporation, or who is employed by the same person as the surgeon respondent, to deal with any third party on collectively determined terms; or

2. Forming, facilitating the formation of, or participating in an integrated joint venture and dealing with any third party on



collectively determined terms through the joint venture, as long as the surgeons participating in the joint venture remain free to deal individually with third parties.

### III.

*It is further ordered*, That respondent Richard A. Johnson, M.D., shall:

A. Dissolve Trauma Associates within one hundred and eighty (180) days after the date on which this order becomes final; and

B. File a verified written report demonstrating how he has complied with Section III.A. above, within two hundred and ten (210) days after the date on which this order becomes final.

### IV.

*It is further ordered*, That respondent Trauma Associates shall:

A. Within thirty (30) days after the date on which this order becomes final, and prior to the dissolution provided for in Section III.A. above, distribute by first-class mail a copy of this order and the accompanying complaint to each party with whom Trauma Associates has entered into contract negotiations or finalized a contract concerning the provision of trauma surgical services; and

B. Within sixty (60) days after the date on which this order becomes final, and prior to the dissolution provided for in Section III.A. above, file a verified written report demonstrating how it has complied with Section IV.A. above.

### V.

*It is further ordered*, That each surgeon respondent shall:

A. File a written report with the Commission within ninety (90) days after the date the order becomes final, and annually thereafter for three (3) years on the anniversary of the date the order became final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which

the surgeon respondent has complied and is complying with the order;

B. For a period of five (5) years after the date on which this order becomes final, notify the Commission in writing within thirty (30) days after the surgeon respondent forms or participates in the formation of, or joins or participates in, any integrated joint venture; and

C. For a period of five (5) years after the date on which this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records sufficient to describe in detail any action taken in connection with the activities covered by this order.

Commissioner Varney not participating.

Complaint

118 F.T.C.

IN THE MATTER OF

ROCHE HOLDING LTD., ET AL.

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

*Docket C-3542. Complaint, Nov. 22, 1994--Decision, Nov. 22, 1994*

This consent order requires, among other things, Roche to divest Syva's drugs of abuse testing (DAT) business within 12 months to a Commission-approved buyer, to operate the Syva assets separately from its own DAT business pending the divestiture, and to obtain, for ten years, prior Commission approval before acquiring assets or interests of any entity involved in the market for drugs of abuse reagent products.

#### *Appearances*

For the Commission: *Claudia Higgins, Ann Malester and Elizabeth Jet.*

For the respondents: *Arthur Golden, Davis, Polk & Wardwell, New York, N.Y. and Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

#### COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Roche Holding Ltd ("Roche"), a corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of respondent Syntex Corporation ("Syntex"), 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, as amended, ("FTC Act"), 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 Roche Holding Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of

## Complaint

Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland.

2. Respondent Syntex Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Panama, with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California.

## II. JURISDICTION

3. Respondents are and, at all times relevant 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 businesses affect commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## III. THE ACQUISITION

4. On or about May 1, 1994, Roche and Syntex signed an agreement and plan of merger whereby Roche would acquire 100 percent of the voting securities of Syntex for approximately \$5.3 billion ("acquisition").

## IV. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the acquisition is the manufacture and sale of drugs of abuse reagent products. Drugs of abuse reagents products are diagnostic products used to screen for the presence or absence of illegal drugs in urine.

6. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the acquisition.

7. The relevant market set forth in paragraphs five and six is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

8. Entry into the relevant market is difficult and time consuming.

9. Roche and Syntex are actual competitors in the relevant market.

## V. EFFECTS OF THE ACQUISITION

10. The effects of the acquisition may be substantially to lessen competition or 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, by, among other things:

- (a) Eliminating actual, direct and substantial competition between Roche and Syntex in the relevant market;
- (b) Increasing the likelihood that Roche will unilaterally exercise market power in the relevant market;
- (c) Creating a dominant firm in the relevant market; and
- (d) Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant market.

## VI. VIOLATIONS CHARGED

11. The acquisition described in paragraph four, 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.

12. The acquisition agreement described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Roche Capital Corporation, a Panamanian corporation and an indirect, wholly-owned subsidiary of Roche Holding Ltd, a Swiss corporation (collectively referred to as "Roche"), of Syntex Corporation ("Syntex"), and it now appearing that Roche and Syntex, hereinafter sometimes referred to as "respondents," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented 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, by their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 said Acts, and the 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 sixty (60) days, now in further conformity with the procedure prescribed 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 Roche Holding Ltd. is a corporation organized, existing, and doing business, under and by virtue of the laws of Switzerland with its principal executive offices located at Grenzacherstrasse 124, Basel, Switzerland 4002. Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche Holding Ltd., is located at 340 Kingsland Street, Nutley, New Jersey.

2. Respondent Syntex is a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal executive offices located at 3401 Hillview Avenue, Palo Alto, California. Syva Company, an indirect wholly-owned subsidiary of Syntex, is headquartered at 3403 Yerba Buena Road, San Jose, California.

3. The Federal Trade Commission has jurisdiction of 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. "*Roche*" means Roche Holding Ltd., its predecessors, subsidiaries, including, without limitation Roche Capital Corporation, divisions, and groups and affiliates controlled by Roche, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. "*Syntex*" means Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syntex, their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. "*Syva*" or "*Syva Company*" means Syva Company, a Delaware corporation and an indirect wholly-owned subsidiary of Syntex Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Syva, their directors, officers, employees, agents, and representatives, and their successors and assigns.

D. "*Respondents*" means Roche and Syntex.

E. "*Commission*" means the Federal Trade Commission.

F. "*Acquisition*" means Roche's proposed acquisition of voting securities of Syntex pursuant to the Acquisition Agreement and Plan of Merger dated May 1, 1994.

G. "*Patents*" means some, all or any part of all U.S. or foreign unexpired patents and patents issued in the future based upon patent applications filed in any country as of August 1, 1994, and all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents, the applications therefor, or said patent applications.

H. "*Drugs of abuse reagent products*" means diagnostic reagent products used for drugs of abuse testing, including without limitation, reagent, control and calibrator products used to test for cannabinoids or marijuana, cocaine and cocaine metabolites, opiates, amphetamines and methamphetamines, phencyclidine, methadone, methaqualone, propoxyphene, barbiturates, benzodiazepine, lysergic acid diethylamide, ethyl alcohol, or other controlled substances for which drugs of abuse testing is conducted.

I. “*Syva Business*” means all of Syntex’s United States rights, title and interest in and to:

(1) Drugs of abuse reagent products, including but not limited to, EMIT<sup>®</sup>, EMIT<sup>®</sup> II, and all patents, production technology and know-how related to the manufacture and sale of drugs of abuse reagent products in the United States; and

(2) All of the Syva Company's assets and businesses as further delineated in Schedule A, attached hereto and made a part hereof.

II.

*It is further ordered, That:*

A. Roche shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Syva Business, and shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Syva Business; provided that Roche is not required to divest any of the Syva assets and businesses identified in Part 2 of Schedule A, if such assets and businesses are not requested by the acquirer.

B. Roche shall divest the Syva Business only to an acquirer that receives the prior approval of the Commission and that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell all of the Syva drugs of abuse reagent products, and only in a manner that has received the prior approval of the Commission. The purpose of the divestiture of the Syva Business is to ensure the continuation of the Syva Business as an ongoing, viable operation, engaged in the same business in which the Syva Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s complaint.

C. Upon reasonable notice from the acquirer to respondents, respondents shall provide such personnel, information, technical assistance, advice and training to the acquirer as is necessary to transfer technology and know-how to assist the acquirer in obtaining any necessary FDA approval for the manufacture and sale of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Such assistance



shall include reasonable consultation with knowledgeable employees of respondents and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture of the Syva drugs of abuse reagent products and any other products identified in Schedule A that are acquired pursuant to this order. Respondents shall not charge the acquirer a rate more than their own direct costs for providing such technical assistance.

D. Pending divestiture of the Syva Business, respondents shall take such actions as are necessary to maintain the viability and marketability of the Syva Business and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Syva Business except for ordinary wear and tear.

### III.

*It is further ordered, That:*

A. If Roche has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Syva Business within twelve (12) months of the date this order becomes final, to an acquirer that has made any necessary notice to or obtained any necessary approval from the FDA to manufacture and sell Syva drugs of abuse products, the Commission may appoint a trustee to divest the Syva Business.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5 (1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Roche shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a 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 trustee, pursuant to Section 5 (1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Roche to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. or B. of this order, Roche shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Syva Business.

3. Within ten (10) days after appointment of the trustee, Roche shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture, which, shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that 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 trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to Syva, or to any other relevant information, as the trustee may request. Roche shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Roche shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Roche 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 trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is admitted to the Commission, subject to Roche's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order, as appropriate; provided, however, if the 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 trustee shall divest to the acquiring entity or entities selected by Roche from among those approved by the Commission. If requested by the trustee or acquirer, Roche shall provide the acquirer(s) with the assistance required by paragraph II.C. of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of Roche, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Roche, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Roche, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Syva Business.

8. Roche shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Syva Business.

12. The trustee shall report in writing to Roche and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until Roche has divested all of the Syva Business as required by this order.

#### V.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, Roche shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

(a) Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in, the manufacture or production of drugs of abuse reagent products in the United States; or

(b) Acquire any assets used or previously used (and still suitable for use) in the manufacture and production of drugs of abuse reagent products in the United States to which sales of \$3 million or more of drugs of abuse reagent products were attributable in the year preceding such acquisition.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services acquired in the ordinary course of business or to any acquisition of a non-exclusive license to any United States patents or other form of intellectual property (excluding assets of the Syva Business).

## VI.

*It is further ordered, That:*

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with paragraphs II and III of this order, Roche 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 paragraphs II, III, and IV of this order. Roche 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 paragraphs II, III, and IV of this order, including a description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Roche 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 the divestiture.

B. One (1) year from 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 such other times as the Commission may require, Roche 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 paragraph V of this order.

## VII.

*It is further ordered, That, for the purpose of determining or securing compliance with this order, respondents shall permit any duly authorized representatives of the Commission:*

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

B. Upon five (5) days, notice to respondents, and without restraint or interference from respondents, to interview officers, directors, or employees of respondents. Officers and employees of re-

spondents whose place of employment is outside the United States shall be made available on reasonable notice.

### VIII.

*It is further ordered,* That Roche 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.

Commissioner Varney not participating.

#### SCHEDULE A

Roche shall divest all of the assets and businesses of the Syva Business pursuant to the terms of this order. The associated assets identified in paragraph I. I.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating to the development, manufacture, sale, distribution and marketing of drugs of abuse reagent products in the United States, including without limitation, the following:

#### PART I

1. All rare reagent inventory (including antibody reagent pools, hapten conjugates, and detection labels), all inventory (finished and work in process), all sources of the antibodies (whether animals or cell lines), immunogens, commodities, cross-reactants machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, technical information, management information systems, software, inventions, copyrights, trademarks, trade names, trade secrets, intellectual property, formulations, patents, technology, know-how, specifications, designs, drawings, processes, quality assurance and control data, research materials, and information, relating to the manufacture and sale of the drugs of abuse reagent products, including without limitation information relating to FDA approvals and applications for FDA approvals, re-

search and development data, data required under the Good Manufacturing Practices Guidelines, regulatory data packages, process validation, and documentation relating to Drug Enforcement Agency (“DEA”) approvals;

3. All rights, title and interest in and results of all research and development efforts by Syntex relating to improvements, developments, and variants of the Syva EMIT, EMIT II, and other drugs of abuse reagent product lines;

4. All rights, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees;

5. All rights under warranties and guarantees, express or implied;

6. All books, records and files; and

7. All items of prepaid expense.

#### PART 2

1. All assets, properties, business and goodwill, tangible and intangible, of the Syva Company in and relating primarily to the development, manufacture, sale, distribution and marketing of any in vitro diagnostic products other than drugs of abuse reagent products, including therapeutic drug monitoring reagent products, infectious disease reagent products, endocrine (thyroid) testing reagent products, and reagents used on the VISTA system (*e.g.*, hormone, cancer, anemia, protein, and hepatitis/HIV testing);

2. Inventory and storage capacity; and

3. All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits.

## APPENDIX I

## AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (“Hold Separate”) is by and between Roche Holding Ltd (“Roche”), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Grenzacherstrasse 124, Basel, Switzerland 4002; Syntex Corporation (“Syntex”), a corporation, organized, existing, and doing business under and by virtue of the laws of Panama with its principal place of business located at 3401 Hillview Avenue, Palo Alto, California; and the Federal Trade Commission (“the Commission”), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the “Parties”).

## PREMISES

*Whereas*, on May 1, 1994, Roche entered into an Acquisition Agreement and Plan of Merger with Syntex Corporation (“Syntex”) to acquire all the voting stock of Syntex (hereinafter “Acquisition”); and

*Whereas*, Syntex with its principal office and place of business located at 3401 Hillview Avenue, Palo Alto, California, manufactures and markets through its indirect wholly-owned subsidiary, the Syva Company, among other things, drugs of abuse reagent products; and

*Whereas*, Hoffmann-La Roche Inc., an indirect wholly-owned subsidiary of Roche, with its principal office and place of business located at 340 Kingsland Street, Nutley, New Jersey, through its subsidiary Roche Diagnostic Systems, Inc., manufacturing and markets, among other things, drugs of abuse reagent products; and

*Whereas*, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

*Whereas*, if the Commission accepts the Agreement Containing Consent Order (“Consent Order”), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

*Whereas*, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Syva Business as defined in paragraph I. of the Consent Order during the period prior to the final acceptance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of the Syva Business and the Commission’s right to have the Syva Business continue as a viable competitor; and

*Whereas*, the purpose of the Hold Separate and the Consent Order is:



1. To preserve the Syva Business as a viable, independent business pending its divestiture as a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition, and
3. To preserve the Syva Business as an ongoing and competitive entity engaged in the same business in which it is presently employed until divestiture is achieved; and

*Whereas*, Roche and Syntex's entering into this Hold Separate shall in no way be construed as an admission by Roche and Syntex that the Acquisition is illegal; and

*Whereas*, Roche and Syntex understand that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

*Now, therefore*, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from Roche with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate, the Agreement Containing Consent Order to which it is annexed and made a part thereof and the Order, once it becomes final, and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Syva Business pursuant to the Consent Order, as follows:

1. Roche and Syntex agree to execute and be bound by the Consent Order.
2. Roche and Syntex agree that from the date this Hold Separate is accepted until the earliest of the time listed in subparagraphs 2.a. - 2.b., they will comply with the provisions of paragraph 3. of this Hold Separate:
  - a. Three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules;
  - b. The time that the divestiture obligations required by the Consent Order are completed.
3. To ensure the complete independence and viability of the Syva Business and to assure that no competitive information is exchanged between the Syva Business and Roche, Roche shall hold the Syva Business as it is presently constituted separate and apart on the following terms and conditions:
  - a. The Syva Business shall be held separate and apart and shall be operated independently of Syntex (meaning here and hereinafter, Syntex excluding the Syva Business and excluding all personnel connected with the Syva Business as of the date this Agreement was signed) and Roche (meaning here and hereinafter, Roche excluding Syntex and excluding all personnel connected with Syntex as of the date this Agreement was signed) except to the extent that Syntex or Roche must exercise

direction and control over the Syva Business to assure compliance with this Agreement or the Consent Order.

b. Syntex personnel connected with Syva or providing support services to Syva as of the date of this Agreement was signed may continue, as employees of Syntex, to provide such services as they are currently providing to Syva. Such Syntex personnel must retain and maintain all material confidential information relating to the Syva 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 other person whose employment involves any other Roche business, including the drugs of abuse reagent products business, therapeutic drug monitoring business and the Roche clinical laboratories business.

c. Roche and Syntex shall elect a five-person board of directors for the Syva Company ("New Board"). The New Board shall consist of the Syva Company President and General Manager, Richard Bastiani, the Syva Company Senior Vice-President of Marketing and Sales, David Oxlade, and the Syva Company Vice - President of Finance, Wilbert Lee, as of the date of this Hold Separate (provided they agree, or comparable, knowledgeable persons among the managers of Syva Company independent of Roche); the Chief Financial Officer of Roche whose responsibilities with Roche do not involve direct management of Roche's drugs of abuse, therapeutic drug monitoring or clinical laboratories businesses, Henri B. Meier (provided he agrees, or a comparable, knowledgeable person among the financial managers of Roche); and the Chairman of Syntex, Paul Freiman (provided he agrees, or a comparable, knowledgeable person among the managers of Syntex). The Chairman of the New Board shall be Richard Bastiani (provided he agrees, or a comparable, knowledgeable person among the managers of Syva), who shall remain independent of Roche and competent to assure the continued viability and competitiveness of the Syva Company. Except for the Roche employee serving on the New Board, Roche shall not permit any director, officer, employee, or agent of Roche also to be a director, officer, employee of the Syva Company. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate.

d. Roche shall not exercise direction or control over, or influence directly or indirectly, the Syva Business, the New Board, or any of its operations or businesses; provided, however, that Roche may exercise only such direction and control over the Syva Business as is necessary to assure compliance with this Hold Separate, the order and with all applicable laws.

e. Roche and Syntex shall maintain the marketability, viability, and competitiveness of the Syva Business, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business they may have to divest except in the ordinary course of business and except for ordinary wear and tear, and they shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Syva Business.

f. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the Consent Order or negotiating agreements to divest assets, Roche and Syntex shall not receive or have access to, or the use of, any material

confidential information of the Syva Business or the activities of the New Board not in the public domain, nor shall the Syva Company, or the New Board, receive or have access to, or the use of, any material confidential information about the Roche drugs of abuse reagent business or the activities of Roche in managing the drugs of abuse reagent business not in the public domain. Roche and Syntex may receive on a regular basis from the Syva Company aggregate financial information necessary and essential to allow Roche and Syntex to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Roche from sources other than the Syva Company or the New Board and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

g. Except as is permitted by this Hold Separate, the director of the Syva Company appointed by Roche who is also a director, officer, agent, or employee of Roche ("Roche New Board member"), shall not receive any Syva Business material confidential information and shall not disclose any such information obtained through his or her involvement with the Syva Business to Roche or use it to obtain any advantage for Roche. The Roche New Board member shall participate in matters that come before the New Board only for the limited purposes of considering any capital investment of over \$150,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.i, and carrying out Roche's responsibilities under the Hold Separate and the Order. Except as permitted by the Hold Separate, the Roche New Board member shall not participate in any matter, or attempt to influence the votes of other directors on the New Board with respect to matters that would involve a conflict of interest between Roche and the Syva Business. Meetings of the New Board during the term of the Hold Separate shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate.

h. The Syva Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Syva Business, which employees shall be the Syva Company employees and may also be hired from sources other than the Syva Company. Each director, officer, and management employee of the Syva Company shall execute a confidentiality agreement prohibiting the disclosure of any Syva Business confidential information.

i. All material transactions, out of the ordinary course of business and not precluded by paragraph 3 hereof, shall be subject to a majority vote of the New Board.

j. Roche shall not change the composition of the New Board unless the Chairman of the New Board consents. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Roche to appoint replacement members to the New Board in the same manner as provided in paragraph 3.c. of this Hold Separate. Roche shall not change the composition of the management of the Syva Company except that the New Board shall have the power to remove management employees for cause.

k. If the Chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c.

l. Roche shall circulate to its management employees of Roche drugs of abuse therapeutic drug monitoring and Roche clinical laboratories businesses and appropriately display a notice of this Hold Separate and Consent Order in the form attached hereto as Attachment A.

m. Roche and Syntex shall cause the Syva Business to continue to expend funds for the advertising and trade promotion of the Syva Business at levels not lower than those budgeted for 1994 and 1995, and shall increase such spending as deemed reasonably necessary by the New Board in light of competitive conditions. If necessary, Roche and Syntex shall provide the Syva Business with any funds to accomplish the foregoing. Syntex shall continue to provide to the Syva Business such support services as it provided prior to the Acquisition to the Syva Company.

n. All earnings and profits of the Syva Business shall be retained separately by the Syva Business. If necessary, Roche shall provide the Syva Business with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of the Hold Separate.

o. The New Board shall serve at the cost and expense of Roche. Roche shall indemnify the New Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the New Board directors.

p. The New Board shall have access to and be informed about all companies who inquire about, seek or propose to buy the Syva Business.

q. The New Board shall report in writing to the Commission every thirty (30) days concerning the New Board's efforts to accomplish the purposes of this Hold Separate.

4. Should the Federal Trade Commission seek in any proceeding to compel Roche to divest itself of the Syva Business or any additional assets, as provided in the proposed order, or to seek any other equitable relief, Roche shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Roche shall also waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Roche made to its General Counsel, Roche and Syntex shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Roche or Syntex and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Roche or Syntex relating to compliance with this Hold Separate;

b. Upon five (5) days' notice to Roche or Syntex, and without restraint or interference from it, to interview officers or employees of Roche or Syntex, who may have counsel present, regarding any such matters.

6. [Deleted].

7. This Hold Separate shall not be binding until approved by the Commission.

## ATTACHMENT A

NOTICE OF DIVESTITURE AND  
REQUIREMENT FOR CONFIDENTIALITY

Roche Holding Ltd (“Roche”) and Syntex Corporation (“Syntex”) have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission (“Commission”) relating to the divestiture of the Syva Business. Until after the Commission’s Order becomes final and the Syva Business is divested, the Syva Business must be managed and maintained as a separate, ongoing business, independent of all other Roche businesses and independent of the Roche drugs of abuse business. All competitive information relating to the Syva Business, including without limitation the drugs of abuse business, must be retained and maintained by the persons involved in the Syva 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 Roche business, including the drugs of abuse business, therapeutic drug monitoring business and the Roche Biomedical Laboratories business. Similarly, all such persons involved in the Roche therapeutic drug monitoring business, drugs of abuse business and the Roche Biomedical Laboratories shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment involves the Syva Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the Consent Order, may subject Roche and Syntex to civil penalties and other relief as provided by law.

## IN THE MATTER OF

## HAYES MICROCOMPUTER PRODUCTS, INC.

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

*Docket C-3543. Complaint, Nov. 28, 1994--Decision, Nov. 28, 1994*

This consent order prohibits, among other things, a Georgia manufacturer and distributor of computer communications products from making representations for any of its modem related products regarding the risk of data loss or data destruction, or data transmission problems due to any escape method, unless the respondent possesses and relies upon competent and reliable substantiating evidence.

*Appearances*

For the Commission: *Linda K. Badger and Kerry O'Brien.*

For the respondent: *James Hawkins, Dennis, Goldstein, Frazer & Murphy, Atlanta, GA.*

## COMPLAINT

The Federal Trade Commission having reason to believe that Hayes Microcomputer Products, Inc. ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Hayes Microcomputer Products, Inc., is a Georgia corporation, with its principal office or place of business at 5835 Peachtree Corners East, Norcross, Georgia.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed products for computer communications, including modems, local area networks, and software. One of respondent's products is a modem with an "escape sequence." An escape sequence is a mechanism by which modems end a data transmission. Respondent patented this product under the title, "Modem with Improved Escape Sequence Mechanism to Prevent Escape in Response to Random Occurrence of Escape Character in Transmitted Data." The escape sequence mechanism defined in this

patent is known as the “Improved Escape Sequence with Guard Time.”

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Improved Escape Sequence with Guard Time, including but not necessarily limited to the attached Exhibits A-B. These advertisements contain the following statements and depictions:

A. Tick, Tick, Tick. Boom! You’re Dead.

A time bomb may be lurking inside your modem. A fatal flaw that can paralyze the data you’re transmitting, causing untold chaos to the flow of accurate data you need.

You see, some modem manufacturers decided to turn their backs on proven modem technology, and on you. They haven’t told you about the dangers because the only solution for this crisis is to replace their modems. Fortunately, Hayes can give you the knowledge to locate the bomb and prevent the purchase of another one.

**HOW TO UNCOVER THE BOMB.** We’ve developed a FREE test kit that’s extremely easy to run on your PC or Mac. The kit spells out the dangers completely and accurately tracks down their fatally flawed component. . . .

**THE ONLY WAY TO BE COMPLETELY PROTECTED.** You can protect your data, your company, and even your job by purchasing modems that incorporate licensed technology from Hayes. . . .

The bomb is armed. The clock is ticking. Where will you be after the bomb goes off? Contact Hayes today for your FREE test kit and stop data transmission disaster before it strikes. (Exhibit A).

B. It’s Time To Find The Bomb.

The Bomb.

By now, you know that a time bomb may be lurking inside your modem. It’s there because some modems are using unreliable technology. This fatal flaw can paralyze the data you’re transmitting because this unreliable escape sequence can fail you at any time.

The Solution.

This bomb is so dangerous that the best solution for this crisis is to replace these modems. . . .

Improved Escape Sequence with Guard Time.

. . . . To be reliable, it is important that a modem not escape if the characters used in the escape sequence appear at any time in the data being transmitted.

Time Independent Escape Sequence.

If you buy a TIES modem, you might assume that the modem is Hayes compatible because it uses AT commands, only to learn later that the modem might have been designed with a serious reliability problem. . . .

How to test your modem for TIES.

If the file transfer is unexpectedly interrupted or if the modem reverts to Command mode you are using a modem that implements the unreliable TIES procedure. (Exhibit B).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-B, respondent has represented, directly or by implication, that:

A. Because a modem does not incorporate the Improved Escape Sequence with Guard Time, the use of that modem creates a substantial risk of data destruction.

B. When incorporated in modems, the "Time Independent Escape Sequence" ("TIES") creates a substantial risk of data transmission failure.

C. The Improved Escape Sequence with Guard Time is the only escape method that does not create a substantial risk of data transmission failure.

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time entails a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard Time.

PAR. 6. In truth and in fact:

A. A modem's failure to incorporate the Improved Escape Sequence with Guard Time does not create a substantial risk of data destruction.

B. When incorporated in modems, TIES does not create a substantial risk of data transmission failure.

C. The Improved Escape Sequence with Guard Time is not the only escape method that does not create a substantial risk of data transmission failure.

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time does not entail a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard



Time. In truth and in fact, other methods of escape can be used, or the escape sequence can be disabled or reset.

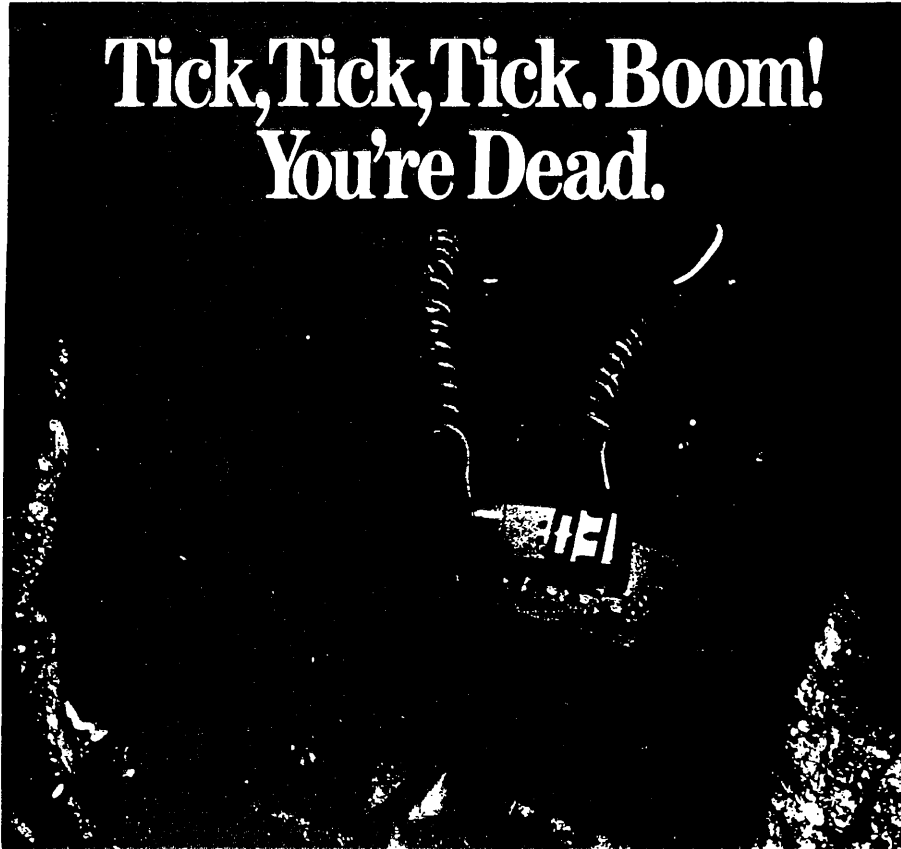
Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-B, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts or practices of respondent 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.

EXHIBIT A



A time bomb may be lurking inside your modem. A fatal flaw that can paralyze the data you're transmitting, causing untold chaos to the flow of accurate data you need.

You see, some modem manufacturers decided to turn their backs on proven modem technology, and on you. They haven't told you about the dangers because the only solution for this crisis is to replace their modems. Fortunately, Hayes\* can give you the knowledge to locate the bomb and prevent the purchase of another one.

**HOW TO UNCOVER THE BOMB.** We've developed a FREE test kit that's extremely easy to run on your PC or Mac. The kit spells out the dangers completely and accurately tracks down their fatally flawed component. To order your FREE kit, just call 800-846-8388, FAX your request to 404-729-6650, or download the test files from the Hayes BBS.

**THE ONLY WAY TO BE COMPLETELY PROTECTED.** You can protect your data, your company,

and even your job by purchasing modems that incorporate licensed technology from Hayes. Modems using complete solution Rockwell

chip sets are licensed as well as most modems of direct licensees of Hayes U.S. Patent 4,549,302. So look for the symbol. It means your modem uses the industry-standard escape sequence technology that has established its reliability for over a decade. Of course, all modems and ISDN products manufactured by Hayes use this technology as well.

The bomb is armed. The clock is ticking. Where will you be after the bomb goes off? Contact Hayes today for your FREE test kit and stop data transmission disaster before it strikes.



Why settle for anything less? Hayes products have the computer world talking. More than ever.

Go On Line with Hayes BBS, call 800-874-2837 or 404-446-6336  
© 1991 Hayes Microcomputer Products, Inc., P.O. Box 9880, Atlanta, GA 30344

EXHIBIT A

EXHIBIT B



## EXHIBIT B

# It's Time To Find The Bomb.

## The Bomb.

By now, you know that a time bomb may be lurking inside your modem. It's there because some modems are using unreliable technology. This fatal flaw can paralyze the data you're transmitting because this unreliable escape sequence can fail you at any time.

## The Test.

Fortunately, this free Hayes' test kit will give you the knowledge to locate the fatally flawed component and help you avoid purchasing another one. The test data file is extremely easy to run on your computer, just follow the instructions on the back of this flyer.

## The Solution.

This bomb is so dangerous that the best solution for this crisis is to replace these modems. You can protect your data transmission, your company, and even your job by purchasing modems that incorporate licensed technology from Hayes. Modems using complete solution Rockwell® chip sets are licensed, as well as most modems of direct licensees of Hayes U.S. Patent 4,549,302. So look for this symbol. It means your modem uses the industry standard escape sequence technology that has established its reliability for over a decade. Of course, all modems and ISDN products manufactured by Hayes use this technology.



## EXHIBIT B

### What is a Modem Escape Sequence?

A modem escape sequence allows a modem to change or 'escape' from the receive/transmit mode of operation to the command mode of operation. Prior to 1981, modems used various escape sequences, such as the Eaton escape sequence, but these escape sequences were unreliable in actual use because they could not prevent the modem from unexpectedly escaping into command mode when the data being transmitted contained the escape code.

### Improved Escape Sequence with Guard Time.

The Improved Escape Sequence with Guard Time was first used in a Hayes modem in 1981. The particular improvement allows a modem to escape from the receive/transmit mode of operation to the command mode of operation in a very reliable manner that does not depend on the probability of character occurrence in the data. To be reliable, it is important that a modem not escape if the characters used in the escape sequence appear at any time in the data being transmitted.

Dale Heatherington was not satisfied with an escape mechanism which caused some data to be unsendable because the modem would not be truly transparent to some data. He solved the problem by choosing predetermined characters for the escape code (such as `+++`) and surrounding them on either side by a predetermined guard time to alert the modem that the sequence is distinguished from a typical data string transmission.

Dale Heatherington redefined the problem, and his resulting invention led to U.S. Patent # 4,549,302 and corresponding patents in a number of countries. Hayes has licensed many modem manufacturers to allow this technology to be readily available to the market. Currently, manufacturers such as Amstrad, Compaq, GPT, IBM, Megahertz, OKI, Practical Peripherals, US Robotics and others license this technology from Hayes and have provided reliable escape mechanisms in their products.

### Time Independent Escape Sequence.

A new escape sequence, the so-called Time Independent Escape Sequence (TIES), has recently appeared on the market. TIES is a non-standard escape sequence which is definitely not the same as the Improved Escape Sequence with Guard Time that was first used in a Hayes modem and is now used as the de facto standard for reliable modem operation by modem manufacturers worldwide.

If you buy a TIES modem, you might assume that the modem is Hayes compatible because it uses AT commands, only to learn later that the modem might have been designed with a serious reliability problem. Under certain system configurations, the modem could be reset or reconfigured by the remote modem, and when a file is being transmitted, the modem may unexpectedly escape into command mode, making it impossible to transmit that particular file. Each time you try to send the file, the same outcome would occur.

By re-introducing the faulty escape problem in the TIES technology, manufacturers would be doing a great disservice to you. Furthermore, because manufacturers of TIES modems do not publicize that the modem uses TIES, you probably would not know that the modem uses the TIES technology until you experience an unexpected interruption of your data transmission.

### How do I know if my modem supports TIES?

We've developed the test data file enclosed (TIESTEST.BIN) that can assist you in determining if your modem or the modems which you are evaluating support TIES. If you transfer the TIESTEST.BIN file using XMODEM or YMODEM and your modem supports TIES, the file transfer will unexpectedly abort at a certain point or the modem will revert to Command State where it will not transmit data until an appropriate AT command is typed.

## EXHIBIT B

Unlike the Improved Escape Sequence with Guard Time, TIES will cause a file transfer to abort if certain sequences of characters are present. The simplest TIES default escape sequence is "→AT<CR>" where <CR> represents "carriage return." In TIES there are no required guard times. Other "poison sequences" might have a lower case AT ("at") or be of the form "→AT<string><CR>", where <string> is any valid AT command.

The particular "poison sequences" for a TIES modem depend on whether the communications software changes the value of the "escape character" (the →) and the end-of-command character (the <CR>). The TIESTEST.BIN file includes all possible sequences of the form "→xxyATy" where the ASCII value for x is varied from 0 to 127 and the ASCII value for y is varied from 0 to 127. This results in 16,384 sequences which are each repeated twice to be sure the protocol does not interrupt the character sequence.

A shorter file, TIESQUIT.BIN, is also available and will detect the existence of TIES if any Hayes Smartcom communications software is used. It will also detect TIES with any other XMODEM or YMODEM file transfer software that does not reprogram the end-of-command character (most widely used communications software fall into this category). This shorter file will upload in 6 to 12 seconds at 2400 bps. (Note: this is a test for TIES escape mechanism only. It does not test for Hayes Improved Escape Sequence with Guard Time in any way).

### How to test your modem for TIES.

To test a modem, transfer the TIESTEST.BIN file on this disk to another system or the Hayes BBS using either XMODEM or YMODEM file transfer protocol.

To use the Hayes BBS, call *OnLine with Hayes* in the U.S. at 404/446-6336 or 800/874-2837. Register on the BBS and then select [T] TIES Modem Test Area from the Main Menu. You may then select: 1. What is TIES?, 2. Who needs to perform this test?, 3. Download test file, 4. Upload file/Perform test, and 5. Ask a question about TIES. Set your data communications software to use XMODEM or YMODEM and select 4 from the TIES Modem Test Area menu to perform the test. Tell the BBS which protocol you selected and send the TIESTEST.BIN file.

If the file transfer is unexpectedly interrupted or if the modem reverts to Command mode you are using a modem that implements the unreliable TIES procedure.

### Remember, if you are using a Hayes modem you do *not* have to perform this test.

If you need assistance with the test or have any questions or comments, please contact Hayes Customer Service at 800/846-8388.

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Why settle for anything less?  
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More than ever.

## DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent that the law has been violated as alleged in such complaint, 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 respondent has 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 sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed 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 Hayes Microcomputer Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 5835 Peachtree Corners East, in the City of Norcross, State of Georgia.

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

## DEFINITIONS

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

A. The term "*Improved Escape Sequence with Guard Time*" means the escape method technology described, among other things, in United States Patent Number 4,549,302, titled as "Modem With Improved Escape Sequence With Guard Time Mechanism."

B. The term "*Time Independent Escape Sequence*," or "*TIES*," means an escape sequence consisting of three escape characters (*e.g.*, "+++"), followed by a valid AT command, which can be followed by additional AT commands, and ended with another character, typically a carriage return.

C. The term "*modem-related product*" means any modem, any component of any modem, or any hardware or software used in the operation of any modem.

## I.

*It is ordered*, That respondent, Hayes Microcomputer Products, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of products containing the Improved Escape Sequence with Guard Time, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Because a modem does not incorporate the Improved Escape Sequence with Guard Time, the use of that modem creates a substantial risk of data destruction;

B. When incorporated in modems, the "Time Independent Escape Sequence" ("TIES") creates a substantial risk of data transmission failure;



C. The Improved Escape Sequence with Guard Time is the only escape method that does not create a substantial risk of data transmission failure; or

D. The use of any modem that does not incorporate the Improved Escape Sequence with Guard Time entails a data transmission problem that can be solved only by replacing it with a modem that incorporates the Improved Escape Sequence with Guard Time;

unless such representation is true, and at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. For purposes of this order, "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.

## II.

*It is further ordered,* That respondent, Hayes Microcomputer Products, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any modem-related product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the risk of experiencing data destruction, data loss or data transmission problems due to any escape method, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

## III.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respon-

dent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

#### IV.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the respondent that may affect compliance obligations under this order such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation(s).

#### V.

*It is further ordered,* That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, to all company executives, and to all marketing and sales managers; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, independent contractors, and employees.

#### VI.

*It is further ordered,* That respondent shall, within sixty (60) days from the date of service of this order upon it, and at such other times as the 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.

Commissioner Varney not participating.

Modifying Order

118 F.T.C.

IN THE MATTER OF

## THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION  
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket 9207. Final Order, June 13, 1994 -- Modifying Order, Dec. 5, 1994*

This order reopens the proceeding and modifies the Commission's final order issued on June 13, 1994, that required the respondent, for ten years, to obtain Commission approval before acquiring certain brand-name soft drink concentrate manufacturers, by eliminating a provision which had expressly defined Coca-Cola Enterprises, Inc. as a Coca-Cola Company subsidiary or affiliate subject to this prior approval requirement.

## ORDER REOPENING AND MODIFYING FINAL ORDER

The Commission issued a final order in this proceeding on June 13, 1994, and respondent The Coca-Cola Company -- and Coca-Cola Enterprises, Inc. -- filed petitions for review of that order in the United States Court of Appeals for the District of Columbia Circuit on August 26, 1994. Coca-Cola Enterprises Inc. was not a party to the administrative proceeding and there is no need that it be singled out in the order for identification as a subsidiary or affiliate of The Coca-Cola Company.

Accordingly, the Commission, having determined *sua sponte* to reopen this proceeding and modify Part I.A of the final order, pursuant to Commission Rule 3.72 (a).

*It is ordered*, That the final order in this matter be, and it hereby is, modified to delete the following sentence from Part I.A of the final order:

For purposes of this order, Coca-Cola Enterprises Inc. is a subsidiary or affiliate of Coca-Cola.

Chairman Steiger and Commissioner Varney acting pursuant to delegated authority, with Commissioner Azcuenaga and Commissioner Starek recused.<sup>1</sup>

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<sup>1</sup> Effective November 30, 1994, the Commission delegated its functions in certain circumstances when no quorum is available for the transaction of business, so that the Commissioner or Commissioners who are available for quorum purposes may act on behalf of the Commission. *See 59 Fed. Reg.* 61336 (Nov. 30, 1994), Commissioner Azcuenaga abstaining in a separate statement.

Complaint

118 F.T.C.

IN THE MATTER OF

## COLUMBIA/HCA HEALTHCARE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION  
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-3544. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994*

This consent order permits, among other things, the hospital company to complete its acquisition of Medical Care America, but requires it to divest the Alaska Surgery Center within twelve months to a Commission-approved entity. If the transaction is not completed in the designated time frame, the respondent is required to permit the Commission to appoint a trustee. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring an interest worth more than \$1 million in any outpatient surgical services facility in Anchorage, Alaska, and before selling such an interest to any entity that operates an outpatient surgical services facility in Anchorage, Alaska.

*Appearances*

For the Commission: *Mark J. Horoschak* and *Philip Eisenstat*.

For the respondent: *Ky P. Ewing, Jr., Vinson & Elkins*,  
Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Columbia/HCA Healthcare Corporation ("Columbia/HCA"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Columbia/HCA will acquire Medical Care America, Inc. ("Medical Care America"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; 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; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11(b) of the

Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

#### DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

a. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician’s, other healthcare professional’s, or group practice’s office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

b. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

c. “*Acute care hospital*” means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

#### THE PARTIES TO THE PROPOSED ACQUISITION

PAR. 2. Columbia/HCA is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Ken-

tucky. Columbia/HCA and/or its subsidiaries own and operate the Alaska Regional Hospital in Anchorage, Alaska.

PAR. 3. Medical Care America is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 13455 Noel Road, Dallas, Texas. Medical Care America, through a limited partnership, owns Alaska Surgery Center, in Anchorage, Alaska.

#### JURISDICTION

PAR. 4. Columbia/HCA and Medical Care America are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia/HCA and Medical Care America are, and at all times relevant herein, have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### THE PROPOSED ACQUISITION

PAR. 5. On or about May 24, 1994, Columbia/HCA and Medical Care America entered into an agreement whereby Columbia/HCA will acquire all the stock of Medical Care America. The total value of the Medical Care America stock to be acquired by Columbia/HCA is approximately \$692 million.

#### NATURE OF TRADE AND COMMERCE

PAR. 6. For the purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of outpatient surgery services and/or any narrower group of services contained therein.

PAR. 7. For the purposes of this complaint, the relevant section of the country is the municipality of Anchorage in Alaska.

#### MARKET STRUCTURE

PAR. 8. The relevant market -- *i.e.*, the relevant line of commerce in the relevant section of the country -- is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by four-firm concentration ratios.

## ENTRY CONDITIONS

PAR. 9. Entry into the relevant market is difficult. In particular, potential new entrants must obtain a certificate of need from the State of Alaska in order to establish a new outpatient surgery facility in the relevant section of the country. It is unlikely that a certificate of need can be obtained for a new outpatient surgery facility in Anchorage within two years.

## COMPETITION

PAR. 10. In the relevant market, Columbia/HCA and Medical Care America are actual and potential competitors.

## EFFECT

PAR. 11. The effect of the aforesaid acquisition may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Columbia/HCA's and Medical Care America's outpatient surgery facilities in the relevant market;

(b) It would significantly increase the already high level of concentration in the relevant market;

(c) It would eliminate Medical Care America's outpatient surgery facility from the relevant market as a substantial, independent competitive force;

(d) It may increase the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(e) It may deny patients, physicians, third-party payers, and other consumers of outpatient surgery services in the relevant market the benefits of free and open competition based on price, quality, and service.

## VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.



PAR. 13. The acquisition described in paragraph five, 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.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation into the proposed acquisition of Medical Care America, Inc. by Columbia/HCA Healthcare Corporation ("Columbia/HCA"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with 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; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 respondent that the law has been violated as alleged in such complaint, 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 respondent has violated the said Acts, 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 sixty (60) days, now in further conformity with the procedure prescribed 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 Columbia/HCA 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 at 201 West Main Street, Louisville, Kentucky.

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*” or “*Columbia/HCA*” means Columbia/HCA Healthcare Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. The “*Acquisition*” means the acquisition by Columbia/HCA of Medical Care America, Inc., including the Alaska Surgery Center.

C. “*Outpatient surgery facility*” means a health facility which has as a function the provision of outpatient surgery services. Outpatient surgery facilities include general acute care hospitals that offer outpatient surgery services, as well as ambulatory surgery centers that are not part of a general acute care hospital. The term “outpatient surgery facility” shall not include a physician's, other healthcare professional's, or group practice's office or offices that provide outpatient surgery services for use solely by that physician, healthcare professional, or group practice, so long as such facility is not licensed as an ambulatory surgical facility by the State of Alaska.

D. “*Outpatient surgery services*” means facilities, personnel, and tools and equipment used by doctors in performing surgical procedures on patients who are not confined for more than 23 hours in an acute care hospital or other facility for recovery following the surgery. Outpatient surgery services include operating rooms, recovery rooms, surgical tools and devices, nurses, anesthesia equipment and personnel.

E. To “*operate an outpatient surgery facility*” means to own, lease, manage, or otherwise control or direct the operations of an outpatient surgery facility, directly or indirectly.

F. “*Affiliate*” means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

G. “*Person*” means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

H. “*Commission*” means the Federal Trade Commission.

I. “*Schedule A Assets*” means assets acquired by the respondent and listed on the attached Schedule A.

J. “*Viability and competitiveness*” means that the Schedule A Assets are capable of functioning independently and competitively.

K. “*Assets and Businesses*” include, but are not limited to, all assets, properties, businesses, rights, privileges, contractual interests, licenses, and goodwill of whatever nature, tangible and intangible, including, without limitation, the following:

1. All real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), together with all buildings, improvements and fixtures located thereon, all construction in progress thereat, all appurtenances thereto, and all licenses and permits related thereto (collectively, the “Real Property”);

2. All contracts and agreements with physicians, other health care providers, unions, third party payors, HMOs, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees (collectively, the “contracts”);

3. All machinery, equipment, fixtures, vehicles, furniture, inventories, and supplies (other than such inventories and supplies as are used in the ordinary course of business during the time that Columbia/HCA owns the assets) (collectively, the “Personal Property”);

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know how, specifications, designs, drawings, processes, and quality control data (collectively, the “Intangible Personal Property”);

5. All books, records and files, excluding, however, the corporate minute books and tax records of Columbia/HCA and its Affiliates; and

6. All prepaid expenses.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Assets, and shall also divest such additional assets and businesses ancillary to the Schedule A Assets and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Schedule A Assets.

B. Respondent shall divest the Schedule A Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Assets is to ensure the continuation of the Schedule A Assets as an ongoing, viable outpatient surgery facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

D. Pending divestiture of the Schedule A Assets, respondent shall take such actions as are necessary to maintain the viability and competitiveness and the marketability of the Schedule A Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Assets, except for ordinary wear and tear.

E. A condition of approval by the Commission of the divestiture shall be a written agreement by the acquirer of the Schedule A Assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, the Schedule A Assets to any person who operates, or will operate immediately following the sale, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

## III.

*It is further ordered, That:*

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Assets, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Schedule A Assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, the respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The 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 trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that 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 trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Schedule A Assets, or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent 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 trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II of this order; provided, however, if the 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 trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The 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 trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commis-

sion and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Schedule A Assets.

12. The trustee shall report in writing to the respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska;

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

Provided, however, that such prior approval shall not be required for:

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

## V.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without



providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other outpatient surgery facility in the Municipality of Anchorage, Alaska, for the joint establishment or operation of any new outpatient surgery facility, or part thereof, in the Municipality of Anchorage, Alaska. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations (as amended), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period for said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of service of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by outpatient surgery facilities not operated by respondent does not exceed one million dollars (\$1,000,000);

2. The service, facility, or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or

3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior

approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

#### VI.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any substantial part of any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondent shall require as a condition precedent to the acquisition.

#### VII.

*It is further ordered,* That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, the 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 paragraph II of 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 paragraph II of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall also 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.

B. One (1) year from 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 shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with paragraphs IV, V, and VI of this order.

## VIII.

*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.

## IX.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, the 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, and other records and documents in the possession or under the control of the respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

Commissioner Varney not participating.

## SCHEDULE A

The assets to be divested ("Schedule A Assets") shall consist of, without limitation, all Assets and Businesses relating to the Alaska Surgery Center, which were acquired by Columbia/HCA pursuant to the Acquisition (including all improvements, additions and enhancements made to such assets prior to divestiture).

\* \* \*

*It is further provided,* That to the extent that any of the contracts, warranties with respect to Personal Property, licenses or other interests in the Intangible Personal Property, or other Schedule A Assets:

(A) Also applies to facilities or operations other than those included in the Schedule A Assets, then during the period (the "Con-

tract Period”) beginning on the closing date of the Acquisition and ending on the earlier of (1) the expiration of the term of the given contract or other right and (2) the second anniversary of Columbia/HCA’s divestiture of the Schedule A Assets, Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to cause the services, property, or other benefits provided or made available under such a contract or other Schedule A Asset to continue to be available to the owner or acquirer of the Schedule A Assets on terms and conditions substantially similar to those presently in effect; or

(B) Requires the consent of a third party in order to transfer or assign such Contract or other Schedule A Asset, then Columbia/HCA, at the request of the owner or acquirer of the Schedule A Assets, shall use its reasonable best efforts to obtain such consent and, if such consent cannot be obtained, to cooperate in any reasonable arrangement with the owner or acquirer of the Schedule A Assets designed to provide to such owner or acquirer the benefits of the given contract or other Schedule A Asset during the Contract Period on terms and conditions substantially similar to those presently in effect.

Commissioner Varney not participating.

## APPENDIX I

## AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (“Agreement”) is by and between Columbia/HCA Healthcare Corporation (“respondent” or “Columbia/HCA”), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky; and the Federal Trade Commission (“Commission”), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

*Whereas*, on or about May 23, 1994, Columbia agreed to acquire all of the stock of Medical Care America, Inc. (“Medical Care America”), and thereby acquire Alaska Surgery Center, an outpatient surgical facility in Anchorage, Alaska, and other Medical Care America assets, including 95 other outpatient surgical facilities (the “Acquisition”); and

*Whereas*, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

*Whereas*, if the Commission accepts the attached Agreement Containing Consent Order (“Consent Order”), which would require the divestiture of certain assets listed in Schedule A of the Consent Order (“Schedule A Assets”), including the Alaska Surgery Center in Anchorage, Alaska, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

*Whereas*, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Schedule A Assets during the period prior to the final acceptance and issuance of the Consent Order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of the Schedule A Assets as described in paragraph II of the Consent Order and the Commission’s right to have Alaska Surgery Center continue as a viable independent outpatient surgical facility; and

*Whereas*, the purpose of this Agreement and the Consent Order is to:

- (i) Preserve Alaska Surgical Center as a viable independent outpatient surgical facility pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

*Whereas*, respondent’s entering into this Agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

*Whereas*, respondent understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the anti-trust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

*Now, therefore*, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Schedule A Assets pursuant to the Consent Order, as follows:

1. Respondent agrees to execute the Agreement Containing Consent Order and be bound by the attached Consent Order.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Order has been completed.

3. Respondent will hold the Schedule A Assets as they are presently constituted separate and apart on the following terms and conditions:

a. The Schedule A Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, Columbia/HCA excluding the Schedule A Assets), except to the extent that respondent must exercise direction and control over the Schedule A Assets to assure compliance with this Agreement or the Consent Order, and except as otherwise provided in this Agreement.

b. Prior to, or simultaneously with its acquisition of the stock of Medical Care America, respondent shall organize a distinct and separate legal entity, either a corporation, limited liability company, or general or limited partnership ("New Company") and adopt constituent documents for the New Company that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer all ownership and control of all Schedule A Assets to the New Company.

c. The board of directors of the New Company, or, in the event respondent organizes an entity other than a corporation, the governing body of the entity ("New Company Board") shall have five members. Respondent may elect the members of the New Company Board; provided, however, that the New Company Board shall include no more than two members who are a director, officer, employee, or agent of respondent ("the respondent's New Company Board member(s)"). The New Company Board shall include a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the Schedule A Assets. Meetings of the New Company Board during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A Assets, the independent Chairman of the Board of the New Company, the New Company Board, or the New Company or any of its operations or businesses; provided, however, that respondent may exercise only such direction and control over the New Company as is necessary to assure compliance with this Agreement or the Consent Order.

e. Respondent shall maintain the viability and competitiveness and the marketability of the Schedule A Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their viability and competitiveness or their marketability.

f. Except for the respondent's New Company Board members, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the New Company.

g. The New Company shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A Assets, which employees shall be selected from Alaska Surgery Center's existing employee base and may also be hired from sources other than Alaska Surgery Center.

h. With the exception of the respondent's New Company Board Members, respondent shall not change the composition of the New Company Board unless the independent chairman consents. The independent chairman shall have power to remove members of the New Company Board for cause. Respondent shall not change the composition of the management of the New Company except that the New Company Board shall have the power to remove management employees for cause.

i. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this Agreement.

j. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, or negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any material confidential information not in the public domain about the New Company or the activities of the New Company Board. Nor shall the New Company or the New Company Board receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent and relating to respondent's outpatient surgical facilities in Anchorage, Alaska. Respondent may receive on a regular basis aggregate financial information relating to the New Company necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondent from sources other than the New Company, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

k. Except as permitted by this Agreement, the respondent's New Company Board members shall not in their capacity as New Company Board members, receive material confidential information and shall not disclose any such information

received under this Agreement to respondent, or use it to obtain any advantage for respondent. The respondent's New Company Board members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. The respondent's New Company Board members shall participate in matters that come before the New Company Board only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's New Company Board members shall not participate in any matter, or attempt to influence the votes of the other members of the New Company Board with respect to matters, that would involve a conflict of interest if respondent and the New Company were separate and independent entities.

l. If necessary to assure compliance with the terms of this Agreement, the Consent Agreement, or the Consent Order, respondent may, but is not required to, assign an individual to the New Company for the purpose of overseeing such compliance ("on-site person"). The onsite person shall have access to all officers and employees of the New Company and such records of the New Company as he deems necessary and reasonable to assure compliance. Such individual shall enter into a confidentiality agreement prohibiting disclosure of material confidential information.

m. Any material transaction of the New Company that is out of the ordinary course of business must be approved by a majority vote of the New Company Board; provided that the New Company shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

n. Respondent shall provide the New Company with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for the New Company which have already been approved.

o. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) twelve months after the date the Consent Order becomes final, or (ii) the date contemplated by subparagraph 2.b (the "Initial Divestiture Period"), respondent shall make available for use by the New Company funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A Assets ("normal repair and replacement"). After termination of the Initial Divestiture Period and until the earlier of the date contemplated by either subparagraph 2.a or 2.b, respondent shall make available for use by the New Company each year an amount not less than that required for normal repair and replacement. Provided, however, that in any event, respondent shall provide the New Company with such funds as are necessary to maintain the viability and competitiveness and marketability of the Schedule A Assets.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Schedule A Assets, as provided in the Consent Order, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Order or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.



5. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or Consent Order.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession, or under the control of respondent relating to compliance with this Agreement;

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

7. This Agreement shall not be binding until approved by the Commission.

## IN THE MATTER OF

## CHEMOPHARM LABORATORY, INC.

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

*Docket C-3545. Complaint, Dec. 6, 1994--Decision, Dec. 6, 1994*

This consent order prohibits, among other things, a Utah corporation that markets the ice melting product, Superior Sno-N-Ice, from making any environmental benefit claim about any product unless it possesses and relies on competent and reliable scientific evidence to substantiate the claims. In addition, the respondent is prohibited from misrepresenting the existence or contents of any test or study.

*Appearances*

For the Commission: *C. Steven Baker, Mary Tortorice and John Hallerud.*

For the respondent: *Jack Schoenhals, Salt Lake City, UT.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Chemopharm Laboratory, Inc., d/b/a CP Industries, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Chemopharm Laboratory, Inc. is a Utah corporation with its principal office or place of business at 503 North 400 West, Salt Lake City, Utah.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed de-icing products, including Superior Sno-N-Ice Melter, to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Superior Sno-N-Ice Melter, including but not necessarily limited to the

attached Exhibits 1 through 4. These advertisements and product labeling contain the following statements:

- A. Superior Sno-N-Ice Melter For The Total Environment (Exhibit 1)
- B. Superior Sno-N-Ice with CMA gives total environmental protection. (Exhibits 1 and 3)
- C. Superior Sno-N-Ice Melter now Contains CMA . . . Calcium Magnesium Acetate (CMA) offers the world an environmentally safe de-icer. (Exhibits 1 and 3)
- D. The blending of Superior Sno-N-Ice with CMA offers the benefits of a fast acting, environmentally safer, more effective ice melter. (Exhibits 1, 3, and 4)
- E. The combinations of Superior Sno-N-Ice with CMA makes a great product even better . . . Superior Sno-N-Ice with CMA offers total protection for the total environment in an effective ice melter. A safer environment begins with you! Finally! The best ice melter and de-icer are combined into one Superior product. (Exhibits 1 and 3)
- F. NOW CONTAINS . . . CMA NATURE'S CHOICE™ A Safer Environment Begins With You (Exhibits 1 and 3)
- G. The only ice melter that protects the total environment. (Exhibit 2)
- H. QUESTION: Why is SUPERIOR SNO-N-ICE MELTER with CMA safer than other de-icers? ANSWER: . . .Vegetation: CMA can improve soil conditions and will assist aeration of tight soil conditions. CMA is not a fertilizer as many ice melters are and does not cause plant tissue burn. (Exhibit 2)
- I. NEW CONTAINS CMA NATURE'S CHOICE™ ENVIRONMENTALLY SAFER (Exhibit 4)
- J. Proven in ten years of independent studies by corporate laboratories, government agencies and universities, CMA is the first de-icer to actually improve the environment. (Exhibits 1 and 3)
- K. Independent test results show CMA can improve soil conditions and be of benefit to vegetation and flowers. (Exhibits 1 and 3)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits 1 through 4, respondent has represented, directly or by implication, that:

- A. Superior Sno-N-Ice Melter does not harm or damage the environment.
- B. Superior Sno-N-Ice Melter provides the environmental benefits of Calcium Magnesium Acetate ("CMA").
- C. Scientific studies of CMA demonstrate that Superior Sno-N-Ice Melter is beneficial to the environment.

Par. 6. In truth and in fact:

A. Superior Sno-N-Ice Melter does harm or damage the environment. Superior Sno-N-Ice Melter contains about 95% sodium chloride (*i.e.*, rock salt) which does harm or damage the environment.

B. Superior Sno-N-Ice Melter does not provide the environmental benefits of CMA.

C. Scientific studies of CMA do not demonstrate that Superior Sno-N-Ice Melter is beneficial to the environment.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 1 through 4, respondent has represented, directly or by implication, that at the time that it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time that it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent 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.

Complaint

118 F.T.C.

EXHIBIT 1

**CMA - A Step Into The Future**

**Superior Sno-N-Ice Melter now contains CMA...**

**Now Contains CMA**

**Superior Sno-N-Ice Melter**

**For The Total Environment**

**CP Industries**  
 10000 W. 10th Avenue, Suite 100  
 Denver, Colorado 80202

**Now Contains CMA**  
 A Later Environment Begins With You

**Finally! The best ice melter and de-icer are combined into one Superior product.**

**EXHIBIT 1**

EXHIBIT 1

## EXHIBIT 2

EXHIBIT 2

## INFORMATION SHEET

THE ONLY ICE MELTER  
THAT PROTECTS  
THE TOTAL ENVIRONMENT

**SUPERIOR**  
**SNO-N-ICE**  
**MELTER** (H)

**CP Industries**  
PENNSYLVANIA  
765 West Philadelphia Street  
York, PA 17403

UTAH  
503 North 400 West  
Salt Lake City, Utah 84103

FOR ORDERS & INFORMATION  
(800) 453-4931

**QUESTION:** What is the SUPERIOR SNO-N-ICE MELTER with CMA positive traction program?

**ANSWER:** Calcium Chloride will leave a very slick oily surface residue on all areas of application. SUPERIOR SNO-N-ICE MELTER with CMA creates a rough surface on ice that builds a surface traction area which, in turn, reduces slick conditions. SUPERIOR SNO-N-ICE MELTER with CMA penetrates the surface area and creates traction where needed.

**QUESTION:** Who is my prospective customer?

**ANSWER:** Any business or government agency that is concerned about safety and liability that occurs with ice, slippery sidewalks, parking lots, driveways, and streets. SUPERIOR SNO-N-ICE MELTER with CMA has been accepted as a proven product in all locations where winter conditions are a problem.

**QUESTION:** What sales aids are available to assist in the sale of SUPERIOR SNO-N-ICE MELTER with CMA?

**ANSWER:** SUPERIOR SNO-N-ICE MELTER with CMA offers more sales support than other de-icers including individual sales training from factory representatives, literature that is complete and professional, video tapes and slides that graphically tell the SUPERIOR SNO-N-ICE MELTER with CMA story, and samples for key accounts. There will also be testimonials from trade journals and other publications and the best packaging that is available in all sizes. All information is designed to illustrate safety and the improvement of the ecological system.

**QUESTION:** How is SUPERIOR SNO-N-ICE MELTER with CMA different from KCl (potassium chloride)?

**ANSWER:** Potassium chloride is a fertilizer often used as a low-cost ice-melter. The melting properties of SUPERIOR SNO-N-ICE MELTER with CMA are much better and faster than potassium chloride which is very corrosive and contains no active inhibitors. Tests indicate that concrete spalling occurs faster when potassium chloride is applied.

SUPPORTING DOCUMENTATION

"Studies have shown the material (CMA) to have little effect on plants and animals."

Tom Harvey, Chickasaw County Agriculturalist  
New Hampton Economist January, 1991

"Calcium Magnesium Acetate (CMA) also doesn't do any known harm. Scientists believe it actually does some good for the soil and plant life."

Frank Edward Allen - "Environment"  
Wall Street Journal January, 1991

"CMA is environmentally safe. It breaks down and goes safely into the soil."

Dr. Shang-Tian Yang, Chemical Engineer  
Ohio State University  
Scholastic Newsline New York, January 1991

C1000015

A Safe Environment Begins with You

EXHIBIT 3

EXHIBIT 3



**Sno-N-Ice Melters  
For The Total Environment  
Now contains CMA**

**Unique Corrosion Inhibitor System**

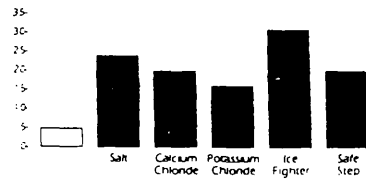
Superior Sno-N-Ice with its unique CMA inhibitor system has shown in test results to be environmentally safer. As shown in the tests below, Superior Sno-N-Ice with CMA inhibits corrosion in metals normally found in the environment as compared with other commonly used ice melters.

Graphs show milligrams of corrosion per year on metal plates in normal solutions of equal amounts.

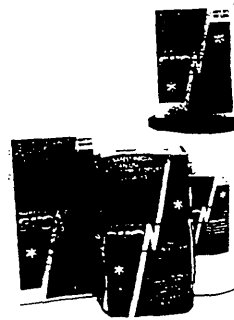
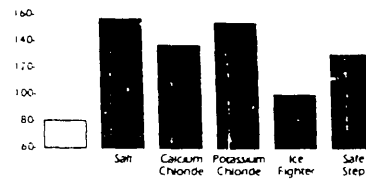
**Total Environmental Protection**

Superior Sno-N-Ice with CMA gives total environmental protection. Its unique formula offers a fast acting ice melter that works up to -8°F., with a residual coating action for long lasting effectiveness. Superior Sno-N-Ice is available in boxes, drums and bags.

**Aluminum Comparison**



**Steel Comparison**



01000913





## DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commissions's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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 sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Chemopharm Laboratory, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah with its principal office or place of business at 503 North 400 West, Salt Lake City, Utah.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
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. The term “*product*” means any product that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the “Superior Sno-N-Ice Melter” brand name or any other brand name of respondent, its successors and assigns; and also means any product sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

2. The term “*competent and reliable scientific evidence*” means 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.

## I.

*It is ordered*, That respondent, Chemopharm Laboratory, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product is “environmentally safe,” “protects the total environment,” or otherwise offers any environmental benefit; or

B. Such product provides the environmental benefits of Calcium Magnesium Acetate,

unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

## II.

*It is further ordered,* That respondent, Chemopharm Laboratory, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

## III.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representations; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## IV.

*It is further ordered,* That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

## V.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

## VI.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the 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.

## IN THE MATTER OF

## RITE AID CORPORATION

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

*Docket C-3546. Complaint, Dec. 15, 1994--Decision, Dec. 15, 1994*

This consent order requires, among other things, Rite Aid, in conjunction with its acquisition of LaVerdiere's Enterprises, Inc., to divest the pharmacy assets either in its own Rite Aid stores, or in the LaVerdiere's stores it will acquire, in three specified cities, to a Commission-approved entity within 12 months of the order. If the divestitures are not accomplished within the time-frame, the Commission can appoint a trustee to accomplish them. In addition, the consent order requires the respondent, for a period of ten years, to obtain Commission approval before acquiring any assets or stocks in any entity engaged in the business of selling prescription drugs at retail outlets in the three designated cities.

*Appearances*

For the Commission: *Ann D. Malester, Catharine M. Moscatelli and E. Eric Elmore.*

For the respondent: *Lewis A. Noonberg, Piper & Marbury, Washington, D.C. Eric Saunders and Larry Bryant, Bernestein, Shur, Sawyer & Nelson, Portland, ME.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Rite Aid Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire LaVerdiere's Enterprises, Inc., a corporation subject to the jurisdiction of the Federal Trade 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"), 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. THE RESPONDENT

1. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at 30 Hunter Lane, Camp Hill, Pennsylvania.

2. For purposes of this proceeding, 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 affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## II. THE ACQUIRED COMPANY

3. LaVerdiere's Enterprises, Inc. ("LEI") is a corporation organized and existing under the laws of the state of Maine, with its business address at Post Office Box 1014, Waterville, Maine.

4. LEI 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

5. On or about April 29, 1994, Rite Aid and LEI entered into a stock purchase agreement providing for the sale of LEI to Rite Aid, for consideration totaling approximately \$50 million ("Acquisition").

## IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

7. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bucksport, Maine; Lincoln, Maine; and Berlin, New Hampshire.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant markets is difficult or unlikely.
10. Rite Aid and LEI are actual competitors in the relevant markets.

#### V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition 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 direct actual competition between Rite Aid and LEI;
- b. By increasing the likelihood that Rite Aid will unilaterally exercise market power; and
- c. By increasing the likelihood of collusion in the relevant markets.

12. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

#### VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The acquisition described in paragraph five, 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.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting stock of La-Verdiere's Enterprises, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with viola-

tions 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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said 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, 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 accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed 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 Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

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. "*Rite Aid*" means Rite Aid Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Rite Aid,



and their directors, officers, employees, agents, representatives, and their successors and assigns.

B. “*Commission*” means the Federal Trade Commission.

C. “*Acquisition*” means the acquisition of all the voting stock of LaVerdiere’s Enterprises, Inc. (“LEI”) by respondent Rite Aid.

D. “*Acquirer*” means the party or parties to whom respondent Rite Aid divests the assets herein ordered to be divested.

E. “*Prescription drugs*” means ethical drugs available at retail only by prescription.

F. “*LEI Pharmacy Business*” means LEI’s business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include LEI’s business of selling other products in those retail stores.

G. “*LEI Pharmacy Assets*” means all assets constituting the LEI, Pharmacy Business, excluding those assets pertaining to the LEI trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports relating to the LEI Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer’s option, lists of stock keeping units (“SKUs”), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to LEI or have supplied to LEI within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

H. “*Rite Aid Pharmacy Business*” means Rite Aid’s business of selling prescription drugs at any of the retail stores listed in paragraph

I.(J). of this order, but does not include Rite Aid's business of selling other products in those retail stores.

I. "*Rite Aid Pharmacy Assets*" means all assets constituting the Rite Aid Pharmacy Business, excluding those assets pertaining to the Rite Aid trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer's option;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, manuals, and operations reports, relating to the Rite Aid Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer's option, lists of SKUS, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to Rite Aid or have supplied to Rite Aid within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Assets To Be Divested*" means either the LEI Pharmacy Assets constituting the LEI Pharmacy Business or the Rite Aid Pharmacy Assets constituting the Rite Aid Pharmacy Business in the following cities or towns:

1. Bucksport, Maine;
2. Lincoln, Maine; and
3. Berlin, New Hampshire.

K. "*Competitiveness, viability and marketability*" of the Assets To Be Divested mean that respondent shall continue the operation of the Assets To Be Divested in the ordinary course of business without

material change or alteration that would adversely affect the value or goodwill of the Assets To Be Divested.

## II.

*It is further ordered, That:*

A. Respondent shall divest absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease respondent through default of the lease or otherwise regains possession of the space, respondent must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession. If respondent has not redinvested such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession, the provisions of paragraph III shall apply to these assets.

## III.

*It is further ordered, That:*

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested

within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a 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 trustee, pursuant to Section 5(1) 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. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The 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 trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that 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 trustee by the court.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent 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 trustee, by the court.

6. The trustee shall use his or her 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 at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order. Provided, however, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer or acquirers selected by respondent from among those approved by the Commission.

7. The 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 trustee shall have 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 reasonably necessary to carry out the trustee's duties and responsibilities. The 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 trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, and respondent shall either defend against such claims or pay the trustee's expenses, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any such claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

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

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, where such concern within the six months preceding such acquisition engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order; or (B) Acquire any assets used, within six months of the offer to acquire, for (and still suitable for use for) the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

## V.

*It is further ordered, That:*

A. Within sixty (60) days after the date this order becomes final and every sixty (60) 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 intends to comply, is complying, and has complied with those provisions. 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 paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent also 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.

B. One (1) year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondent 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 paragraph IV. of this order.

## 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 upon reasonable notice and subject to any legally recognized privilege, 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 and other records and documents in the possession or under the control of respondent relating to any matters contained in this consent 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 such matters.



## IN THE MATTER OF

## LEVI STRAUSS &amp; CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9081. Consent Order, July 12, 1978--Modifying Order, Dec. 20, 1994*

This order reopens a 1978 consent order (92 FTC 171), that settled allegations that the respondent had engaged in a number of anticompetitive practices, including fixing the resale prices at which retailers sold its products, and modifies the consent order by adding a provision to clarify that the order does not prohibit conduct by the respondent that is necessary to form and operate wholly-owned retail stores, or retail stores partially-owned by the respondent in lawful joint ventures. The Commission found that the respondent had satisfactorily met its burden of showing that changed conditions of fact required the modification.

## ORDER REOPENING AND MODIFYING ORDER

On August 25, 1994, Levi Strauss & Co. ("LS&CO") filed a Petition To Reopen Proceedings And For Modification of Consent Decree ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) ("FTC Act"), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 ("Rules"). The Petition asks the Commission to reopen the proceeding in Docket No. 9081 and modify the consent order issued by the Commission on July 12, 1978, *Levi Strauss & CO.*, 92 FTC 171 (1978) ("order"). Specifically, LS&CO requests that the Commission add a paragraph to the order stating that the order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores either wholly-owned and operated or partially owned by LS&CO in a lawful joint venture. LS&CO's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Rules, and two comments were received.

After reviewing the Petition and other relevant information, the Commission has determined to grant the Petition. LS&CO has shown changed conditions of fact that require reopening and modify-

ing the order.<sup>1</sup> These changed conditions make the continued application of the order without the modification LS&CO now seeks inequitable and harmful to competition.

### The Complaint and Order and LS&CO's Petition

The Commission issued its complaint in this matter on May 5, 1976, charging LS&CO with illegally fixing the retail prices of its blue jeans and other products, in violation of Section 5 of the FTC Act.<sup>2</sup> The consent order was issued on July 12, 1978, and prohibits LS&CO from engaging in resale price maintenance ("RPM") and from using various non-price vertical restraints to further or implement RPM.<sup>3</sup>

LS&CO now requests the Commission to modify the order by adding a paragraph stating that the order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores, either wholly-owned and operated or partially-owned by LS&CO (or its subsidiaries or affiliates) in a lawful joint venture.<sup>4</sup> LS&CO plans to establish retail stores that sell only LS&CO products ("OLS stores"). One aspect of this plan includes the formation of a joint venture with an LS&CO customer, Designs, Inc. ("Designs"), that will operate OLS stores in one part of the country.<sup>5</sup> Because the order restricts LS&CO's ability to influence prices charged by retailers authorized to sell LS&CO products, LS&CO believes that "as to the contemplated joint venture

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<sup>1</sup> Because LS&CO has demonstrated that changed conditions of fact require reopening and modifying the order, the Commission need not consider whether reopening is warranted under the public interest standard.

<sup>2</sup> 92 FTC at 171-75.

<sup>3</sup> Paragraph I of the order prohibits LS&CO from, among other things, "[f]ixing, establishing, controlling or maintaining, directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or sell any product at retail." 92 FTC at 176. "Dealer" is defined as "any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product." *Id.* LS&CO is also prohibited from limiting participation in cooperative advertising funds or otherwise disciplining dealers who fail to adhere to RPM. Nor may it require its dealers to report cheaters, or itself conduct any other type of surveillance program to enforce resale prices. Finally, paragraph I also prohibits LS&CO from restricting the classes of customers to whom its dealers may sell when such restrictions are in furtherance of RPM. *Id.* at 176-77.

<sup>4</sup> Petition at 2.

<sup>5</sup> Memorandum in Support of Request to Reopen the Proceedings and for Modification of Consent Decree at 1 ("Petition Memorandum").

. . . the literal language of the order may prohibit LS&CO's involvement, making modification necessary before the joint venture is consummated."<sup>6</sup>

In support of its Petition, LS&CO argues that the relief it seeks is required by changed conditions and is in the public interest. When the order was issued, LS&CO, for practical purposes, did not own, or partially own, any retail operations.<sup>7</sup> Instead, it was engaged almost exclusively in manufacturing and sold its apparel products to independent retailers throughout the United States. Recently, LS&CO concluded that the planned OLS retail stores are important to LS&CO's "overall marketing and product vision."<sup>8</sup> A similar marketing approach has been adopted by many of LS&CO's competitors who have formed and currently operate "brand-only" retail stores. LS&CO thus asserts that the order, without the clarifying language it now seeks, restricts it from competing in the retail market and, consequently, "cause[s] [LS&CO] significant competitive harm not envisioned by the consent order."<sup>9</sup> LS&CO also argues that the order was "never intended to impose a restriction on LS&CO's ability to compete at retail," and that the order does not expressly prohibit LS&CO from undertaking any form of vertical integration.<sup>10</sup> LS&CO believes that modifying the order will allow it to engage in the same lawful conduct (without disturbing the main purposes of the order) in which its competitors are free to engage and are in fact engaging, to the benefit of competition and, ultimately, consumers of apparel products.

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<sup>6</sup> *Id.* at 2. LS&CO believes that the order should not be construed to apply to a retail outlet wholly-owned by LS&CO, because LS&CO does not actually "authorize" such an outlet to sell any products. Nevertheless, to avoid any uncertainty concerning application of the order to LS&CO's wholly-owned retail operations, LS&CO requests that the order be modified to authorize the formation and operation of wholly-owned LS&CO retail stores. *Id.* at 2, 5-6. The Commission believes that "dealer" as used in the order does not apply to retailers that are wholly-owned by LS&CO, in light of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (coordinated activity of parent and wholly-owned subsidiary to be viewed as that of a single enterprise).

<sup>7</sup> LS&CO "owned a small retail operation selling closeouts in the east, but had no meaningful presence in the retail market." *Id.* at 5.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.*

### Standards for Opening and Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the petitioner “makes a satisfactory showing that changed conditions of law or fact” require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued a plaction of it inequitable or harmful to competition.<sup>11</sup>

The burden is on the petitioner to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.<sup>12</sup> If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner’s burden is not a light one given the public interest in repose and the finality of Commission orders.<sup>13</sup>

#### LS&CO Has Shown that Changed Conditions of Fact Require Reopening and Modifying the Order

The 1976 complaint in this matter describes LS&CO as the largest apparel manufacturer in the world engaged in the manufacture, sale and distribution of a “wide variety of wearing apparel for men,

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<sup>11</sup> Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) (“L-P Letter”) at 4. Cf. *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that “[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.”

<sup>12</sup> The Commission may properly decline to reopen an order if a request is “merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.” S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

<sup>13</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items.”<sup>14</sup> At the time, LS&CO sold its products directly to numerous retail dealers located throughout the United States who in turn resold the products to the general public. Currently, LS&CO is the second largest producer of denim jeans in the United States<sup>15</sup> but faces competition from numerous other branded jeans manufacturers, many of which have vertically integrated into retailing through company-owned stores.<sup>16</sup> In addition, competition also is provided by a proliferation in private label jeans manufactured for and marketed by large retailers.<sup>17</sup>

When the order was issued, LS&CO, like its competitors, had no meaningful retail presence. Since the order was entered, however, many of LS&CO’s competitors have integrated into retailing, in order to showcase their products, market their complete lines, and demonstrate to their own retailer-customers the benefits of promoting the manufacturer’s products. In view of these changed conditions, the order exerts an unintended chilling effect on LS&CO’s ability to participate in retailing in response to this development, because LS&CO may not influence “directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or retail.”<sup>18</sup> The order’s restriction on influence prices charged by retailers products inhibits LS&CO from becoming lawful retail joint ventures.

LS&CO has made a satisfactory showing that changed conditions require the Commission to reopen the proceeding. The significant change in circumstances identified by LS&CO in support of its Petition is the fact that since the order was issued, “brand-only” retail stores have been established by many of LS&CO’s competitors. LS&CO would like to open similar stores in a proposed joint venture with Designs, as part of an overall business strategy responsive to, among other things, competition in the marketing of casual apparel and jeans in the United States.

LS&CO believes that establishment of the OLS stores is “vital to LS&CO.’s long-term competitive interests.”<sup>19</sup> It hopes that the OLS

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<sup>14</sup> 92 FTC at 172.

<sup>15</sup> Petition Memorandum at 7.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> 92 FTC at 176.

<sup>19</sup> Declaration of Robert D. Rockey, President of Levi Strauss North America paragraph 2.

stores will position the Levi's brand in an environment that emphasizes LS&CO's image, values and reputation, and provides consumers with the opportunity, in one store, to see a broad assortment of Levi's products. LS&CO also believes that once the OLS stores demonstrate the viability of dedicating retail space and substantial product assortments to LS&CO products, retailers may be persuaded to dedicate space to "focus areas" and in-store shops developed for the Levi's brands they carry.<sup>20</sup>

OLS stores are unlikely adversely to affect competition among apparel retailers in the United States. United States retail apparel sales are highly fragmented. More than 250,000 stores carry apparel products; of these, more than 200,000 stores sell only apparel and accessories, and 50,000 stores are primarily department, chain or general merchandise stores.<sup>21</sup> Even the largest retailers account for only a small percentage of apparel and jeans sales.<sup>22</sup> Based on this data, LS&CO's OLS stores will account for a small fraction of the overall jeans volume and even less of overall casual apparel sales.<sup>23</sup>

The record evidence suggests that LS&CO lacks market power in the manufacturing of jeans and other casual wear and that the proposed joint venture will not have market power in apparel retailing. Without market power at either level of distribution, LS&CO's retailing venture would be unlikely to give rise to anticompetitive effects. In the absence of likely anticompetitive effects, the order as modified would permit LS&CO flexibility to adopt new marketing strategies that may increase competition and benefit consumers.

A modification of the order to clarify that it does not prohibit LS&CO from entering into otherwise lawful retail joint ventures is consistent with past Commission action involving other orders against *per se* unlawful conduct. In *American Standard, Inc.*, 108 FTC 181 (1986), and *General Railway Signal Co.*, 110 FTC 143 (1987), the Commission modified a 1964 consent order<sup>24</sup> to permit

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<sup>20</sup> Petition Memorandum at 13.

<sup>21</sup> Petition Memorandum at 10-11.

<sup>22</sup> *Id.*

<sup>23</sup> LS&CO's annual jeans volume in the United States amounts to approximately 57.5 million units of a total of about 300 million jeans units sold. The United States casual apparel industry has annual sales of approximately 2 billion units with LS&CO's products accounting for about 97 million units. *Id.* at 11-12.

<sup>24</sup> See *General Railway Signal Co.*, 66 FTC 882 (1964), order reopened and modified to provide for expiration (Aug. 29, 1994).

the respondents to engage “in conduct . . . ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.”<sup>25</sup> The order against the signaling companies broadly prohibited agreements with “any other person, persons or business entity not a party hereto.” Concluding that the order was aimed at collusive agreements, the Commission modified the order so that the respondents could participate in otherwise lawful joint venture activity.<sup>26</sup> Like the proposed modifications in General Railway Signal, LS&CO is requesting that the order be modified to permit lawful joint ventures.<sup>27</sup>

The requested modification also is consistent with the Commission’s previous action in *Liquid Air Corporation of North America, et al.*, Docket No. C-2990, 94 FTC 390 (1979), and *L’Air Liquide S.A.*, Docket No. C-3216, 110 FTC 19 (1987).

In those matters, the respondents,<sup>28</sup> in a joint petition, requested the Commission to modify the respective orders because, in essence, they required the respondents to obtain the prior approval of the Commission before undertaking purely internal business activities.<sup>29</sup> The Commission granted the petition on public interest grounds, stating that the respondents had shown that the orders “impose[d] substantial costs on the respondents because they require[d] the respondents to obtain the prior approval of the Commission in connection with the respondents, wholly internal activities.”<sup>30</sup> The Commission determined that “[s]uch internal activities would raise no competitive

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<sup>25</sup> 108 FTC at 183.

<sup>26</sup> *Id.* at 181.

<sup>27</sup> Lawful joint ventures can generate efficiencies such as economies of scale, sharing risks, synergies resulting from pooling complementary resources and facilitating entry into new markets. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-23 (1979); *Brunswick Corp.*, 94 FTC 1174, 1265 (1979), *aff’d in part and modified in part sub nom. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). *See also Copperweld Corp.*, 467 U.S. at 768, where the Court stated that “joint ventures, and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination’s actual effect.”

<sup>28</sup> At the time, L’Air Liquide was the parent of Liquid Air Corporation.

<sup>29</sup> For example, under the orders, L’Air Liquide would have to obtain the prior approval of the Commission for a transaction in which it caused its subsidiary, Liquid Air Corporation, to acquire all or any part of another L’Air Liquide subsidiary.

<sup>30</sup> *See* Order Reopening and Modifying Orders Issued on September 5, 1979, Against Liquid Air Corporation of North America and on July 15, 1987, Against *L’Air Liquide Societe Anonyme Pour L’Etude Et L’Exploitation Des Precedes Georges Claude*, 111 FTC 135, 137 (1988).

questions. . . .”<sup>31</sup> The Commission, citing *Copperweld Corp.*, 467 U.S. 752, concluded that application of the orders’ prior approval provisions to respondents’ “wholly internal activities” would not be consistent with the principle that the coordinated activity of a parent and its wholly-owned subsidiaries must be viewed as that of a single enterprise for Federal antitrust law purposes.<sup>32</sup>

The Commission has recognized the need to avoid applying a consent order aimed at particular unlawful conduct to inhibit conduct that is lawful. For example, in *Adolph Coors Company*, 112 FTC 191, 197 (1989), the Commission found that a general prohibition against Coors’ hindering, suppressing or eliminating competition between or among distributors was unduly restrictive and overbroad and could have a chilling effect on Coors’ ability to implement certain distributional efficiencies.

In light of the competitive developments in the casual apparel and jeans retail distribution channels, the minimal foreclosure of these channels by implementation of the proposed LS&CO/Designs joint venture, and the fact that LS&CO’s competitors are not restricted by similar orders and indeed operate retail stores exclusively featuring their respective brands, the order should be modified to permit LS&CO to enter into lawful joint ventures in retailing. LS&CO will remain subject to all the requirements of the order in its dealings with independent retailer-customers. Any attempt by LS&CO to influence pricing by its independent dealers (including Designs, when acting in its capacity as an independent dealer) will remain subject to the requirements of the order in this case.

LS&CO has made a satisfactory showing that reopening the proceeding and modifying the order is warranted by changed conditions of fact. Granting the Petition permits LS&CO to operate in the same manner as its competitors who have moved to a new marketing strategy. The order, as modified, retains the prohibition against fixing the prices at which independent retailers resell LS&CO products (as well as its other prohibitions).

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that the Commission’s order in Docket No. 9081 be and it hereby is modified to include a new ending paragraph, as follows:

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



Provided, however, that the provisions of this order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores either wholly-owned and operated or partially-owned by respondent, or its subsidiaries or affiliates, in a lawful joint venture.

Set Aside Order

IN THE MATTER OF

## ARMSTRONG CORK COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT  
AND SEC. 2(a) OF THE CLAYTON ACT*Docket C-1010. Consent Order, Nov. 3, 1965--Set Aside Order, Dec. 23, 1994*

The Federal Trade Commission has set aside a 1965 consent order with Armstrong Cork Company, (68 FTC 849), pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING  
AND SETTING ASIDE ORDER

On September 6, 1994, Armstrong World Industries, Inc. ("Armstrong"), the successor to Armstrong Cork Company, filed a Petition to Reopen Proceedings and Set Aside Order ("Petition") in this matter. Armstrong requests that the Commission set aside the 1965 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45, 286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Armstrong affirmatively states that it has not engaged in any conduct violating the terms of the order. The Request was placed on the public record, and the thirty-day comment period expired on October 14, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."<sup>1</sup> The Commission's order in Docket No. C-1010 was issued on November 3, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that

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<sup>1</sup> See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-1010.

Accordingly, *it is ordered*, That this matter be, and it hereby is, reopened;

*It is further ordered*, That the Commission's order in Docket No. C-1010 be, and it hereby is, set aside, as of the effective date of this order.