

Modifying Order

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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, May 25, 1995*

This order reopens a 1994 final order that requires the respondent to obtain Commission approval before acquiring stock or interest in any company that manufactures or sells concentrate, syrup, or carbonated soft drinks in the U.S. This order modifies the final order in settlement of the petitions for review filed by the respondent in the U.S. Court of Appeals.

## ORDER REOPENING AND MODIFYING FINAL ORDER

The Commission issued a Final Order in this proceeding on June 13, 1994, and an Order Reopening and Modifying Final Order on December 5, 1994. Respondent, The Coca-Cola Company, filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's Final Order on August 26, 1994, and on February 3, 1995, a petition for review of the Final Order, as modified by the Commission's Order of December 5, 1994. On May 17, 1995, the Commission approved the terms of a modified final order in settlement of the petitions for review; and on May 18, 1995, the Commission and The Coca-Cola Company filed a Stipulation of Dismissal in the court of appeals pursuant to Fed. R. App. P. 42(b).

Now therefore, *It is hereby ordered*, That the aforesaid Final Order, as modified, be, and it hereby is, modified to read as follows:

## I. DEFINITIONS

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

A. "*Coca-Cola*" means The Coca-Cola Company, a corporation organized under the laws of Delaware, with its headquarters located at One Coca-Cola Plaza, N.W., Atlanta, Georgia, and its directors,

officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. "*Concentrate*" means the base element, flavors, or essences mixed according to a formula which, when added to carbonated water and nutritive or non-nutritive sweetener, is a carbonated soft drink.

C. "*Syrup*" means the concentrate and nutritive or non-nutritive sweetener which, when added to carbonated water, is a carbonated soft drink.

D. "*Branded concentrate or branded syrup*" means concentrate or syrup used to produce carbonated soft drinks that are identified with any nationally or regionally recognized label, name, or trademark and that, in general, are heavily advertised, widely available in the take-home and cold drink channels, and distributed by bottlers that provide store-door service or services to retailers in the cold drink channel. This definition does not include a label, name, or trademark associated solely with a single grocery or restaurant retailer, or with a generic flavor.

E. "*Branded concentrate soft drink*" means a drink made by combining carbonated water with branded syrup or with nutritive sweetener or non-nutritive sweetener and branded concentrate.

## II.

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

A. Any rights to the Dr Pepper® or diet Dr Pepper® brand in the United States, or any brand, name, or trademark associated with the production, marketing, sale or distribution of Dr Pepper® or diet Dr Pepper® carbonated soft drinks in the United States;

B. The whole or any part of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that holds, owns, or otherwise controls the Dr Pepper® or diet Dr Pepper® brand, name, or trademark in the United States.

Provided however, that this prior approval requirement shall not apply to any acquisition by Coca-Cola of only physical assets involved in the production, sale, or distribution of Dr Pepper® and/or

diet Dr Pepper® syrups, concentrates, or carbonated soft drinks, or from acquiring a bottler of Dr Pepper® and/or diet Dr Pepper® carbonated soft drinks, so long as the bottler is engaged in the manufacture and sale of Dr Pepper® or diet Dr Pepper® concentrates or syrups solely as a holder of a Dr Pepper® or diet Dr Pepper® trademark, license, or franchise agreement and is not the owner of the Dr Pepper® or diet Dr Pepper® brand, name, or trademark.

### III.

*It is further ordered,* That Coca-Cola, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Federal Trade Commission:

A. The whole or any part of the stock, share capital, equity or other interest in any concern, corporate or non-corporate:

1. Engaged in the manufacture and sale in the United States of branded concentrate or branded syrup; or

2. Engaged in the franchising or licensing of any brand, name, or trademark used in the United States in connection with the production, marketing, or sale of branded concentrate, branded syrup, or branded carbonated soft drinks.

B. Any brand, name, or trademark associated with the production, sale, or distribution of branded concentrate, branded syrup, or branded carbonated soft drinks in the United States.

Provided however, that this advance notification requirement shall not apply to any acquisition by Coca-Cola of only physical assets involved in the production, sale, or distribution of concentrate, syrup, or carbonated soft drinks, or from acquiring a bottler of carbonated soft drinks, so long as the bottler is not engaged in the manufacture and sale of branded concentrate or branded syrup, or in the franchising or licensing of any brand, name, or trademark of any branded carbonated soft drinks or is engaged in the manufacture and sale of branded concentrate or branded syrup solely in its capacity as

a licensee, bottler, or franchisee under carbonated soft drink trademark rights issued by another firm.

Advance notification of any transaction covered by this paragraph III shall be provided to the Federal Trade Commission when Coca-Cola's Board of Directors, or any individual or entity that is authorized to act on Coca-Cola's behalf in such acquisitions, authorizes issuance of a letter of intent or enters into an agreement to make an acquisition covered by this paragraph III, whichever is earlier.

The notification required of Coca-Cola by this paragraph shall be 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 given to the United States Department of Justice and notification is required only of Coca-Cola and not of any other party to the transaction. Coca-Cola shall comply with reasonable requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

The notification required of Coca-Cola by this paragraph III shall not require additional notification by Coca-Cola to the Federal Trade Commission of any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Federal Trade Commission is required, and has been requested, pursuant to paragraph II of this order.

Provided further, that the requirements of this paragraph III shall not apply to any acquisition by Coca-Cola of any company or firm where such company or firm has sales of less than ten million (10,000,000) 192-oz. case-equivalents of carbonated soft drinks in each of the three years preceding such acquisition.

#### IV.

*It is further ordered,* That one (1) year from the date this order becomes final, and annually on the anniversary of the date this order becomes final until the prior approval and prior notification requirements of paragraphs II and III expire, and at other times as the Commission may reasonably require, Coca-Cola shall file a verified

written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

*It is further ordered*, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Coca-Cola made to its principal office, Coca-Cola shall permit any duly authorized representatives of the Federal Trade Commission:

A. During office hours and in the presence of counsel, to have access to, inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Coca-Cola relating to any matters contained in this order; and

B. Upon five days' notice to Coca-Cola and without restraint or interference from Coca-Cola, to interview officers or employees of Coca-Cola, who may have counsel present, regarding such matters.

VI.

*It is further ordered*, That Coca-Cola shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

GATEWAY EDUCATIONAL PRODUCTS, LTD., ET AL.

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

*Docket C-3581. Complaint, June 1, 1995--Decision, June 1, 1995*

This consent order prohibits, among other things, a California-based corporation and two officers from making reading and comprehension claims for their "Hooked on Phonics" reading program or any other educational program or product without possessing and relying upon competent and reliable substantiating evidence. In addition, it prohibits them from representing that any endorsement represents the typical or ordinary experience of consumers with any educational program or product without possessing and relying upon competent and reliable substantiating evidence.

*Appearances*

For the Commission: *Toby M. Levin and Dean C. Forbes.*

For the respondents: *Michael Denger, Gibson, Dunn & Crutcher,* Washington, D.C. and *Scott R. Miller, Rordan McKinzie,* Los Angeles, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gateway Educational Products, Ltd., a corporation, and John Shanahan and John Herlihy, individually and as officers of said corporation ("respondents"), have 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 Gateway Educational Products, Ltd. is a Delaware corporation, with its principal office or place of business at 1050 Katella Ave., Suite D, Orange CA.

Respondents John Shanahan and John Herlihy are officers of the corporate respondent. Individually or in concert with others, they formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

Their principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labelled, offered for sale, sold, and distributed educational products, including Hooked on Phonics and Hooked on Phonics/SRA Reading Power (collectively "HOP"), to consumers. HOP is an instructional reading program consisting of color-coded workbooks, cassette tapes, and flash cards.

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

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for HOP, including but not necessarily limited to the attached Exhibits A through L. These advertisements contain the following statements:

A. "We've Made Learning to Read Easy & Fun! 'We're Hooked on Phonics' and Here's Why... [ellipses in original ad] [headline]

\* \* \*

Hooked on Phonics helps new readers every step of the way. By learning the sounds of the alphabet, students can sound out and read most of the words in the English language.

\* \* \*

Good reading comprehension is essential to success in all subjects and is the very heart and soul of education. Dr. Don Parker adapted his highly acclaimed SRA Reading Laboratory for use with Hooked on Phonics. The result: Hooked on Phonics plus SRA Reading Power...the reading program that's sweeping the nation. [ellipses in original ad]

\* \* \*

If instruction is fun, learning is easy. This is the basic principle behind the Hooked on Phonics reading program, and it has proven true with students from most every culture, every walk of life, and every age group throughout the country. Hooked on Phonics is ideal for children or adults who are beginning readers or those who need remedial help. Hooked on Phonics is your own personal, friendly and uncritical private teacher.

[Consumer] 'This program worked for me and Tyler! I never learned to read in school, and I've tried a lot of reading programs that didn't help. I would have given anything for Hooked on Phonics when I was Tyler's age.' -- Eric Fisher and Tyler

[Text in box] It's Easy! You can listen to your Hooked on Phonics tapes: at home...in your car...or anywhere you choose! This is very important for older learners who desire their privacy. [ellipses in original ad]

Many teachers and parents have reported that Hooked on Phonics has helped those with learning disabilities such as dyslexia and attention deficit disorders. The

lessons can be repeated as often as necessary giving students the personalized repetition they need.

We're so confident of your success that we give you a 30-day written money back guarantee. If you don't see dramatic reading results within 30 days, return the program for a full refund. It's as simple as that." [Exhibit A]

B. "With Hooked on Phonics you will 'Learn to Read' [headline]

Hooked on Phonics helps teach children and adults how to read. Because all the lessons are set to music, learning to read becomes simple and fun. With Hooked on Phonics most students can work alone at their own pace and review the lessons at any time.

\* \* \*

With SRA Reading Power you will 'Read to Learn' [headline]

\* \* \*

SRA Reading Power includes 100 exciting stories followed by exercises to help with comprehension, vocabulary and grammar. This program will strengthen your reading skills and lead to better comprehension of all subjects." [Exhibit B, p.1]

\* \* \*

'What Educational Experts & Parents Say About Hooked on Phonics [headline]  
[Consumer] Dr. Don Parker, Ph.D., Author of SRA Reading Laboratories, California [headline]

'As author of the SRA Reading Laboratories, which is used by 61 million people in 62 countries around the world, I can say that Hooked on Phonics is a program I will recommend unconditionally for any age, in any culture around the world, seeking to learn to read.'

[Consumer] Sister Nancy Lynn McNamara, teacher, New York [headline]

'I started using Hooked on Phonics in my classroom in late October and saw phenomenal results in just a few weeks. There was success right away! I would recommend Hooked on Phonics for any age level, any nationality, anybody - because it works!'

\* \* \*

[Consumer] Sissy Paradis, Teacher/Tutor, Massachusetts [headline]

'When I tutored one particular student, his reading was at a 1st grade level. Recently he was retested and now he's at an 8th grade level...amazing, all this in four months. Hooked on Phonics is the best thing I've ever found.' [ellipses in original ad]

\* \* \*

[Consumer] Joan & Matt Nelson, Nebraska [headline]

'I thought our son's future was at stake because of his reading problem. But after we got Hooked on Phonics, his reading skills improved incredibly. He has so much more confidence in himself.'

[Consumer] Dr. & Mrs. R.A. Livingston, Michigan [headline]

'We purchased Hooked on Phonics when our son was four and one half years old. Within three months he was reading fluidly. Just after entering kindergarten, his reading skills were tested and showed that his reading and comprehension skills were on a 5th grade level. After his kindergarten year, he was put straight into 2nd grade and he's thriving. Believe me, people who know us know about Hooked on Phonics.'

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[Consumer] Ardie Keligond, California [headline]

'We got Hooked on Phonics for our son at the beginning of the school term. By January he was reading at a 3rd grade level. A lot of people ask me what's so special about Hooked on Phonics? Well, my son went from D's to B-'s in reading, and his spelling tests went to B+'s and A's. What's so special about Hooked on Phonics...It really works!' [ellipses in original ad]

[Consumer] Delores Coble, Oregon [headline]

'When Hooked on Phonics first arrived, my daughter was in the 7th grade with only a 2nd grade reading level. After one month she went to a 5th grade reading level. I've watched her grow. Now that we have Hooked on Phonics, it's everything they say it is. I can't say enough about it!'

[Consumer] Karol Pierce, California [headline]

'When you can make learning fun for the child, it works. It's really exciting! My son's report card went from C's and D's to almost straight A's, with an A in reading and an A in Math. Hooked on Phonics turned my son's whole school life around.'

\* \* \*

[Consumer] Jeff Herman, California [headline]

'We bought Hooked on Phonics when our daughter was three. By the time she was five, she was reading everything in the house. She was recently tested in the 2nd grade and the results showed a reading level of 6th grade and a comprehension level of 7th grade. This program is marvelous.'

[Consumer] Bob Unger, Author of Tune in to Success, New York [headline]

'I immediately noticed results with my son who's five. First it was the basics, and within several weeks he was reading simplistic sentences. And now he's reading the book I wrote...college level material. What's the bottom line? Hooked on Phonics works!'" [ellipses in original ad] [Exhibit B, p.2]

C. "And now, Hooked on Phonics joins forces with SRA Reading Laboratories used by an estimated 60 million people around the world. Dr. Don Parker has adapted his SRA program, which teaches reading and comprehension for home study use. So now with Hooked on Phonics you'll learn to read and with SRA Reading Power, you'll read to learn." [Exhibit C]

D. [Consumer] "Dear Hooked on Phonics...

'My son has shown great progress in his ability to read and comprehend since we ordered Hooked on Phonics. . . . I can say without reservation that Hooked on Phonics is an outstanding program.' - J.R., New Franken, Wisconsin" [1st set of ellipses in original ad] [Exhibit D]

E. "Are you still wondering if Hooked on Phonics is right for you and your family? Here's who's getting results:

Hooked on Phonics is an excellent program for preschoolers; Hooked on Phonics is exceptional for helping older students with reading comprehension; and most adults can teach themselves to read without any help or embarrassment.

From pre-school to high school, Hooked on Phonics is changing the way America learns to read!" [Exhibit E]

F. "(Phone Rings)

Hooked on Phonics...

To give your preschooler a headstart in reading, press 'A'

For help with reading comprehension, press 'B'

For older students who've fallen behind in reading, 'C'

To improve spelling skills, 'D'  
 For adults ready to teach themselves to read, press 'E'  
 For all your reading needs, call 1-800-ABCDEFGH and put Hooked on Phonics under your Christmas tree!" [ellipses in original ad] [Exhibit F]

G. "If your kids have problems reading, like guessing at words or below grade level, try Hooked on Phonics, the musical reading program the whole country's talking about. If you don't see a dramatic increase in reading skills in thirty days, just return Hooked on Phonics for a complete refund. Now is there any other reading method that will make this promise?" [Exhibit G]

H. [Consumer] "Dear Hooked on Phonics...  
 'In the first grade, my grandson attended a special reading program offered at a local college. It didn't help. In the second and third grades, he was enrolled in a special reading class at school. This didn't help either. Finally, we ordered Hooked on Phonics and his grades went from Cs and Ds to As and Bs. Thanks to Hooked on Phonics, my grandson got the help he needed.' - C.S., Jamaica, New York." [ellipses in original ad] [Exhibit H]

I. [Consumer] "Dear Hooked on Phonics:  
 'For 27 embarrassing years I had a secret. I could barely read. I tried so many reading programs but nothing worked. Then I got Hooked on Phonics. In two short months, I went from a 3rd to a 10th grade reading level. And since Hooked on Phonics, I finished trade school and have my own business. If you have a problem with reading, try Hooked on Phonics. It changed my life. It could change yours.'  
 Signed, Eric, Zainesville, Ohio." [Exhibit I]

J. [Consumer] [WRITTEN SUPERSCRIPT appearing on screen: "ADAM, AGE 6"]

"Adam: There is no excuse for illiteracy. Learning to read should be simple. Phonics makes reading simple by teaching letter sounds and syllables. I learned to read with phonics.

Announcer: Learn to read with Hooked on Phonics, the musical reading program. [WRITTEN SUPERSCRIPT appearing on screen: 'CHILDREN, REMEDIAL, ADULT'] Then, read to learn with SRA Reading Comprehension used by over 60 million people. [WRITTEN SUPERSCRIPT appearing on screen: 'USED BY OVER 60 MILLION PEOPLE']

Adam: Hooked on Phonics worked for me." [Exhibit J]

K. [Announcer: Chad Murdock] "I felt that any reading program that taught my son as quickly and as simply as 'Hooked on Phonics' is just too good not to share. And when I did, I found out that Michael's success wasn't unusual. There were many, many stories just like his. . . . So if you have a youngster beginning to read, an older student who may need some reading help, or if there is anyone in your life who has trouble reading, you should really take the next few minutes and watch these stories. [Exhibit K, p.1]

\* \* \*

[Consumer] [Ron (Livingston)]: One of the things that impressed me the most about Blake's reading and his development in reading was the fact that when he was in kindergarten he tested at a 5th grade reading level. But what really amazed us and we were told by the teachers that tested him that he actually comprehended on a 5th grade level, which makes all the difference in the world. And as a result of

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that, they moved him directly from kindergarten straight into 2nd grade at six years old. [Exhibit K, p.5]

\* \* \*

[Consumer] [Dr. Parker] . . . As author of the SRA Reading Laboratories, over the past forty years, which has now been used by over 61 million in 62 countries around the world, in all cultures, I can say that 'Hooked on Phonics' is a program that I would recommend unconditionally for a four year old, a forty-four year old, or in any culture around the world seeking to learn to read.

[Murdock]: Dr. Parker feels that 'Hooked on Phonics' is the missing link in helping most students learn to read. [Exhibit K, p.6]

\* \* \*

[Murdock]: Karol's son Robert struggled through the first and second grade. She ordered 'Hooked on Phonics' and his struggles have turned to success.

[Consumer] [Karol Pierce]: His report card this semester was the best that he's ever had. It was almost straight A's. And that's exciting, you know, going from C's sometimes D's and seeing mostly A's and B's and A's in reading, you know A minus in math. . . . [I]t's like you have your own in-home tutor. [Exhibit K, pp.6-7]

\* \* \*

[Murdock]: Ironically, Fred Carl worked for twenty years binding books that he couldn't read. Finally with the help of 'Hooked on Phonics' and his tutor, Sissy Paradis, Fred is learning to read.

[Consumers] [Sissy]: When I first got him as a student, he was classified as a first grade reader -- one/two, which is first grade, second half of the year -- and he recently has been retested and he's up to eighth grade. 'Hooked on Phonics' is the best thing I've found. If a child can't read, he can't go any further in school in any of his subjects, none of them. He can't do math because he can't read a problem. He can't do history because he can't read. He can't do science, he can't do experiments because he can't follow directions. What's he gonna do? He has to learn to how to read. If you can't read, you can't go anywhere, nowhere, nowhere.

[Fred Carl]: I can't see any reason why anybody would have any problem learning how to read or write with 'Hooked on Phonics.' . . .

[Sissy]: He's gone on for forty-eight years. He couldn't read anything when he got here -- barely anything. . . . It's unbelievable. . . . How much he's progressed in just, I would say the last four months. . . . It's gonna work. It absolutely will work. [Exhibit K, pp.7-8]

\* \* \*

[Announcer: Randy Thomas] All the lessons are set to music. And that makes learning to read simple and fun. You can work at your own pace, in your own home, and in complete privacy. It's like having your own private tutor for a fraction of the cost. . . . Most of the [musical, p.17] lessons are only nine minutes long and they're [all, p.17] easy to learn. It's as simple as that. You'll increase your skills in reading, spelling, pronunciation, and also build confidence and self esteem. Being a better reader opens the door for job opportunities and increases your potential for success. [Exhibit K, pp.8-9, 17]

\* \* \*

[Consumer] [Delores Coble]: Amanda's level was -- when we arrived in Oregon -- between the second and third grade level in reading. And she was put in the seventh grade which made it very difficult for her to read some of the seventh

grade books they gave her which left her a span of about four or five years to make up. With 'Hooked on Phonics' she probably came up to about a fourth or fifth grade level of reading and she's had the set, oh, I'd say about a month.

\* \* \*

[Murdock] . . . It doesn't matter if you have a child with reading difficulties, a child who is ready to learn, or an adult who never learned to read. 'Hooked on Phonics' may be the answer. [Exhibit K, p.14]

\* \* \*

[Consumer] [Jeff Herman]: We got the program when she was three and by the time she was five, she was reading everything in the house. She's in the third grade now, but we had her tested last year in the second grade and she was reading at a sixth grade level at that point and she has a seventh grade comprehension. . .

After Kia finished the program, a friend of ours [sic] son couldn't read and they were taking a cross country trip from California to New York. They were moving there and we gave them our 'Hooked on Phonics' program and on the four week trip, he took the whole program, he was five years old. By the time they got to New York he could read." [Exhibit K, pp.14-15]

L. "Hooked on Phonics has helped nearly one million students learn to read at home." [Exhibit L]

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through L, respondents have represented, directly or by implication, that:

A. HOP will quickly and easily teach persons with reading problems or disabilities to read, regardless of the nature of the problem or disability;

B. HOP is effective for teaching persons with learning disabilities, including dyslexia and attention deficit disorders, to read;

C. HOP will cause users with reading problems or disabilities to achieve significant improvement in reading levels and classroom grades;

D. HOP is effective for teaching persons in a home setting to read, without the need for additional assistance such as a teacher or tutor;

E. HOP is effective for teaching reading comprehension skills;

F. HOP has helped nearly one million students to learn to read at home;

G. The testimonials or endorsements from consumers appearing in advertisements for HOP reflect the typical or ordinary experience of members of the public who use HOP.

PAR. 6. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through L, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

CONFIDENTIAL

# We've Made Learning to Read Easy & Fun



## "We're Hooked on Phonics" and Here's Why...

Reading opens doors to information and self-confidence. When children learn to read, they are eager to tell the world. When adults learn their secret is...  
*Hooked On Phonics* helps new readers every step of the way. By learning the sounds of the alphabet, students can sound out and read most of the words in the English language.

Remember when you learned the ABC's? It was fun... and it was easy! If instruction is fun, learning is easy. This is the basic principle behind the *Hooked On Phonics* reading program, and it has proven true with students from most every culture, every walk of life, and every age group throughout the country. *Hooked On Phonics* is ideal for children or adults who are beginning readers or those who need remedial help. *Hooked On Phonics* is your own personal, friendly and unorthodox private teacher.

**It's Easy!**  
This can follow in your *Hooked On Phonics* steps...  
at home...  
in your car...  
or anywhere you choose!  
This is very important for older learners who don't have a teacher.

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or anywhere you choose!  
This is very important for older learners who don't have a teacher.

"Readers need to get the correct way to read from the start. But after *Hooked On Phonics* she would read the correct way. She was excited about that!"  
—Lynn Dalton and Karlen



Good reading comprehension is essential to success in all subjects and is the very heart and soul of education. Dr. Don Parker adapted his highly acclaimed SRA Reading Laboratory for use with *Hooked On Phonics*. The result: *Hooked On Phonics* plus SRA Reading Power, the reading program that's sweeping the nation.

There is a reason why over one million people have ordered *Hooked On Phonics* and thousands of schools are using it in their classrooms! It works and it's fun.



"*Hooked On Phonics* is a great teacher in my classroom. We have so many exceptional children who have poor language skills, and I can never give them all the help they need. But *Hooked On Phonics* can. They can learn without me, or on their own, make progress and not feel embarrassed."  
—Caren Bente

*Hooked On Phonics* is perfect for the classroom and has been endorsed by the National Right to Read Foundation as the exemplary instructional program for teaching children and adults to read.

# Hooked On Phonics

GEP 002546

"The program worked for me and Tyler. I never learned to read in school, and I've tried a lot of reading programs that didn't help. I would have given up on reading if not for *Hooked On Phonics* from Tyler's dad."  
—Eric Fisher & Tyler



Many teachers and parents have reported that *Hooked On Phonics* helped those with learning disabilities such as dyslexia and attention deficit disorder. The lessons can be repeated as often as necessary giving students the personal attention they need.

We're so confident of your success that we give you a 30-day written money back guarantee. If you don't see dramatic reading results within 30 days, return the program for a full refund. It's as simple as that.



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## EXHIBIT B



With  
**Hooked on Phonics**  
 you will  
**“Learn to Read”**

*Hooked on Phonics* helps teach children and adults how to read. Because all the lessons are set to music, learning to read becomes simple and fun. With *Hooked on Phonics* most students can work alone at their own pace and review the lessons at any time.

Phonics teaches the sounds of all the letters in the alphabet. After learning these sounds with *Hooked on Phonics*, it's possible to sound out and read most of the words in the English language. Learning by phonics also helps with spelling. It's as simple as that!

*Hooked on Phonics* includes 8 audio cassettes, 5 reading books, and 9 decks of color-coded flash cards.

GEF 005558

With  
**SRA Reading Power**  
 you will  
**“Read to Learn”**

*SRA Reading Power* is adapted for home study by Dr. Don Parker, author of the *SRA Reading Laboratories* used by over 61 million in 62 countries around the world.

*SRA Reading Power* includes 100 exciting stories followed by exercises to help with comprehension, vocabulary and grammar. This program will strengthen your reading skills and lead to better comprehension in all subjects.

*SRA Reading Power* includes 4 audio cassettes, 100 Power Builder stories, student record book and an answer book.

We're so confident you'll be successful, you have a  
**30-Day Unconditional  
 Money Back Guarantee!**

***Over half a million people have ordered Hooked on Phonics***

## EXHIBIT B

**Hooked on Phonics**

(P.2)

**Dr. Don Parker, Ph.D., Author of SRA Reading Laboratories, California**

*"As author of the SRA Reading Laboratories, which is used by 61 million people in 62 countries around the world, I can say that Hooked on Phonics is a program I will recommend unconditionally for any age, in any culture around the world, seeking to learn to read."*

**Sister Nancy Lynn McNamara, Teacher, New York**

*"I started using Hooked on Phonics in my classroom in late October and saw phenomenal results in just a few weeks. There was success right away! I would recommend Hooked on Phonics for any age level, any nationality, anybody - because it works!"*

**Maria Daniel, Teacher, Texas**

*"Hooked on Phonics doesn't just promise, it delivers! I have studied its phonetic structure and it's foolproof."*

**Sissy Paradis, Teacher/Tutor, Massachusetts**

*"When I tutored one particular student, his reading was at a 1st grade level. Recently he was retested and now he's at an 8th grade level...amazing, all this in four months. Hooked on Phonics is the best thing I've ever found."*

**Dorothy Raab, M.A., Teacher, California**

*"It's amazing. I watch my four-year old daughter turn on the tape and learn to read without any help from me. When you come across a program this wonderful that makes the child want to learn to read, I can say as an educator and a parent that I would buy another Hooked on Phonics and use it in my own classroom."*

**Joey Toney, School Board President, California**

*"My daughter was just an average student. After going through Hooked on Phonics just one time, Jill experienced a dramatic increase in her ability to read. Now she's the best reader in her 1st grade class."*

**Richard Martinik, Age 52, Connecticut**

*"Hooked on Phonics has made the greatest difference in my life. It has turned it around 100% because now I can read. But reading is only half of it. It has also taken an emotional burden off of my back and made my life easier."*

**Twila Morris, Indiana**

*"Now I can read and I'm using the skills I've learned with Hooked on Phonics to write stories for my children."*

**Joan & Matt Nelson, Nebraska**

*"I thought our son's future was at stake because of his reading problem. But after we got Hooked on Phonics, his reading skills improved incredibly. He has so much more confidence in himself."*

**Dr. & Mrs. R.A. Livingston, Michigan**

*"We purchased Hooked on Phonics when our son was four and one half years old. Within three months he was reading fluidly. Just after entering kindergarten, his reading skills were tested and showed that his reading and comprehension skills were on a 5th grade level. After his kindergarten year, he was put straight into 2nd grade and he's thriving. Believe me, people who know us know about Hooked on Phonics."*

**Ardie Keligond, California**

*"We got Hooked on Phonics for our son at the beginning of his school term. By January he was reading at a 3rd grade level. A lot of people ask me what's so special about Hooked on Phonics? Well, my son went from D's to B's in reading, and his spelling tests went to B+'s and A's. What's so special about Hooked on Phonics...It really works!"*

**Delores Coble, Oregon**

*"When Hooked on Phonics first arrived, my daughter was in the 7th grade with only a 2nd grade reading level. After one month she went to a 5th grade reading level. I watched her grow. Now that we have Hooked on Phonics it's everything they say it is. I can't say enough about it."*

**Karol Pierce, California**

*"When you can make learning fun for the child, it works. It's really exciting! My son's report card went from C's and D's to almost straight A's, with an A in reading and an A in Math. Hooked on Phonics turned my son's whole school life around."*

**Ken Fuchs, Washington**

*"At the beginning of the 1st grade, our daughter was tested and the results showed her at the 15th percentile. Then she got Hooked on Phonics, and after six months she was retested again and she was at the 65th percentile. She has made great strides in the little amount of time working with Hooked on Phonics. It's fantastic! We have a new child now."*

**Jeff Herman, California**

*"We bought Hooked on Phonics when our daughter was three. By the time she was five, she was reading everything in the house. She was recently tested in the 2nd grade and the results showed a reading level of 6th grade and a comprehension level of 7th grade. This program is marvelous."*

**Bob Unger, Author of Tune In to Success, New York**

*"I immediately noticed results with my son who's five. First it was the basics, and within several weeks he was reading simplistic sentences. And now he's reading the book wrote...college level material. What's the bottom line? Hooked on Phonics works!"*

CONFIDENTIAL

GEP 005561

Complaint

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EXHIBIT C

CONFIDENTIAL

**GATEWAY EDUCATIONAL PRODUCTS, LTD.  
HOOKED ON PHONICS**

And now, Hooked on Phonics joins forces with SRA Reading Laboratories used by an estimated 60 million people around the world. Dr. Don Parker has adapted his SRA program, which teaches reading and comprehension for home study use. So now with Hooked on Phonics you'll learn to read and with SRA Reading Power, you'll read to learn.

For information call 1-800-ABCDEFG

EXHIBIT D

**CONFIDENTIAL**

30 Second Radio Spot for *Hooked on Phonics*:  
J.R., New Franken, Wisconsin

Dear Hooked on Phonics...

"My son had shown great progress in his ability to read and comprehend since we ordered *Hooked on Phonics*. His motivation to do well is much improved, as well as his self-confidence. Now I no longer need to read his homework instructions to him. I can say without reservation that *Hooked on Phonics* is an outstanding program." – J.R., New Franken, Wisconsin

For *Hooked on Phonics* plus SRA Reading Laboratories, call 1-800-ABCDEFG.

## EXHIBIT E

RADIO EXHIBIT E

**CONFIDENTIAL****30 Second Radio Spot for *Hooked on Phonics*:  
Reasons**

Are you still wondering if *Hooked on Phonics* is right for you and your family? Here's who's getting results:

*Hooked on Phonics* is an excellent reading program for pre-schoolers; *Hooked on Phonics* is exceptional for helping older students with reading comprehension; and most adults can teach themselves to read without any help or embarrassment.

From pre-school to high school, *Hooked on Phonics* is changing the way America learns to read!

Call 1-800-ABCDEFG.

EXHIBIT F

EXHIBIT F

**HOOKED ON PHONICS**  
**CHRISTMAS '92**

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(Phone Rings)

Hooked on Phonics...

To give your preschooler a headstart in reading, press "A"

For help with reading comprehension, press "B"

For older students who've fallen behind in reading, "C"

To improve spelling skills, "D"

For adults ready to teach themselves to read, press "E"

For all your reading needs, call 1-800-ABCDEFG and put Hooked on Phonics under your Christmas tree!

## EXHIBIT G

**GATEWAY EDUCATIONAL PRODUCTS, LTD.  
HOOKED ON PHONICS  
Spot "Guessing at Words"**

*If your kids have problems reading, like guessing at words or below grade level, try Hooked on Phonics, the musical reading program the whole country's talking about. If you don't see a dramatic increase in reading skills in thirty days, just return Hooked on Phonics for a complete refund. Now is there any other reading method that will make this promise?*

*For Hooked on Phonics plus SRA Reading Power, call  
1-800-ABCDEF*

EXHIBIT H

~~CONFIDENTIAL~~

30 Second Radio Spot for *Hooked on Phonics*:  
C.S., Jamaica, New York

Dear Hooked on Phonics...

"In the first grade, my grandson attended a special reading program offered at a local college. It didn't help. In the second and third grades, he was enrolled in a special reading class at school. This didn't help either. Finally, we ordered *Hooked on Phonics* and his grades soon went from Cs and Ds to As and Bs. Thanks to *Hooked on Phonics*, my grandson got the help he needed." – C.S., Jamaica, New York.

For *Hooked on Phonics* plus SRA Reading Laboratories, call 1-800-ABCDEFG.

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## EXHIBIT I

RADIO

EXHIBIT I

CONFIDENTIAL

30 Second Radio Spot for *Hooked on Phonics*:  
Eric

*Dear Hooked on Phonics:*

"For 27 embarrassing years I had a secret. I could barely read. I tried so many reading programs but nothing worked. Then I got *Hooked on Phonics*.

In two short months, I went from a 3rd to a 10th grade reading level. And since *Hooked on Phonics*, I finished trade school and have my own business.

If you have a problem with reading, try *Hooked on Phonics*. It changed my life. It could change yours."

Signed, Eric, Zainesville, Ohio.

Call 1-800-ABCDEFG.

729

Complaint

EXHIBIT J

TELEVISION

EXHIBIT J

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Title - "No Excuse" - Adam  
QQEN 1805

Adam, age 6

Adam: There is no excuse for illiteracy. Learning to read should be simple. Phonics makes reading simple by teaching letter sounds and syllables. I learned to read with phonics.

Announcer: Learn to read with Hooked on Phonics, the musical reading program. Then, read to learn with SRA Reading Comprehension used by over 60 million people.

Adam: Hooked on Phonics worked for me.

Announcer: Call 1-800-ABCDEFG

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Complaint

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## EXHIBIT K

## INFOMERCIAL

Hello. My name is Chad Murdock. I've been producing and directing television and film for over ten years now and it's kind of unusual for me to find myself on this side of the camera. But I'm here today because of this little guy. My son Michael.

It was about a year ago that Michael showed some signs of wanting to learn to read and at that time I heard these ads on the radio for a reading program called "Hooked on Phonics." I was especially curious because I learned to read phonetically. I was always a very good reader and I wanted the best for my son. So, I ordered the "Hooked on Phonics" program for Michael and in no time he started reading almost everything he could get his hands on. Thanks pal.

I was so impressed that I went to "Hooked on Phonics" to tell them my story because I felt that any reading program that taught my son as quickly and as simply as "Hooked on Phonics" is just too good not to share. And when I did, I found out that Michael's success wasn't unusual. There were many, many stories just like his. So many, in fact, that I convinced the "Hooked on Phonics" people to do this television show. So we took our camera crews all across America -- from California to New York, from Oregon to Texas -- so that we could show you a few of the people, both kids and adults, who learned to read with "Hooked on Phonics." So if you have a youngster beginning to read, an older student who may need some reading help, or if there is anyone in your life who has trouble reading, you should really take the next few minutes and watch these stories. Because "Hooked on Phonics" just might be the answer to your reading problems.

We went to a school in South Bronx, New York, to meet a remarkable second grade class and their teacher, Sister Nancy McNamara.

[Sr. McNamara]: I had heard the ads for "Hooked on Phonics" for years and the idea that it was somehow connected with music or tied in with the music. I said that maybe something would work. Nothing short of a miracle was going to work with these kids that I have. This year I got first seventeen students the class that size was later doubled to thirty-two students. All non-readers. I had started using the phonics around mid-October and I had begun to see pretty phenomenal results and if you reach . . . the level of self-confidence is just incredible, I mean they want to read. They see the "Hooked on Phonics" tapes, they sing along with the music. Kids took to the phonics program like ducks to water. They had materials to listen, materials to look at, materials to manipulate, and materials that they really got excited about. And they began to see progress in their own lives that they had never seen before. They began to get a sense of, uh, I guess self-value, self-worth. They were getting someplace. So there was success. You know, right away. Parents night is usually a disaster. I had 100% of the parents come to see me. 100% of the parents Monday night and some came back on Tuesday. They were fascinated with this program. The "Hooked on Phonics" program is the only program that has the visual and auditory input simultaneously. It's a logical, sequential program and it works. I would recommend "Hooked on Phonics" for any age level, any nationality, anybody.

\* \* \*

Our next story comes from Connecticut where Richard Martinik, for more than fifty years of his life did not know how to read -- kept it a secret and thought he would never be able to read. Then he ordered "Hooked on Phonics."

[Martinik]: Every morning of my life, I would look in the mirror, shaving, and probably one of the first thoughts that ever crossed my mind in the morning was, "Am I gonna get caught today? Is somebody gonna find out?"

And turning 50, my wife gave a surprise party for me. All my friends, relatives came from oh, a hundred miles away. They sat me down in a nice chair in the back yard and a card table in front of me covered with greeting cards. I showed a little bit of emotion and my daughter promptly took over the reading of those greeting cards for me because I didn't know what to do. I couldn't possibly stand up in front of all those people and tell them, "You know I've been lying to you. I can't read." I just couldn't do that.

[His wife Mona]: I never really realized what an impact that had on his life. One day I went down the stairs, 'cause he would be in the basement, and he said to me, "Mona, this is the key. Do you know how many years I have been waiting for this? It's finally here."

[Martinik]: This product, "Hooked on Phonics," came along. It's a godsend. You can make every mistake in the world. You can make as many mistakes as necessary because it's just between you and the tape recorder. That's the success of "Hooked on Phonics" and that's what makes it work. It takes all that shame, fear, embarrassment and all that tension out of your life. The tension that's involved when you're sitting with your wife, the woman that you love, and saying, "Help me, I'm stupid."

[His wife Mona]: So I didn't know that this man, until he learned to read through "Hooked on Phonics," that this man was really in agony every day of his life.

[Martinik]: "Hooked-on Phonics" has made the greatest difference in my life. It's turned it around 100%. I feel better about myself. I can read. But reading is only half of it. What it's done for me emotionally -- it's just taken the burden off my back. It's just made life so much easier to cope with because I feel good about myself. And I contribute that to "Hooked on Phonics."

[His wife Mona]: I get kinda choked up with this because I know the hurt and what he went through and because I didn't understand, he suffered by himself. And if I knew now all that -- I'd say, if I had to mortgage the house to buy that product to make this man what he is today, I would.

\* \* \*

Just outside of Detroit, Ron and Glenna live with their son Blake. At age 4½, Blake was ready to start learning to read.

[Ron]: One of the things that impressed me the most about Blake's reading and his development in reading was the fact that when he was in kindergarten he tested at a 5th grade reading level. But what really amazed us and we were told by the teachers that tested him that he actually comprehended on a 5th grade level, which makes all the difference in the world. And as a result of that, they moved him directly from kindergarten straight into 2nd grade at six years old. And he's done well. He's thrived in the second grade. I can remember one of the first little school productions he had and Glenna was videotaping and when we got it home and I was in the background telling Blake to slow down because he was reading too fast.

[Glenna]: We're not biased. But we're very proud of him.

[Ron]: Yeah. We're extremely proud of him and I don't want to sound like I'm bragging, but sometimes I can't help it. I have to let him know what's going on, you know, because this is too good not to share. And believe me, people who know us know about "Hooked on Phonics."

\* \* \*

[Murdock]: Now I'd like to introduce Dr. Don Parker, who has over forty years experience in reading research and listed in "Who's Who In America." In addition to many achievements in the fields of psychology and education, Dr. Parker is author of the SRA Reading Laboratory, which has been used by over 60 million students in 62 countries around the world.

[Dr. Parker]: I spent six hours over a period of two days fine tooth combing, going through all the motions of learning, just like the program said. And I tell you, I was amazed that my responses to my ear, my eye, my hand, movement of the cards, total body feeling of the rhythm and the music, the clear spoken voices on the tapes, it's a program that had to work. As author of the SRA Reading Laboratories, over the past forty years, which has now been used by over 61 million in 62 countries around the world, in all cultures, I can say that "Hooked on Phonics" is a program I would recommend unconditionally for a four year-old, a forty-four year old, or in any culture around the world seeking to learn to read.

[Murdock]: Dr. Parker feels that "Hooked on Phonics" is the missing link in helping most students learn to read.

\* \* \*

[Murdock]: Karol's son Robert struggled through the first and second grade. So she ordered "Hooked on Phonics" and his struggles have turned to success.

[Karol Pierce]: His report card this semester was the best that he's ever had. It was almost all straight A's. And that's exciting, you know, going from C's sometimes D's and seeing mostly A's and B's and A's in reading, you know A minus in math. The spelling test that he would have before he would maybe get C's on, but after using the phonics course, he gets A's, this is the truth, on every single spelling test. When you have a program such as this that you can take advantage of every single day, seven days a week, it's like you have your own in-home tutor. That's probably the most important thing about the "Hooked on Phonics" program is knowing that it really turned my son's whole school situation, whole school life around.

[Murdock]: Ironically, Fred Carl worked for twenty years binding books that he couldn't read. Finally with the help of "Hooked on Phonics" and his tutor, Sissy Paradis, Fred is learning to read.

[Sissy]: When I first got him as a student, he was classified as a first grade reader -- one/two, which is first grade, second half of the year-- and he recently has been retested and he's up to eighth grade. "Hooked on Phonics" is the best thing I've found. If a child can't read, he can't go any further in school in any of his subjects, none of them. He can't do math because he can't read a problem; He can't do history because he can't read. He can't do science, he can't do experiments because he can't follow directions. What's he gonna do? He has to learn how to read. If you can't read, you can't go anywhere, nowhere, nowhere.

[Fred Carl]: I can't see any reason why anybody would have any problem learning how to read or write with "Hooked on Phonics."

[Sissy]: People that know how to read don't understand that people who don't know how to read are in a world all their own -- a closed world, a world with no light, no where to go. They're just in the dark forever. It's like being blind almost. You can see, but you don't know where you're going. He's gone along for forty-eight years. He couldn't read anything when he got here -- barely anything.

[Fred]: It's worth it all. Worth the weight in gold. If I had ever made a decision that affected my life more it's getting help.

[Sissy]: It's unbelievable. It really is. How much he's progressed in just, I would say the last four months. Like Fred said, what he's learned now he wouldn't be able to replace for a million dollars. Try it. They give you a thirty day trial. I know they'll like it. It's gonna work. It absolutely will work.

\* \* \*

Hi. I'm Randy Thomas and you've probably heard me on the radio talking about "Hooked on Phonics." You know -- call 1-800-ABCDEFGH. Well that's me. And I'm really proud to be involved with this program because it's helped so many people learn to read. In fact, thousands of schools and almost half a million people have ordered "Hooked on Phonics". What is "Hooked on Phonics"? It's a program that helps teach children and adults how to read by teaching the sounds of the letters in the alphabet. All the lessons are set to music. And that makes learning to read simple and fun. You can work at your own pace, in your home, and in complete privacy. It's like having your own private tutor for a fraction of the cost. "Hooked on Phonics" includes five books, eight cassettes, and nine decks of flash cards, all color coded. That means, when you use the yellow book, you use the yellow tape and the yellow cards. Purple book, purple tape and purple cards. Most of the lessons are only nine minutes long and they're easy to learn. It's as simple as that. You'll increase your skills in reading, spelling, pronunciation, and also build confidence and self esteem. Being a better reader opens the door for job opportunities and increases your potential for success. Call 1-800-ABCDEFGH. We're waiting for your call.

[Murdock]: Just outside New York City in Great Neck, lives a wonderful family, the Ungers. Bob is an accomplished attorney and author of a new book, Tune Into Success.

[Bob]: A lot of people try to criticize phonetics but it's like a house. In order to build a house you've got to have a strong foundation. And what "Hooked on Phonics" provides is an unbelievably solid foundation to build upon for the future. And really it carries over to any part of life. Enthusiasm level is absolutely incredible and it's every day, "Daddy, I want to do Hooks, I want to do Hooks." He calls it "Hooks." Some times it's "Hooks."

[Phyllis]: The other thing I find, he's starting to teach Sammy. And she's learning better from him with "Hooks" than just from me. I don't -- so he's having fun passing it on to her.

[Adam]: She knows a lot of letters. I think all she needs to know. She knows A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y -- she needs to learn Z.

[Bob]: I remember he called me on the phone when he finished the program and he said, "Daddy, daddy, I did it, I did it. I finished Hooks. I finished Hooks. I did it." It's a tremendous self esteem builder. And this success with that program will lead to other successes. Now he can read my book.

[Adam]: What do two lawyers who have made a name for themselves singing a national anthem before baseball games. Robert Unger and John \_\_\_\_\_ not only sing the song of success but . . .

[Bob]: Adam is a product of the product and if anybody wants to come here and see him read, they're welcome, any time. It works, that's the bottom line.

\* \* \*

[Murdock]: Dorothy Raab, who has her Master's Degree in education, has been teaching school for many years. Yet to balance between the distractions of her other children at home and her daughter's intense desire to learn to read, she needed another tool to help. "Hooked on Phonics" was that tool.

[Dorothy]: I would say this program is one of the best that I've come across as an educator and as a parent. If any parent feels their child is ready to read, this is a perfect program because it doesn't push a child. It lets the child learn at their own speed. I think "Hooked on Phonics" could be used by anyone and just watching my daughter, who's four, do it without any problems, without any explanation from me, just turn on the tape and follow the directions. When you come across a program that really tries to hit the very basic for the child, give simple directions, give a positive approach, and help the child feel good about themselves so that they want to learn to read and they want to do it, you know . . . I mean, I'd buy this program and use it in my class room. That's what I'd do.

\* \* \*

This story comes from Coperopolis in the hills of Northern California. Joey and Rita heard about "Hooked on Phonics" from their friends and orderd it for their daughter Jill. Joey, by the way, is president of the local elementary school board. Here's what happened.

[Joey Toney]: After going through the program just one time, Jill experienced a dramatic increase in her ability to read and in fact now she's the best reader in her first grade class.

[Rita Toney]: I think what amazes me the most is not only can she read much better, but the spelling. She's great in her spelling and she aces all of her tests and we're real proud of her. Since we've been working with Jill on "Hooked on Phonics," she volunteers now to read in front of the class which is great and the teacher even commented on that.

[Joey]: One of the real impressive aspects of "Hooked on Phonics" is how effective it is yet at the same time, it's very simple to use. I'm a very skeptical nuts and bolts kind of a person and if I think something is over rated or I think I've been had, I'll be the first one to speak up.

[Rita]: It has a money back guarantee. You can always send it back. But you wouldn't want to.

[Joey]: You know, I've told the school teachers, I've told the other members of the board, I've told parents at meetings and so on, you know, I'm always raving about "Hooked on Phonics" because it works.

\* \* \*

Next we go to Los Angeles, California where Ardie Keligond talks about her son Jamar when he started to fall behind in school.

[Ardie]: "Hooked on Phonics" wasn't like a lot of the other programs that I've researched and I've had a lot of people ask me that same question. What is so special about "Hooked on Phonics"? It works. That's what's special about it and

you know, you can't get anything cheaper. I've called private tutors and, you know, you can pay two hundred bucks a month for a private tutor, so it's well, well worth the cost. And when he starts fourth grade, then he'll be the one that's on top getting the A's. He went from D's and he's at probably about C pluses and B minuses. But his spelling tests have gone to B plus and A's. So that's what "Hooked on Phonics" has done for him, and I'm proud of that, I really am. I can't even give you one word that would just tell you how good I feel about "Hooked on Phonics."

[Jamar]: It feels good.

[Ardiel]: Yes. That's a good one. It feels good.

\* \* \*

[Dr. Parker]: The greatest strength of "Hooked on Phonics" is that it goes right to the point of connecting the ear and the eye, the sound and the sight. The fundamentals of what reading really is.

\* \* \*

[Murdock]: Maria Daniel is another teacher who has seen the profound impact that "Hooked on Phonics" has had on her students.

[Maria Daniel]: The advantage that "Hooked on Phonics" delivers. It doesn't promise. I mean, twenty years of teaching I've heard of a lot of programs and I looked into them and they promised, but they didn't deliver. I really have studied it, as a phonetic structural program and I feel that the soundness that the way it develops, that the progressive way it presents, is foolproof.

\* \* \*

[Murdock]: In a small Oregon town, we visited with Amanda Coble who has shown extraordinary courage. And yet she has never lost sight of her dreams.

[Delores Coble]: Amanda's level was -- when we arrived in Oregon -- between the second and third grade level in reading. And she was put in the seventh grade which made it very difficult for her to read some of the seventh grade books they gave her which left her a span of about four or five years to make up. With "Hooked on Phonics" she probably came up to about a fourth or fifth grade level of reading and she's had the set, oh, I'd say about a month.

[Amanda]: I was the one that saw it on TV and I said "Mom, call that and get me on 'Hooked on Phonics' because I want help and learn how to read."

[Delores]: I can't say I've prayed enough praise for it. Because I've watched it and now that I've got it, it's everything they say it is. It's really good. Get "Hooked on Phonics."

[Amanda]: And I want to get into college -- and when you get into college, go to a different college -- get married, and do whatever I want to do. And like I said, just again. Thank you. Thank you so much.

[Murdock]: Amanda's goals are now within reach. It doesn't matter if you have a child with reading difficulties, a child who is ready to learn, or an adult who never learned to read. "Hooked on Phonics" may be the answer.

\* \* \*

[Jeff Herman]: We got the program when she was three and by the time she was five, she was reading everything in the house. She's in the third grade now, but we had her tested last year in the second grade and she was reading at a sixth grade level at that point and she has a seventh grade comprehension.

Complaint

119 F.T.C.

[Kia Herman]: In kindergarten, the principal came to our class and tested everybody for reading and since I was the only one who could really read, I was able to read in front of the class, because the principal told me to.

[Jeff]: After Kia finished the program, a friend of ours son couldn't read and they were taking a cross country trip from California to New York. They were moving there and we gave them our "Hooked on Phonics" program and on the four week trip, he took the whole program, he was five years old. By the time they got to New York he could read. It was marvelous.

[Kia]: I think they should learn how to read if they don't already know because it's fun.

\* \* \*

[Murdock]: Next, I had an opportunity to interview Twila Morris, a 32-year-old mother from Fort Wayne, Indiana, who as a child ran crying from her class room when asked to read. From that day on until she got "Hooked on Phonics," she struggled through life as a non-reader.

[Twila]: I'd walk into a store, not knowing how to read, and I'd see the Pine Sol that I always see, you know, it had the tree. And I seen this white bottle sitting by it and I thought, "Oh, a new kind of Pine Sol." Well, I opened up that thing it's embarrassing -- there were about four or five people around -- and I opened it up and smelled it to see how good the pine would smell -- was ammonia. Knocked me right down on the floor. The ammonia went everywhere. And the guy at the store's mad and he said -- "What in the world would ever make you smell something like that?" And I didn't want to say because I couldn't read it. Both my girls know, knew, that I had a problem. It took my baby girl to say, "Hey Mom, it's time." And she had seen "Hooked on Phonics" on a commercial. And on the way home I was crying. She said, "Well, don't cry. Just order 'Hooked on Phonics.'" And she looked at me in the eyes and I knew that it was time for her Mom to learn.

[Patricia]: I needed help on some of my school work, and she couldn't help me. Until she got "Hooked on Phonics." And she started listening to them and it just turned out great. She started helping me with my homework. Now she's written stories.

[Twila]: Now I can read and I'm using the skills I've learned from "Hooked on Phonics" to write stories.

[Patricia]: I'm proud of her. I just can't think of another word to go over that word. I am really proud of her.

\* \* \*

Hi, I'm Randy Thomas, and you've probably heard me on the radio talking about "Hooked on Phonics." You know, call 1-800-ABCDEFG. Well, that's me. And I am really proud to be involved with this program because it's helped so many people learn to read. In fact, thousands of schools and almost half a million people have ordered "Hooked on Phonics." What is "Hooked on Phonics"? It's a program that can help teach children and adults to read by teaching the sounds of the letters in the alphabet. All the lessons are set to music, and that makes learning to read simple and fun. You can work at your own pace, in your own home, and in complete privacy. It's like having your own private tutor for a fraction of the cost. "Hooked on Phonics" includes five books, eight cassettes and nine decks of flash cards, all color coded. That means when you use the yellow book, you use the yellow tape and the yellow cards. Purple book, purple tape and purple cards. Most

of the musical lessons are only nine minutes long and they're all easy to learn. It's as simple as that. You'll increase your skills in reading, spelling, pronunciation, and also build confidence and self esteem. Being a better reader opens the doors for job opportunities and your potential for success. Call 1-800-ABCDEFGH. We're waiting for your call.

\* \* \*

[Murdock]: Well, we're just about out of time now. And you have seen the difference that "Hooked on Phonics" has made in these peoples' lives. And I know how they feel because as a father it was wonderful to see my son gain such self confidence while learning how to read. Now he believes he can do anything in life and so do I. And I'd like to say one more thing to you. If there's someone you know who might need some help with reading, try "Hooked on Phonics." It worked for my son Michael. It could work for you. Thank you for watching.

[Film Participant]: For what it's done for our daughter is just fantastic. I can't say enough about it.

[Film Participant]: It was a success for us to use the program.

[Film Participant]: We have a new child now and she's just wonderful.

EXHIBIT L

# HOOKED ON PHONICS CLASSROOM PACKAGE.

## CUSTOMIZED KITS FOR GROUPS OF FIVE TO FIFTY ANY CLASSROOM SIZE.

Hooked On Phonics has helped nearly one million students learn to read at home.

### NOW WE'RE READY FOR SCHOOL.

For the very first time, Hooked On Phonics has been designed especially for your classroom. Each kit allows you to offer one-on-one instruction to five students at a time. With user kits you can offer this unique method of instruction to your entire class.

The kits are convenient to set up and very easy to use. In fact, you'll receive a comprehensive user's guide that, among other things, will show you how to identify each student's specific needs for individual application of the program.

We've also improved Hooked On Phonics's overall efficiency. Our flash cards now come with a special binding so you won't have to worry about cards being out of sequence or worse, lost. Still, if flash cards are worn or lost, or a single tape is misplaced, replacement parts are now available.

### PHONICS IS YOUR PERFECT PARTNER.

Still, the best reason to order Hooked On Phonics is that it works. Based on systematic phonics, your students will learn vital reading skills such as letter recognition, decoding and spelling.

It can be integrated into any whole language program to reinforce previously learned skills without interruption.

Teaching our program requires no special skills on your part. It's as easy to teach as it is to learn.

Your students will easily remember their lessons because Hooked On Phonics is set to music with rhythm and rhyme.

Careful materials appear clearly and inviting while stimulating interest and participation.

More importantly, everyone who uses our program can progress at their own pace without feeling inhibited by peer pressure. This way, even your slow learners can benefit from the program penalty. Our program also stresses repetition so rules and patterns of language are quickly acquired. Clear directions make students in charge of their own.

### TEACH MORE FOR LESS.

Even better, the program that has taught so many at home is now available with an educator's discount.

Your order will receive a 12% to 40% discount based on the number of kits you buy in a quantity.

Compared to other reading supplemental programs, Hooked On Phonics will cost your classroom considerably less.

### YOU CAN PUT THE FUN BACK INTO LEARNING.

When was the last time you had to tell your students to have fun? Children have fun naturally, and our program lets them learn while having fun. Learning to read becomes an exciting process when all the pieces start to fall into place as they will with every Hooked On Phonics lesson.

So give yourself something to smile about: a classroom full of confident and accomplished boys and girls.

And reading will just grow out of it's natural. As a teacher, the best gift you can give students is the knowledge of who they are, where they came from and where they're going.

To receive more information about the Hooked On Phonics Classroom Package or to speak with a consultant about pricing, call 1-800-READING... because learning to read with Hooked On Phonics isn't just easy, it's fun!



*Hooked On Phonics*  
1-800-READING

## DECISION AND ORDER

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

The respondents, their attorneys, and counsel for 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, 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 Gateway Educational Products, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1050 Katella Ave., Suite D, in the City of Orange, State of California.

Respondents John Shanahan and John Herlihy are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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

### ORDER

#### DEFINITIONS

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

A. "*HOP*" means the reading program known as "Hooked on Phonics/SRA Reading Power" marketed by Gateway Educational Products, Ltd.

B. "*Educational program or product*" means any program or product that provides instruction in any field of study, including but not limited to any aspect of reading.

C. "*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 respondents Gateway Educational Products, Ltd., a corporation, its successors and assigns, and its officers, and John Shanahan and John Herlihy, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of HOP or any other educational program or 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 such program or product:

A. Can or will quickly and easily teach persons with reading problems or disabilities to read, regardless of the nature of the problem or disability;

B. Is effective for teaching persons with learning disabilities, including dyslexia and attention deficit disorders, to read;

C. Can or will cause users with reading problems or disabilities to achieve significant improvement in reading levels or classroom grades;

D. Is effective for teaching persons in a home setting to read, without the need for additional assistance such as a teacher or tutor;

E. Is effective for teaching reading comprehension skills;

F. Has helped nearly one million or any other number of students to learn to read; or

G. Provides any other educational benefit, unless at the time of making such representation, respondents possess and rely 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 respondents Gateway Educational Products, Ltd., a corporation, its successors and assigns, and its officers, and John Shanahan and John Herlihy, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any educational program or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the program or product represents the typical or ordinary experience of members of the public who use the program or product, unless at the time of making such representation, respondents possess and rely 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 respondents Gateway Educational Products, Ltd., a corporation, its successors and assigns, and its

officers, and John Shanahan and John Herlihy, individually and as officers of said corporation, shall for five (5) years after the date of the last dissemination to which they pertain, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. Any advertisement making any representation covered by this order;

B. All materials that were relied upon by respondents in disseminating any representation covered by this order; and

C. All reports, tests, studies, surveys, demonstrations or other evidence in any respondent's possession or control that contradict, qualify, or call into question such representation, or the basis upon which respondents relied for such representation, including complaints from consumers.

#### IV.

*It is further ordered,* That respondent Gateway Educational Products, Ltd., its successors and assigns, shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of its current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of entry of this order, provide a copy of this order to each of its principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person commences his or her responsibilities.

#### V.

*It is further ordered,* That respondent Gateway Educational Products, Ltd., its successors and assigns, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment, or sale resulting in the emergence of a

successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other change in the corporation that may affect compliance obligations arising out of this order.

## VI.

*It is further ordered,* That respondents John Shanahan and John Herlihy shall, for a period of ten (10) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of their present business or employment with respondent Gateway Educational Products, Ltd., or its successors and assigns, and of their affiliation with any new business or employment in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale, or distribution of any educational program or product. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

## VII.

*It is further ordered,* That respondents shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Complaint

119 F.T.C.

IN THE MATTER OF

HÄAGEN-DAZS COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3582. Complaint, June 2, 1995--Decision, June 2, 1995*

This consent order prohibits, among other things, a New Jersey-based ice cream and frozen yogurt corporation from misrepresenting the existence or amount of fat, saturated fat, cholesterol, or calorie content of any of its frozen food products in the future, and requires the respondent to meet the Food and Drug Administration qualifying amount for any nutrient-content claim.

*Appearances*

For the Commission: *Anne V. Maher* and *Michelle K. Rusk*.

For the respondent: *Basil Culyba* and *Kirsten Wolfe*, *Howrey & Simon*, Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Häagen-Dazs Company, Inc., a corporation ("Häagen-Dazs" or "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 Häagen-Dazs is a New Jersey corporation, with its principal office or place of business at Glenpointe Centre East, Teaneck, NJ.

PAR. 2. Respondent has manufactured, advertised, labeled, offered for sale, sold and distributed Häagen-Dazs Frozen Yogurt, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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 Häagen-Dazs Frozen Yogurt, including but not necessarily limited to the attached Exhibits 1-3. These advertisements contain the following statements and depictions:

- A. [In a 70-point type headline:]  
 WHY IS HÄAGEN-DAZS®  
 FROZEN YOGURT  
 BETTER THAN YOUR  
 FIRST TRUE LOVE?  
 [Depiction of "Honeymooners"]  
 HÄAGEN-DAZS IS STILL  
 98% FAT FREE\*.  
 [In 15-point text below the headline:]  
 Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.  
 What could be better?  
 [Depiction of frozen yogurt carton container and box of frozen yogurt bars]  
 [In 8-point type at the bottom right side of the page:]  
 \* frozen yogurt and sorbet combinations  
 (Exhibit 1)
- B. [In a 70-point type headline:]  
 WHY IS HÄAGEN-DAZS  
 FROZEN YOGURT  
 BETTER THAN YOUR  
 FIRST TRUE LOVE?  
 [Depiction of "Honeymooners"]  
 HÄAGEN-DAZS IS STILL  
 98% FAT FREE\*.  
 [In 20-point text below the headline:]  
 Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt.  
 Both are 98% fat free and still totally Häagen-Dazs.  
 [Depiction of frozen yogurt carton container]  
 [In 8-point type at the bottom right side of the page:]  
 \*frozen yogurt and sorbet combinations  
 (Exhibit 2)
- C. [In a 110-point type headline:]  
 NOW DISAPPEARING AT A STORE NEAR YOU.  
 [Depiction of frozen yogurt bar]  
 [In 15-point text below the headline:]  
 Take a good look. This is what a Häagen-Dazs Frozen Yogurt bar looks like. We thought we'd point that out, just in case you have some trouble finding them in your store. Because it seems that people are demanding them faster

than we can supply them. Not that we're really surprised. After all, we're the ones who made them so irresistible in the first place -- with flavors like Raspberry & Vanilla, Peach, Strawberry Daiquiri and Piña Colada. And each with just 1 gram of fat and 100 calories. So now that you know what they look like -- go ahead and try one. And you'll find out for yourself just how quickly they can disappear.

(Exhibit 3)

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 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is 98 percent fat free.

PAR. 6. In truth and in fact, in most cases Häagen-Dazs Frozen Yogurt is not 98 percent fat free. Seven of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained more than two percent fat content at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph five was, and is, 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 1 and 2, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt is low fat.

PAR. 8. In truth and in fact, in most cases Häagen-Dazs Frozen Yogurt is not low fat. Three of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons and three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eight to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. In addition, four of the nine Häagen-Dazs Frozen Yogurt flavors sold in cartons contained from four to six grams of fat per serving. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain one gram of fat per serving.

PAR. 10. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than one gram of fat per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represents directly or by implication, that Häagen-Dazs Frozen Yogurt Bars are low fat.

PAR. 12. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars are not low fat. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from eleven to twelve grams of fat per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 3, respondent has represented, directly or by implication, that Häagen-Dazs Frozen Yogurt Bars contain 100 calories per serving.

PAR. 14. In truth and in fact, in many cases Häagen-Dazs Frozen Yogurt Bars contain more than 100 calories per serving. Three of the eight Häagen-Dazs Frozen Yogurt Bar flavors contained from 210 to 230 calories per serving at the time of dissemination of the advertisements referred to in paragraph four. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. The acts and practices of the respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

# WHY IS HÄAGEN-DAZS<sup>®</sup> FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?



## HÄAGEN-DAZS IS STILL 98% FAT FREE.\*

Imagine pineapple sorbet tantalizingly wrapped around a coconut frozen yogurt bar. And now imagine that this bar has 100 calories. Or imagine a pint of vanilla frozen yogurt swirled with heavenly raspberry sorbet. And that these and all the rest of our irresistible frozen yogurt and sorbet combinations are 98% fat free. But they're still totally Häagen-Dazs.

What could be better?

**HÄAGEN-DAZS. IT'S BETTER THAN ANYTHING.™**



\*frozen yogurt and sorbet combinations

EXHIBIT 2

# WHY IS HÄAGEN-DAZS<sup>®</sup> FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?



## HÄAGEN-DAZS IS STILL 98% FAT FREE.\*

©1993 The Häagen-Dazs Company, Inc.

COUPON EXPIRES 12/31/93

**SAVE \$1.00**  
ON ANY FLAVOR  
HÄAGEN-DAZS<sup>®</sup> FROZEN YOGURT PINTS



**VOID**  
This certificate is redeemable at grocery/  
convenience stores or at participating Häagen-Dazs Ice Cream Shops



Try new Raspberry  
Rendezvous<sup>®</sup> and Orange  
Tango<sup>®</sup> Frozen Yogurt. Both  
are 98% fat free and still  
totally Häagen-Dazs.

**HÄAGEN-DAZS.<sup>™</sup>**  
**IT'S BETTER THAN ANYTHING.<sup>™</sup>**

\*Frozen yogurt and sorbet combinations

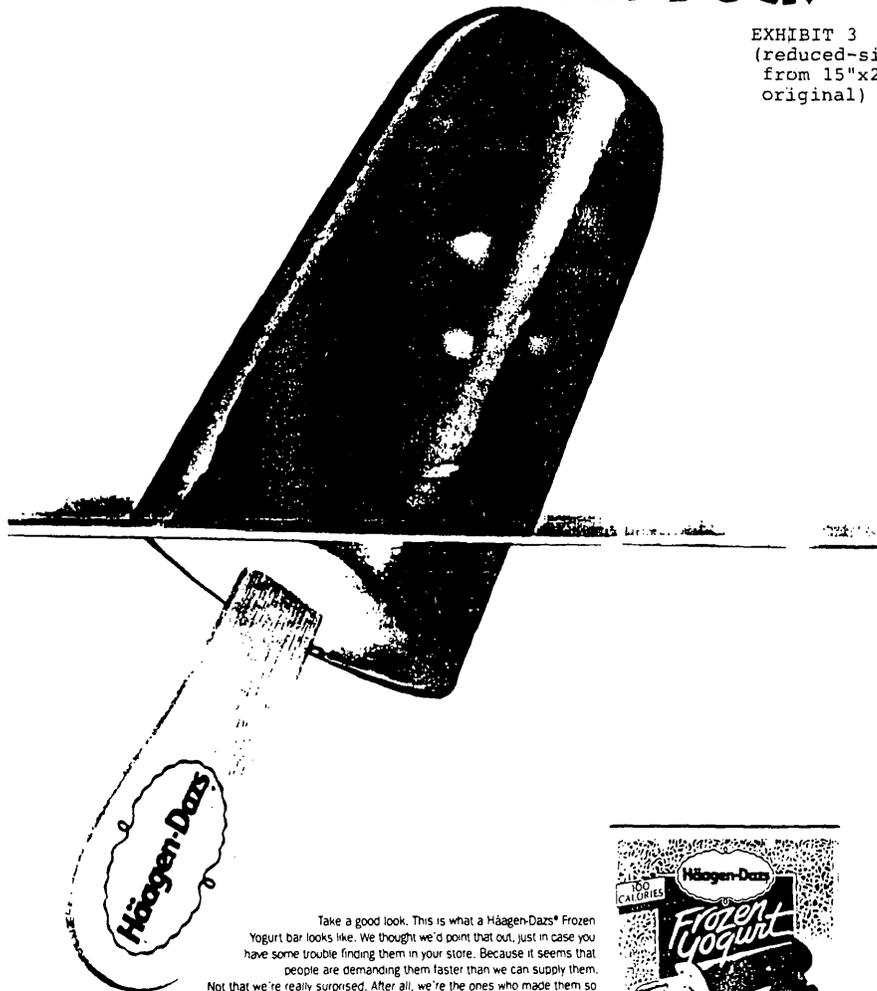
Complaint

119 F.T.C.

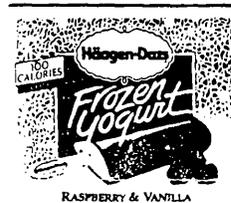
EXHIBIT 3

# NOW DISAPPEARING AT A STORE NEAR YOU.

EXHIBIT 3  
(reduced-size  
from 15"x25"  
original)



Take a good look. This is what a Häagen-Dazs® Frozen Yogurt bar looks like. We thought we'd point that out, just in case you have some trouble finding them in your store. Because it seems that people are demanding them faster than we can supply them. Not that we're really surprised. After all, we're the ones who made them so irresistible in the first place—with flavors like Raspberry & Vanilla, Strawberry Cheesecake, and Piña Colada. And each with just 1 gram of fat and 100 calories. So now that you know what they look like—go ahead and try one. And you'll find out for yourself just how quickly they can disappear.



**HÄAGEN-DAZS® IT'S BETTER THAN ANYTHING.™**

## 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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations 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 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 comment 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 Häagen-Dazs Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at Glenpointe Centre East, Teaneck, NJ.

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 respondent Häagen-Dazs Company, 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 frozen food 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, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

## II.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any frozen food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

## III.

*It is further ordered,* That for three (3) 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 copies of:

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

2. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, including complaints from consumers.

#### IV

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

#### V

*It is further ordered,* That respondent shall, within thirty (30) days after service of this order, distribute a copy of, this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertisements or other materials covered by this order.

#### VI.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order, 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.

Chairman Pitofsky not participating.

Complaint

119 F.T.C.

IN THE MATTER OF

LA ASOCIACIÓN MÉDICA DE PUERTO RICO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3583. Complaint, June 2, 1995--Decision, June 2, 1995*

This consent order prohibits, among other things, the Medical Association, the Psychiatry Section, and the two doctors from encouraging, organizing or entering into: any boycott or refusal to deal with any third-party payer; or any agreement to refuse to provide services to patients covered by any third-party payer. In addition, the consent order prohibits, for five years, the respondents from soliciting information from psychiatrists regarding their decisions whether to participate in agreements with insurers and provide service; from passing such information along to other doctors; and from giving psychiatrists advice about making those decisions.

*Appearances*

For the Commission: *Alan B. Loughman* and *Alice Au*.

For the respondents: *Demitrio Fernandez*, Rio Piedras, Puerto Rico. *Roberto Boneta*, *Muno*, *Boneta*, *Gonzalez*, *Arbona*, *Benitez & Peral*, Hato Rey, Puerto Rico.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that La Asociación Médica de Puerto Rico; La Sección de Fisiatría de la Asociación Médica de Puerto Rico; Rafael L. Oms, individually and as an officer of La Sección de Fisiatría de la Asociación Médica de Puerto Rico; and Rafael E. Seín, individually and as an officer of La Sección de Fisiatría de la Asociación Médica de Puerto Rico, have violated the provisions of said Act, 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 La Asociación Médica de Puerto Rico ("La Asociación Médica") and respondent La Sección de Fisiatría de la Asociación Médica de Puerto Rico ("La Sección de Fisiatría") are unincorporated associations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico. Both respondents have their offices and principal places of business at Ave. Fernández Juncos Num. 1305, Apartado 9387, Santurce, Puerto Rico. Respondents are professional associations of physicians who practice or reside in Puerto Rico.

PAR. 2. Respondent Rafael L. Oms is a physiatrist licensed to practice medicine in Puerto Rico and is engaged in the business of providing health-care services to patients for a fee in Puerto Rico. Dr. Oms served as president of La Sección de Fisiatría in 1991-1992. Dr. Oms' business address is Palmas Mail Station, Box 879, Suite 170, Humacao, Puerto Rico.

PAR. 3. Respondent Rafael E. Seín physiatrist licensed to practice medicine in Puerto Rico and is engaged in the business of providing health-care services to patients for a fee in Puerto Rico. Dr. Seín has at all relevant times served as the president of the Comité de Planes Médicos ("Medical Plans Committee") of La Sección de Fisiatría. Dr. Seín's business address is 11746 Fernandez Juncos Station, San Juan, Puerto Rico.

PAR. 4. The members of La Asociación Médica are physicians engaged in the practice of medicine in Puerto Rico. The members of La Sección de Fisiatría are physicians engaged in the practice of physiatry (physical medicine and rehabilitation) in Puerto Rico. Except to the extent that competition has been restrained as alleged herein, the members of La Sección de Fisiatría have been and now are in competition among themselves and with other physiatrists in Puerto Rico.

PAR. 5. The acts and practices of the 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. 6. Respondent associations are and have been, at all times relevant to this complaint, organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 7. La Administración de Compensaciones por Accidentes de Automóviles ("Administration for Compensation of Automobile

Accidents" or "ACAA") is a third-party payer that provides health care coverage to automobile accident victims in Puerto Rico. Absent agreements among physiatrists, competing physiatrists decide individually whether to enter into contracts with third-party payers, including ACAA, to treat their subscribers or enrollees. As of January 1991, 108 physiatrists had contracts with ACAA, under which they agreed to accept designated reimbursement rates for services provided by them to persons covered by the ACAA insurance program.

PAR. 8. Before 1988 a subcommittee of La Sección de Fisiatría was established to organize and coordinate Physiatry Section efforts to approach third-party payers and attempt to obtain higher reimbursement rates and adoption of "exclusive referral" rules under which patients would be reimbursed for physical therapy services only if referred for treatment by a physiatrist. ACAA did not make such changes because it regarded them as expensive and unnecessary, since ACAA was having no difficulty finding physiatrists who were willing to serve its clients even at existing fee levels.

PAR. 9. After La Sección de Fisiatría failed to persuade ACAA that ACAA's clients would be better served by adopting higher reimbursement rates and exclusive referral rules, it sought to use economic coercion to compel ACAA to adopt these changes. In October 1990, members of La Sección de Fisiatría met at the Annual Convention of Physiatrists and voted to stop accepting new ACAA patients as of February 1, 1991. La Sección de Fisiatría and numerous physiatrists signed a letter to ACAA dated October 13, 1990, demanding, among other things, an increase in reimbursement rates for physical therapy services and adoption of an exclusive referral rule. The letter informed ACAA that the signatories would suspend services to new ACAA patients if their demands were not met.

PAR. 10. In subsequent meetings of La Sección de Fisiatría and of physiatrists in various local geographic areas, the participating physiatrists reaffirmed their agreement to no longer accept the ACAA medical plan after February 1, 1991.

PAR. 11. In February 1991, groups of physiatrists from the regions of Mayagüez, Caguas, Bayamon, and Carolina signed and sent similar letters to ACAA. Each of these letters informed ACAA that the signatories would not accept new ACAA patients until their demands, as outlined in La Sección de Fisiatría's October 13, 1990

letter, were met. The sending of these letters and the implementation of the boycott of ACAA was coordinated by respondent La Sección de Fisiatría and by respondent Dr. Oms and respondent Dr. Seín. La Asociación Médica, though opposing the demand for exclusive referral powers, endorsed and supported La Sección de Fisiatría's decision to boycott ACAA.

PAR. 12. By late February approximately forty-seven (47) of the 108 physiatrists who had contracts with ACAA were refusing to treat new ACAA patients. The concerted refusal to treat new patients continued at least until September 1991.

PAR. 13. Although ACAA continued to refuse to change its practices or reimbursement rates, the actions of the physiatrists who participated in the boycott required ACAA patients to forgo treatment from physiatrists or to seek services from physiatrists not participating in the boycott. These actions caused delays in receipt of medically-necessary treatment for some patients and subjected ACAA and its patients to other costs and inconveniences.

PAR. 14. During the time when the respondents were planning and implementing this concerted refusal to deal with ACAA or to treat ACAA patients, the respondents solicited professional associations of physical therapists in Puerto Rico to join in the boycott. The physical therapy associations refused to do so. The invitation to the physical therapists to join in the boycott, if accepted, would have constituted an agreement in restraint of trade.

PAR. 15. The respondents have restrained competition among physiatrists by conspiring to engage in a concerted refusal to deal with ACAA or treat ACAA patients. The acts and practices of respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition and to injure consumers in the following ways, among others:

- A. By restraining competition among physiatrists in Puerto Rico;
- B. By restraining competition between physiatrists and other physicians in Puerto Rico;
- C. By restraining competition between physiatrist-employed physical therapists and independent physical therapists;
- D. By fixing or increasing the reimbursement rates that physiatrists in Puerto Rico receive from third-party payers; and
- E. By increasing the rates that physiatrists or physical therapists receive from consumers and third-party payers.

PAR. 16. The combination or conspiracy and the acts and practices described in paragraphs nine to fifteen above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The violation or effects thereof, as herein alleged, may 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 New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that 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, 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. Respondents La Asociación Médica and La Sección de Fisiatría are unincorporated associations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with their offices and principal place of business at

Ave. Fernandez Juncos Num. 1305, Apartado 9387, Santurce, Puerto Rico.

Respondents Dr. Oms and Dr. Seín are psychiatrists, licensed to practice medicine in the Commonwealth of Puerto Rico. Drs. Oms and Seín, have at relevant times been officers of La Sección de Fisiatría. Dr. Oms' business address is Palmas Mail Station, Box 879, Suite 170, Humacao, Puerto Rico, and Dr. Seín's business address is 11746 Fernandez Juncos Station, San Juan, Puerto Rico.

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, as used in this order, the following definitions shall apply:

A. "*La Asociación Médica*" means La Asociación Médica de Puerto Rico, the Medical Association of Puerto Rico, its predecessors, sections, committees, subsidiaries, divisions, groups, and affiliates, and their respective directors, officers, employees, agents, consultants, and any other persons working for or on behalf of the foregoing, and their respective successors and assigns;

B. "*La Sección de Fisiatría*" means La Sección de Fisiatría de la Asociación Médica de Puerto Rico, the Psychiatry Section of the Medical Association of Puerto Rico, its predecessors, sections, committees, subsidiaries, divisions, groups, and affiliates and their respective directors, officers, employees, agents, consultants, and any other persons working for or on behalf of the foregoing, and their respective successors and assigns;

C. "*Rafael Oms*" means Rafael L. Oms, M.D., his agents, and employees;

D. "*Rafael Seín*" means Rafael E. Seín, M.D., his agents, and employees;

E. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such person or entity agrees to pay for treatment by physicians or therapists to individuals described in the plan or program as eligible for such coverage ("Covered

Persons"), and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, whether operated by a private or governmental entity; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; health benefits programs for government employees, retirees, and dependents; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs; and

F. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a physician or therapist for the provision of medical, physical therapy, or other health-care services to Covered Persons, and the physician or therapist agrees to accept such payment from the third-party payer for such provision of medical, physical therapy, or other health-care services during the term of the agreement.

## II.

*It is further ordered*, That respondents, directly or indirectly, or through any corporate or other device, in or in connection with their activities 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:

A. Entering into, threatening or attempting to enter into, organizing or attempting to organize, encouraging, continuing, cooperating in or carrying out any agreement, either express or implied, between or among any psychiatrists, to boycott or refuse to deal with any third-party payer, or to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into any proposed or existing participation agreement;

B. Entering into, threatening or attempting to enter into, organizing or attempting to organize, encouraging, continuing, cooperating in or carrying out any agreement, either express or implied, between or among any psychiatrists, to refuse to provide services to patients covered by any third-party payer in any proposed or existing participation agreement, or to threaten to refuse to provide services to such patients;

C. For a period of five (5) years after the date this order becomes final, continuing a formal or informal meeting of physiatrists after

1. Any person makes any statement concerning one or more physiatrists, intentions or decisions with respect to

a. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

b. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation Agreement;

and respondents La Asociación Médica and La Sección de Fisiatría fail to eject such person from the meeting; or

2. Two persons make statements prohibited in order paragraphs II.C.1.a. or II.C.1.b.;

provided, however, that respondent Oms or Seín, shall not be in violation of the order if, immediately following a violation of this paragraph of the order, he leaves a meeting continued in violation of this paragraph, and within thirty (30) days after such meeting, reports to the Commission the circumstances of such meeting, the substance and source of the prohibited statements, and the respondents' actions in response thereto;

D. For a period of five (5) years after the date this order becomes final, providing advice to any physiatrist regarding

1. The desirability or appropriateness of participating in any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement;

provided, however, that nothing contained in this paragraph II.D. shall prohibit respondents from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payer;

E. For a period of five (5) years after the date this order becomes final, communicating in any way to any physiatrist any information concerning any physiatrist's intentions or decisions with respect to

1. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement; or

F. For a period of five (5) years after the date this order becomes final, soliciting from any physiatrist any information concerning that physiatrist's or any other physiatrist's intentions or decisions with respect to

1. Entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement; or

2. Refusing or threatening to refuse to provide services to patients covered by any third-party payer in any existing or proposed participation agreement.

Provided, however, that nothing in this order shall be construed to prevent respondents from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal, state, or commonwealth government executive agency or legislative body concerning legislation, rules, programs, or procedures, or to participate in any federal, state or commonwealth administrative or judicial proceeding;

Provided further that this order shall not be construed to prohibit any respondent or any member of respondent associations from entering into an agreement or combination with any other physician or health care practitioner with whom the individual physician practices in partnership or in a professional corporation, or who is employed by the same person.

## III.

*It is further ordered,* That this order shall not be construed to prohibit respondents Drs. Oms or Seín from communicating Médical conditions or personal assessments of individual patients, where such communication neither constitutes nor is part of (1) an agreement, proposed agreement, or attempt to enter into an agreement among physiatrists to boycott or refuse to deal with any third-party payer, or (2) any other agreement, combination, or conspiracy the purpose, effect, or likely effect of which is to impede competition unreasonably.

## IV.

*It is further ordered,* That:

A. La Sección de Fisiatría, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of its current members, and to the last known address of any other person who was a member of La Sección de Fisiatría in 1990 or 1991;

B. La Asociación Médica, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of its current members who is not also a member of La Sección de Fisiatría;

C. La Sección de Fisiatría, within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each third-party payer with whom La Sección de Fisiatría has entered into negotiations concerning the provision of physiatry services;

D. La Asociación Médica, within sixty (60) days after the date on which this order becomes final, publish in Spanish this order and the accompanying complaint in an issue of *Prensa Médica* or in any successor publication, in the same type size normally used for articles that are published in *Prensa Médica* or successor publication;

E. La Sección de Fisiatría and La Asociación Médica, for a period of five (5) years after the date on which this order becomes final, provide each new member of La Sección de Fisiatría and new member of La Asociación Médica with a copy of this order at the

time the member is accepted into membership of La Sección de Fisiatría or La Asociación Médica;

F. La Sección de Fisiatría and La Asociación Médica each file a verified, written report with the Commission within ninety (90) days after the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary of the date on which this order becomes final, and at such other times as the Commission may require, by written notice to La Sección de Fisiatría or La Asociación Médica, setting forth in detail the manner and form in which it has complied and is complying with this order;

G. La Sección de Fisiatría and La Asociación Médica 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 Parts II and IV of this order;

H. For a period of five (5) years after the date on which this order becomes final, La Sección de Fisiatría and La Asociación Médica notify the Commission at least thirty (30) days prior to any proposed change in La Sección de Fisiatría or La Asociación Médica, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, a change of name, a change of address, or any other change that may affect compliance obligations with this order.

V.

*It is further ordered*, That this order shall terminate on June 2, 2015.

## IN THE MATTER OF

## SCHWEGMANN GIANT SUPER MARKETS, INC.

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-3584. Complaint, June 2, 1995--Decision, June 2, 1995*

This consent order requires, among other things, the Louisiana-based corporation to divest, within twelve months, seven stores in the New Orleans area to Commission-approved purchasers, and requires the respondent, for ten years, to obtain Commission approval before acquiring an interest in a supermarket, or another entity that operates a supermarket, in the relevant area.

*Appearances*

For the Commission: *Ronald B. Rowe, Arthur Nolan and William Baer.*

For the respondent: *Scott Whittaker and Nelea Absher, Stone, Pigman, Walther, Wittman & Hutchinson, New Orleans, LA.*

## 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 ("Commission"), having reason to believe that respondent Schwegmann Giant Super Markets, Inc. ("Schwegmann"), a corporation subject to the jurisdiction of the Commission, has acquired certain assets of National Holdings, Inc. and certain affiliates ("National"), 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, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

## DEFINITIONS

1. For the purposes of this complaint:

"*Supermarket*" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

SCHWEGMANN GIANT SUPER MARKETS, INC.

2. Respondent Schwegmann is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 5300 Old Gentilly Road, New Orleans, Louisiana.

3. Respondent Schwegmann is, and at all times relevant herein has been, engaged in the operation of supermarkets in Louisiana.

4. Respondent Schwegmann 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

5. John F. Schwegmann is the Chief Executive Officer and majority shareholder of Schwegmann Giant Super Markets, Inc., with his office and principal place of business at 5300 Old Gentilly Road, New Orleans, Louisiana.

ACQUISITION

6. On or about November 23, 1994, Schnuck Markets, Inc. ("Schnucks") entered into an agreement with National to acquire all of the supermarkets owned and operated by National in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks entered into an agreement with Schwegmann whereby Schwegmann agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National

supermarkets located in Louisiana, Mississippi, and Alabama, which operate under the "Canal Villere," "That Stanley!," and "The Real Superstore" trade names.

#### TRADE AND COMMERCE

7. Relevant lines of commerce in which to analyze the acquisition described herein are the retail sale of food and grocery products in supermarkets, and narrower markets contained therein.

8. Relevant sections of the country in which to analyze the acquisition described herein are the metro New Orleans, Louisiana area, which consists of the parishes of Orleans, Jefferson, and St. Bernard, and narrower markets contained therein.

#### MARKET STRUCTURE

9. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

10. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

#### ACTUAL COMPETITION

11. Prior to the acquisition described herein, Schwegmann and National were actual competitors in the relevant lines of commerce and sections of the country.

#### EFFECTS

12. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country 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, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between supermarkets owned or controlled by Schwegmann and supermarkets owned or controlled by National;
- b. By increasing the likelihood that Schwegmann will unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

Each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

#### VIOLATIONS CHARGED

13. The acquisition by Schwegmann of assets of National violates 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 of the proposed acquisition by Schnuck Markets, Inc. ("Schnucks") of certain assets owned and operated by National Holdings, Inc. and certain affiliates ("National") in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks having entered into an agreement whereby Schwegmann Giant Super Markets, Inc. ("Schwegmann"), the respondent, agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National supermarkets located in Louisiana, Mississippi, and Alabama, and the respondent, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act;

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 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, 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 Schwegmann is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business at 5300 Old Gentilly Road, New Orleans, Louisiana.

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 "*Schwegmann*" means John F. Schwegmann and Schwegmann Giant Super Markets, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Schwegmann Giant Super Markets, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*Assets to be divested*" means the supermarket assets described in paragraph II.A. of this order.

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

D. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

E. "*New Orleans metro area*" means the area consisting of Jefferson, Orleans, and St. Bernard parishes in Louisiana.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within twelve months from the date this order becomes final:

1. That Stanley supermarket located at 315 E. Judge Perez Drive (store no. 79), Chalmette, LA;

2. Canal Villere supermarket located at 4726 Paris Avenue (store no. 24), New Orleans, LA;

3. Canal Villere supermarket located at 2125 Caton Street (store no. 25), New Orleans, LA;

4. That Stanley supermarket located at 4223 Chef Menteur Highway (store no. 8), New Orleans, LA;

5. That Stanley supermarket located at 9319 Jefferson Highway (store no. 33), River Ridge, LA;

6. Canal Villere supermarket located at 5245 Veterans Memorial Boulevard (store no. 93), Metairie, LA; and

7. Canal Villere supermarket located at 135 Robert E. Lee Boulevard (store no. 83), New Orleans, LA.

The assets to be divested shall include the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at the locations listed above, but shall not include those assets consisting of

or pertaining to any Schwegmann or National trade names, trade dress, trade marks, service marks, computer software, vehicles and other assets except fixtures also used or to be used by respondent at locations other than those listed above in connection with the Schwegmann or National business operations.

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 is to ensure the continuation of the assets to be divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition 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 viability, competitiveness, and marketability of the assets to be divested to comply with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the assets to be divested except in the ordinary course of business and except for ordinary wear and tear.

D. Respondent shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all assets to be divested have been divested as required by this order.

### 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 months from the date this order becomes final, the Commission may appoint a trustee to divest any of the assets to be divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. 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 written 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 divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III. B. 3. to accomplish the divestitures, 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 12-month period only one (1) time for one (1) year.

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 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 divestitures. 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 divestitures 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 for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities 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 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 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 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 assets to be divested to satisfy paragraph II. of this order.

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 assets to be divested.

12. The trustee shall report in writing to respondent and 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 ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in the New Orleans metro area.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in the New Orleans metro area.

Provided, however, that these prohibitions shall not apply to the construction of new facilities by respondent or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondent's offer to purchase or lease.

## V.

*It is further ordered*, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondent shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) acquiring any supermarket owned or operated by respondent, any leasehold interest in any supermarket, or any interest in that portion of any retail location used as a supermarket on or after January 1, 1995 in the New Orleans metro area to operate a supermarket at that site; provided however, that nothing in this paragraph shall prevent respondent from entering into or enforcing any agreement requiring its approval of any sublease, assignment, or change in occupancy, which approval shall not be unreasonably withheld; provided further that use of a site for the operation of a supermarket shall not be a basis for withholding such approval.

B. Respondent shall not remove any equipment from a supermarket owned or operated by respondent in the New Orleans metro area prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondent in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

## 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 respondent has fully complied with the provisions of paragraphs II. or III. of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. and III. 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 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 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 year (1) 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 verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

#### VII.

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

#### VIII.

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

A. Upon five days' written notice to respondent, access, during office hours and in the presence of counsel for respondent, 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 order; and

B. Upon five days' written notice to respondent and without restraint or interference from it, to interview respondent or officers, directors, or employees of respondent in the presence of counsel for respondent relating to any matters contained in this order.

## APPENDIX I

## ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Schwegmann Giant Super Markets, Inc. ("Schwegmann"), a corporation organized under the laws of the State of Louisiana, with its principal offices located at 5300 Old Gentilly Road, New Orleans, Louisiana, 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.* (collectively "the Parties").

## PREMISES

*Whereas*, Schwegmann, pursuant to an agreement dated November 23, 1994, agreed to purchase certain assets of National Holdings, Inc. and certain affiliates (hereinafter "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 agreement containing consent order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment 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 agreement is not reached preserving the *status quo ante* of the assets to be divested as described in paragraph II.A. of the agreement containing consent order ("Assets") during the period prior to their divestitures, when those Assets will be in the hands of Schwegmann, that any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

*Whereas*, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the

order, in order to remedy any anticompetitive effects of the Acquisition; and

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

*Whereas*, Schwegmann understands that no act or transaction contemplated by this Agreement 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 Agreement;

*Now, therefore*, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

#### TERMS OF AGREEMENT

1. Schwegmann agrees to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Schwegmann will be free to close the Acquisition after 11:59 p.m., March 8, 1995.

3. Schwegmann agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a - 3.b it will comply with the provisions of this Agreement:

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; or

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Schwegmann acquires the Assets until the earliest of the dates listed in subparagraphs 3.a - 3.b, Schwegmann shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall it sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Schwegmann to divest itself of the Assets or to seek any other injunctive or equitable relief, Schwegmann 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 not sought to enjoin the Acquisition. Schwegmann also waives all rights to contest the validity of this Agreement.

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 Schwegmann to its principal offices, Schwegmann shall permit any duly authorized representative or representatives of the Commission:

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

b. Without restraint or interference from them, to interview officers or employees of Schwegmann, who may have counsel present, regarding any such matters.

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

Complaint

119 F.T.C.

IN THE MATTER OF

SCHNUCK MARKETS, INC.

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-3585. Complaint, June 8, 1995--Decision, June 8, 1995*

This consent order requires, among other things, the Missouri-based corporation to divest 24 stores in the St. Louis area to Commission-approved purchasers, and requires the respondent, for ten years, to obtain Commission approval before acquiring an interest in a supermarket, or another entity that operates a supermarket, in the relevant area.

#### *Appearances*

For the Commission: *Ronald B. Rowe, Arthur J. Nolan, Jim Fishkin and Marc Schneider.*

For the respondent: *James Rill, Chris McAvoy and Judy Oldham, Collier, Shannon, Rill & Scott, 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 ("Commission"), having reason to believe that respondent Schnuck Markets, Inc. ("Schnucks"), a corporation subject to the jurisdiction of the Commission, has acquired certain assets of National Holdings, Inc. and certain affiliates ("National"), 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, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

#### DEFINITIONS

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

a. "*Supermarket*" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

b. "*St. Louis MSA*" means the metropolitan statistical area consisting of the following areas: in Missouri, the counties of Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, and the city of St. Louis; in Illinois, the counties of Clinton, Jersey, Madison, Monroe, and St. Clair.

## SCHNUCK MARKETS, INC.

2. Respondent Schnucks is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 11420 Lackland Road, St. Louis, MO.

3. Respondent Schnucks is, and at all times relevant herein has been, engaged in the operation of supermarkets in Missouri and Illinois.

4. Respondent Schnucks 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## ACQUISITION

5. On or about November 23, 1994, Schnucks entered into an agreement with National to acquire all of the supermarkets owned and operated by National in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks entered into an agreement with Schwegmann Giant Super Markets, Inc. ("Schwegmann")

whereby Schwegmann agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National supermarkets located in Louisiana, Mississippi, and Alabama, which operate under the "Canal Villere," "That Stanley!," and "The Real Superstore" trade names.

#### TRADE AND COMMERCE

6. Relevant lines of commerce in which to analyze the acquisition described herein are the retail sale of food and grocery products in supermarkets, and narrower markets contained therein.

7. Relevant sections of the country in which to analyze the acquisition described herein are the St. Louis MSA, and narrower markets contained therein.

#### MARKET STRUCTURE

8. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

9. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

#### ACTUAL COMPETITION

10. Prior to the acquisition described herein, Schnucks and National were actual competitors in the relevant lines of commerce and sections of the country.

#### EFFECTS

11. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country 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, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between supermarkets owned or controlled by Schnucks and supermarkets owned or controlled by National;
- b. By increasing the likelihood that Schnucks will unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

Each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

#### VIOLATIONS CHARGED

12. The acquisition by Schnucks of assets of National violates 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.

#### APPENDIX I

##### ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Schnuck Markets, Inc. ("Schnucks"), a corporation organized under the laws of the State of Missouri, with its principal offices located at 11420 Lackland Road, St. Louis, MO, 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.* (collectively "the Parties").

##### PREMISES

*Whereas*, Schnucks, pursuant to an agreement dated November 23, 1994, agreed to purchase certain assets of National Holdings, Inc. and certain affiliates (hereinafter "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 agreement containing consent order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment 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 agreement is not reached preserving the *status quo ante* of the assets to be divested as described in paragraph II.A. of the agreement containing consent order ("Assets") during the period prior to their divestitures, when those Assets will be in the hands of Schnucks, that any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

*Whereas*, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

*Whereas*, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

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

*Whereas*, Schnucks understands that no act or transaction contemplated by this Agreement 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 Agreement;

*Now, therefore*, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

## TERMS OF AGREEMENT

1. Schnucks agrees to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Schnucks will be free to close the Acquisition after 11:59 p.m., March 8, 1995.

3. Schnucks agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a - 3.b it will comply with the provisions of this Agreement:

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; or

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Schnucks acquires the Assets until the divestiture set out in the consent order has been completed, Schnucks shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall it sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Schnucks to divest itself of the Assets or to seek any other injunctive or equitable relief, Schnucks 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 not sought to enjoin the Acquisition. Schnucks also waives all rights to contest the validity of this Agreement.

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 Schnucks to its principal offices, Schnucks shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Schnucks, 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 Schnucks relating to compliance with this Agreement; and

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

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

#### DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Schnuck Markets, Inc. ("Schnucks"), the respondent, of certain assets owned and operated by National Holdings, Inc. and certain affiliates ("National") in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks having entered into an agreement whereby Schwegmann Giant Super Markets, Inc. ("Schwegmann") agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National supermarkets located in Louisiana, Mississippi, and Alabama, and the respondent, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act;

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 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, 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 Schnuck Markets, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 11420 Lackland Road, St. Louis, MO.

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 "*Schnuck Markets, Inc.*" means Schnuck Markets, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Schnuck Markets, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*Assets to be divested*" means the supermarket assets described in paragraph II.A. of this order.

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

D. "*Supermarket*" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar,

flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

E. The term "*St. Louis MSA*" means the metropolitan statistical area consisting of the following areas: in Missouri, the counties of Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, and the city of St. Louis; in Illinois, the counties of Clinton, Jersey, Madison, Monroe, and St. Clair.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within twelve months from the date this order becomes final:

1. The following supermarkets located in the city of St. Louis, Missouri:

- a. National store no. 15 located at 2700 S. Grand Avenue, St. Louis, MO;
- b. National store no. 30 located at 5433 Southwest Avenue, St. Louis, MO;
- c. National store no. 50 located at 8945 Riverview Drive, St. Louis, MO; and
- d. National store no. 60 located at 1605 S. Jefferson, St. Louis, MO.

2. The following supermarkets located in St. Louis County, Missouri:

- a. National store no. 26 located at 8823 Ladue Road, Ladue, MO;
- b. National store no. 45 located at 6 S. Old Orchard, Webster, MO;
- c. National store no. 46 located at 10431 St. Charles, St. Ann, MO;
- d. National store no. 47 located at 13041 New Halls Ferry, Florissant, MO;
- e. National store no. 62 located at 421 N. Kirkwood Road, Kirkwood, MO;

f. National store no. 63 located at 7434 Olive Street Road, University City, MO;

g. National store no. 77 located at 4432 Lemay Ferry Road, Mehlville, MO;

h. National store no. 85 located at 14855 Clayton Road, Chesterfield, MO;

i. Schnucks store no. 103 located at 9719 Crestwood Road, Crestwood, MO;

j. Schnucks store no. 124 located at 3661 Reavis Barracks, St. Louis, MO;

k. Schnucks store no. 130 located at 10223 Lewis & Clark, Bellefontaine, MO; and

l. Schnucks store no. 195 located at 6965 Parker Road, St. Louis, MO.

3. The following supermarkets located in St. Charles County, Missouri:

a. National store no. 22 located at 850 Jungerman, St. Peters, MO; and

b. Schnucks store no. 126 located at 1355 South 5th Street, St. Charles, MO.

4. The following supermarkets located in Jefferson County, Missouri:

a. National store no. 65 located at 1200 Sugar Creek Square, Fenton, MO; and

b. National store no. 70 located at 215 Arnold Cross Road, Arnold MO.

5. The following supermarkets located in Madison County, Illinois:

a. National store no. 35 located at 1716 Vandalia Road, Collinsville, IL; and

b. Schnucks store no. 175 located at 1435 Vaughn Road, Wood River, IL.

6. The following supermarkets located in St. Clair County, Illinois:

a. National store no. 64 located at 1290 Camp Jackson Road, Cahokia, IL; and

b. National store no. 80 located at 4 Market Place, Fairview Heights, IL.

The assets to be divested shall include the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at the locations listed above, but shall not include those assets consisting of or pertaining to Schnucks or National trade names, trade dress, trade marks, service marks, and such other intangible assets that respondent also utilizes in its business at locations other than those listed above.

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 is to ensure the continuation of the assets to be divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition 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 viability, competitiveness, and marketability of the assets to be divested to comply with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the assets to be divested except in the ordinary course of business and except for ordinary wear and tear.

D. Respondent shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all assets to be divested have been divested as required by this order.

### 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 months from the date this order becomes final, the Commission may appoint a trustee to divest any of the assets to be divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a 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 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, 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 written 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 divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in

paragraph III. B. 3. to accomplish the divestitures, 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 12-month period only one (1) time for one (1) year.

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 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 divestitures. 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 divestitures 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 for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities 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 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 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 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 assets to be divested to satisfy paragraph II. of this order.

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 assets to be divested.

12. The trustee shall report in writing to respondent and 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 ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in the St. Louis MSA.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or

owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in the St. Louis MSA.

Provided, however, that these prohibitions shall not apply to the construction of new facilities by respondent or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondent's offer to purchase or lease.

V.

*It is further ordered*, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondent shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) acquiring any supermarket owned or operated by respondent, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1995 in the St. Louis MSA to operate a supermarket at that site; provided however, that nothing in this paragraph shall prevent respondent from entering into or enforcing any agreement requiring its approval of any sublease, assignment, or change in occupancy, which approval shall not be unreasonably withheld; provided further that use of a site for the operation of a supermarket shall not be a basis for withholding such approval.

B. Respondent shall not remove any equipment from a supermarket owned or operated by respondent in the St. Louis MSA prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondent in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

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 respondent has fully complied with the provisions of paragraphs II. or III. of this order,

respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. and III. 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 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 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 year (1) 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 verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

#### VII.

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

#### VIII.

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

A. Upon five days' written notice to respondent, 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 order; and

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

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The complaint alleges a geographic market comprising "the St. Louis MSA, and narrower markets contained therein." Although I question the broad geographic market alleged, the investigational record contains sufficient information to support a finding of reason to believe with respect to small, discrete geographic markets located within the broad regions alleged in the complaint, and the stores to be divested were selected with a view to remedying competitive concerns in the small, discrete markets.

In addition, the complaint alleges as the product market "the retail sale of food and grocery products in supermarkets, and narrower markets contained therein." A serious argument can be made that the market should include sales of food and groceries in certain stores other than traditional supermarkets. Since the investigational record suggests that the concentration is high even if additional sales are included in the market, the issue need not be resolved at this time. Accordingly, I concur in the decision to accept the consent agreements.

IN THE MATTER OF

GLAXO PLC

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-3586. Complaint, June 14, 1995--Decision, June 14, 1995*

This consent order requires, among other things, a British drug company to divest, within nine months, Wellcome's worldwide research and development assets for non-injectable drugs, or else agree to have a Commission-appointed trustee to complete the transaction. In addition, the consent order requires Glaxo, for a period of ten years, to obtain Commission approval before acquiring more than one percent interest in any entity involved in the clinical development, manufacture or sale of migraine drugs.

*Appearances*

For the Commission: *Claudia R. Higgins* and *Ann B. Malester*.

For the respondent: *Charles E. Koch, Simpson, Thatcher & Bartlett*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Glaxo plc ("Glaxo"), a British corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the capital stock of Wellcome plc ("Wellcome"), a British 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. RESPONDENT

1. Respondent Glaxo plc is a corporation organized, existing, and doing business under and by virtue of the laws of England with its

principal executive offices located at Lansdowne House, Berkeley Square, London W1X 6BQ, England.

## II. JURISDICTION

2. 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 affects commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

## III. THE ACQUIRED COMPANY

3. Wellcome is a corporation organized, existing and doing business under and by virtue of the laws of England, with its principal place of business located at Unicorn House, 160 Euston Road, London, NW1 2BP, England.

## IV. THE ACQUISITION

4. Glaxo proposes to acquire the outstanding capital stock of Wellcome for consideration valued at approximately \$15.15 billion ("Acquisition").

## V. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the effects of the Acquisition is the research and development of non-injectable 5HT<sub>1D</sub> agonists. 5HT<sub>1D</sub> agonists are a specific class of drugs known to act on receptors in the human body that are responsible for migraine attacks.

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

## VI. STRUCTURE OF THE MARKETS

7. The relevant market set forth in paragraphs five and six is highly concentrated as measured by the Herfindahl-Hirschmann Index.

8. Glaxo and Wellcome are actual competitors in the relevant market.

## VII. BARRIERS TO ENTRY

9. Entry into the relevant market is difficult and time consuming. Entry into the relevant market is governed by the requirements of the Food and Drug Administration ("FDA"). Entry into the relevant market requires the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result.

## VIII. 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 Glaxo and Wellcome in the relevant market;
- b. Decreasing the number of research and development tracks for non-injectable 5HT<sub>1D</sub> agonists; and
- c. Increasing Glaxo's ability to unilaterally reduce research and development of non-injectable 5HT<sub>1D</sub> agonists.

11. All of the above increase the likelihood that firms in the relevant market will restrict output of research and development both in the near future and in the long term.

## IX. VIOLATIONS CHARGED

12. 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.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Wellcome plc ("Wellcome"), and the 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 violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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, 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 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, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Glaxo plc is a corporation organized, existing and doing business under and by virtue of the laws of England, with its principal place of business located at Lansdowne House, Berkeley Square, London W1X 6BQ, England.

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 "*Glaxo*" means Glaxo plc, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Glaxo plc; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

B. "*Wellcome*" means Wellcome plc, its directors, officers, employees, agents and representatives, successors and assigns; its subsidiaries, divisions, groups and affiliates controlled by Wellcome plc; and the respective directors, officers, employees, agents and representatives, and the respective successors and assigns of each.

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

D. "*Acquisition*" means the acquisition by Glaxo of the capital stock of Wellcome pursuant to an offer announced on January 23, 1995.

E. "*Sumatriptan*" means the compound with the formula 3-[2-(Dimethylamino)ethyl]-N-methylindole-5-methanesulfonamide and/or the butanedioate (I:I) salt thereof [*i.e.* the "succinate"] in respect of its therapeutic indication for the treatment of the disease migraine.

F. "*311C90*" means the compound with the formula (S)-4-[[3-2-(dimethylamino)ethyl]-]H-indol-5-yl]methyl]-2-oxazolidinone and/or a pharmaceutically acceptable salt thereof in respect of its therapeutic indication for the treatment of the disease migraine.

G. "*Wellcome's 311C90 Assets*" means Wellcome's worldwide assets relating to the worldwide research and development, manufacture, distribution and sale of 311C90 that are not part of Wellcome's physical facilities. "Wellcome's 311C90 Assets" include, but are not limited to, all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), software used in connection with Wellcome's 311C90, inventory sufficient for the Acquirer to complete all clinical trials or bioequivalency studies necessary to obtain United States Food and Drug Administration ("FDA") approvals and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or

regulatory approvals for the United States or other countries for Wellcome's 311C90.

H. "*Glaxo's Sumatriptan Assets*" means Glaxo's worldwide assets relating to the worldwide research and development, manufacture, distribution and sale of Glaxo's Sumatriptan that are not part of Glaxo's physical facilities. "Glaxo's Sumatriptan Assets" include, but are not limited, to all formulations, patents, trade secrets, technology, know-how, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, distribution information, customer lists, information stored on management information systems (and specifications sufficient for the Acquirer to use such information), software used in connection with Glaxo's Sumatriptan, inventory sufficient for the Acquirer to complete all clinical trials or bioequivalency studies necessary to obtain FDA approvals and all data, contractual rights, materials and information relating to obtaining FDA approvals and other government or regulatory approvals for the United States or other countries for Glaxo's Sumatriptan.

I. "*Alternative Assets to be Divested*" means Wellcome's 311C90 Assets or Glaxo's Sumatriptan Assets at the discretion of the trustee to be appointed pursuant to paragraph IV. of this order.

J. "*Acquirer*" means the entity to whom Glaxo shall divest either Wellcome's 311C90 Assets or Glaxo's Sumatriptan Assets pursuant to this order.

K. "*Non-injectable-5HT<sub>1D</sub> agonists*" means any 5HT<sub>1D</sub> agonist medicine formulation intended for the treatment of the disease migraine to be administered to patients by any method other than subcutaneous, intramuscular or intravenous injection.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, within nine (9) months of the date this order becomes final, Wellcome's 311C90 Assets.

B. Respondent shall divest Wellcome's 311C90 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 Wellcome's 311C90 Assets is to ensure continued research and development of Wellcome's 311C90, in the same manner in which Wellcome's 311C90 would be researched and developed absent the proposed Acquisition, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. The time period for divestiture pursuant to this paragraph II. of this order shall be tolled if and when respondent:

1. Provides to the Commission objective evidence, including, but not limited to, results of clinical trials, indicating that, based on 311C90's medical profile, and through no fault of respondent, Wellcome's 311C90 Assets are not viable or marketable; and

2. Petitions the Commission to modify this order, pursuant to Section 5(b) of the FTC Act and Section 2.51 of the Commission's Rules of Practice, based on the circumstances described in subparagraph II.C.1 of this order.

This tolling of the time period for divestiture shall end when the Commission rules on respondent's petition to modify this order.

### III.

*It is further ordered, That:*

A. Within forty-five (45) days of the date this order becomes final, the Commission shall appoint a trustee to ensure that Glaxo expeditiously performs its responsibilities required by this order. Glaxo shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. If respondent has not opposed, in writing, including the reasons for opposing, the selection of 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. Within ten (10) days after the appointment of the trustee, Glaxo shall execute a trust agreement that, subject to the prior approval of

the Commission, confers on the trustee all the rights and powers necessary to permit the trustee to assure Glaxo's compliance with the terms of this order. As part of the trustee agreement, the trustee shall execute confidentiality agreement(s) with Glaxo.

3. The trustee shall serve until either (a) the Acquirer has filed with the FDA for approval to manufacture and sell a product based on Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order); (b) the trustee determines that the Acquirer has abandoned its efforts to obtain FDA approval to manufacture and sell a product based upon Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order); or (c) the trustee determines that the Acquirer has failed to exercise reasonable diligence in research and development toward obtaining FDA approval to manufacture and sell a product based upon Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order), which lack of diligence will have been certified to and accepted by the Commission, whichever comes first. The trustee's service shall continue for no more than two (2) years following divestiture of Wellcome's 311C90 Assets or the Alternative Assets to be Divested.

4. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to Wellcome's 311C90 Assets and Glaxo's Sumatriptan Assets, or to any other relevant information, as the trustee may reasonably request, including but not limited to all records kept in the normal course of business that relate to the research and development of, and the cost of manufacturing, Wellcome's 311C90 and Glaxo's Sumatriptan. Respondent shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of his or her responsibilities pursuant to this order.

5. 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 may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties

and responsibilities. The trustee shall account for all expenses incurred. The Commission shall approve the account of the trustee, including fees for his or her services.

6. 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 preparations 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.

7. 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.

8. The Commission 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 requirements of this order.

9. The trustee shall report in writing to respondent and the Commission every one hundred and eighty (180) days concerning the trustee's obligations pursuant to this paragraph III.

B. Respondent shall comply with all reasonable directives of the trustee regarding respondent's obligations to comply with this order.

C. The trustee may require Glaxo to manufacture Wellcome's 311C90 (or Sumatriptan, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order) for use by the Acquirer in conducting clinical trials or bioequivalency studies if:

1. The Acquirer has depleted its inventory of 311C90 (or Sumatriptan, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order) acquired pursuant to the divestiture;

2. The Acquirer has a need to conduct further clinical development trials or bioequivalency studies prior to submission of an application to the FDA to manufacture and sell a product based on Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order); and

3. Despite good faith efforts to establish its own manufacturing capability for 311C90 (or Sumatriptan, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order), the Acquirer has not succeeded in doing so as of the time 311C90 (or Sumatriptan, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order) is needed for such clinical trials or bioequivalency studies.

The trustee shall determine reasonable compensation for Glaxo, based upon the costs of manufacture, for such production.

#### IV.

*It is further ordered, That:*

A. If Glaxo has not divested, absolutely and in good faith and with the Commission's prior approval, Wellcome's 311C90 Assets within the time required by paragraphs II.A. and II.C. of this order, the Commission may direct the trustee appointed pursuant to paragraph III. of this order to divest the Alternative Assets to be Divested. Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest the Alternative Assets to be Divested 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If the trustee is directed under subparagraph A. of this paragraph to divest the Alternative Assets to be Divested, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall extend the authority and responsibilities of the trustee appointed under paragraph III. of this order to include divesting the Alternative Assets to be Divested.

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

3. Within ten (10) days after the extension of the trustee's authority and responsibilities, respondent shall amend the existing trust agreement in a manner 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 extension of the trustee's authorities and responsibilities as described in paragraph IV.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, facilities and technical information related to Wellcome's 311C90 Assets and Glaxo's Sumatriptan Assets, or to any other relevant information, as the trustee may reasonably request, including but not limited to all records kept in the normal course of business that relate to research and development of, and the cost of manufacturing, Wellcome's 311C90 and Glaxo's Sumatriptan. Respondent shall develop such financial or other information as the trustee may 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 serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale 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 the respondent. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Alternative Assets to be Divested.

7. 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 preparations 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.

8. 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.

9. 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.

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

11. If a divestiture application filed pursuant to this paragraph IV. is pending before the Commission, and respondent petitions the Commission to modify this order based on the conditions in paragraph II.C., then the Commission shall not approve the divestiture application until it rules on the petition to modify.

## V.

*It is further ordered, That:*

A. Upon reasonable notice and request from the Acquirer to Glaxo, Glaxo shall provide information, technical assistance and advice to the Acquirer with respect to Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order) such that the Acquirer will be capable of continuing the current research and development. Such assistance shall include reasonable

consultation with knowledgeable employees of Glaxo and training at the Acquirer's facility for a period of time sufficient to satisfy the Acquirer's management that its personnel are adequately knowledgeable about Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested to the Acquirer pursuant to paragraph IV.A. of this order). However, respondent shall not be required to continue providing such assistance for more than twelve (12) months after divestiture of Wellcome's 311C90 Assets or the Alternative Assets to be Divested. Respondent may require reimbursement from the Acquirer for all of its own direct costs incurred in providing the services required by this subparagraph V.A. Direct costs, as used in this subparagraph V.A., means all actual costs incurred exclusive of overhead costs.

B. Pending divestiture of Wellcome's 311C90 Assets pursuant to paragraph II. of this order or the Alternative Assets to be Divested pursuant to paragraph IV. of this order, respondent shall:

1. Take such actions as are necessary to prevent the destruction, removal, wasting, deterioration or impairment of Wellcome's 311C90 Assets and Glaxo's Sumatriptan Assets, except for ordinary wear and tear; and
2. Maintain research and development of Wellcome's 311C90 Assets and Glaxo's Sumatriptan Assets at the levels planned by Wellcome for 311C90 and Glaxo for Sumatriptan as of January 1, 1995.

C. Glaxo shall maintain physical assets necessary to manufacture Wellcome's 311C90 and Glaxo's Sumatriptan until the Acquirer has filed with the FDA for approval to manufacture and sell a product based upon Wellcome's 311C90 Assets (or Glaxo's Sumatriptan Assets, if Glaxo's Sumatriptan Assets are divested pursuant to paragraph IV.A. of this order). The maintenance of physical assets described in this subparagraph shall not exceed two (2) years following divestiture of Wellcome's 311C90 Assets or the Alternative Assets to be Divested. Provided however, that Glaxo shall be allowed to discontinue maintenance of the physical assets necessary to manufacture Glaxo's Sumatriptan if Glaxo divests Wellcome's 311C90 Assets pursuant to 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 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, (1) the clinical development of non-injectable 5HT<sub>1D</sub> agonists for approval by the FDA for the treatment of migraines or (2) the manufacture and sale of non-injectable 5HT<sub>1D</sub> agonists approved by the FDA for the treatment of migraines; or

B. Acquire any assets currently used for or previously used for (and still suitable for use for) (1) the clinical development of non-injectable 5HT<sub>1D</sub> agonists for approval by the FDA for the treatment of migraines or (2) the manufacture and sale of non-injectable 5HT<sub>1D</sub> agonists approved by the FDA for the treatment of migraines.

Provided, however, that this paragraph VI. shall not apply to the acquisition of products or services in the ordinary course of business.

## VII.

*It is further ordered,* That:

A. Within sixty (60) days after the date this order becomes final and every sixty days (60) days thereafter until respondent has fully complied with the provisions of paragraphs II., III., IV., V.A. and V.B. 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 paragraphs II., III., IV. and V. 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 paragraphs II., III., IV. and V. of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all

written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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 is complying with this order.

### VIII.

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

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

### IX.

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