IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

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

Docket C-3224. Consent Order, Mar. 17, 1988--Modifying Order, Sept. 5, 1995

This order reopens a 1988 consent order (110 FTC 369) that settled allegations that the acquisition of the El Paso Division of Safeway Stores, Inc., by Supermarket Development Corporation and Furr's, Inc. would reduce supermarket competition in 12 towns in New Mexico and western Texas, and required, for ten years, prior Commission approval before acquiring supermarket assets. This order modifies the consent order by substituting for the prior-approval requirement a provision requiring Furr's Supermarket to notify the Commission at least 30 days before acquiring certain supermarkets in those areas.

ORDER REOPENING AND MODIFYING ORDER

On April 3, 1995, Furr's Supermarkets, Inc. ("FSI"), a successor to respondent Supermarket Development Corporation ("SDC") and its subsidiary Furr's, Inc. ("Furr's"), filed an Application to Modify Consent Order ("Application") in Docket No. C-3224, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Application requested that the Commission reopen and modify paragraph IV, the prior approval provision of the order in Docket No. C-3224, to permit FSI to acquire fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. In its Application, FSI asserts that the public interest supports its request for reopening and modification. The Application was placed on the public record for thirty days, and no comments were received. Subsequently, on July 14 and 21, 1995, FSI filed amendments to its Application, requesting that the Commission set aside the prior approval requirement in its entirety, or in the alternative, substitute a prior notice requirement, citing the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 22, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Prior Approval Policy Statement").

The Commission, in its Prior Approval Policy Statement, said, in relevant part, that "the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3224 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent and its successors could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3224 charged that respondent SDC's proposed acquisition of the El Paso Division of Safeway Stores, Inc. would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the retail sale and distribution of food and grocery store items in supermarkets in twelve relevant geographic markets consisting of individual cities and towns in Texas and New Mexico. (Complaint, ¶¶ 13-15, 18-19). The complaint also alleged that there were nineteen cities and towns in Texas and New Mexico in which respondent SDC and Safeway both operated grocery stores (*Id.*, at ¶ 12), and paragraph IV of the order required respondent to obtain prior Commission approval before acquiring any retail grocery store or any interest in a retail grocery store in those nineteen cities and towns.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3224 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph IV of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.

The Commission has also determined, pursuant to the Prior Approval Policy Statement, to exclude from paragraph IV FSI's acquisitions of fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. FSI has a contractual right to operate each of the leased stores for terms that extend beyond the remainder of the order. FSI's change in status from a leaseholder to a feeowner in any one or more of these stores would have no practical effect on competition in the relevant markets. Under the circumstances, it is unnecessary to require prior notice of these transactions.

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

It is further ordered, That paragraph IV of the order in Docket No. C-3224 be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall not, without prior notification to the Federal Trade Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns:

Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

The prior notification required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Furr's and not of any other party to the transaction. Furr's shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Furr's shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction 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.

Provided further that these prohibitions shall not relate to the construction of new facilities by Furr's, or the leasing of a facility by Furr's not presently a grocery store in those locations, or the acquisition by Furr's of the fee simple interest in real estate for a facility in which it currently operates a retail grocery store as the lessee.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

IN THE MATTER OF

GIANT FOOD, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6459. Modified Consent Order, April 13, 1964--Set Aside Order, Sept. 7, 1995

This order reopens a 1964 consent order--which prohibited Giant from inducing its suppliers to offer, or to receive from its suppliers, compensation for promotional services or facilities on terms that Giant knew were not proportionally equal to the terms those suppliers offered other retailers--and sets aside the consent order pursuant to the Commission's 1994 Sunset Policy Statement, under which the Commission presumed that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On June 5, 1995, Giant Food, Inc. ("Giant Food") filed its Request To Reopen and Vacate Order ("Petition") in this matter. Respondent requests that the Commission set aside the 1964 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, respondent affirmatively states that it has complied with the terms of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[1] The Commission's cease and desist order in Docket No. 6459, issued on June 1, 1961, affirmed as modified by the United States Court of Appeals for the District of Columbia Circuit on June

[1] Sunset Policy Statement, 59 Fed. Reg. at 45,289.

14, 1962, and modified by the Commission in accordance with the direction of the court on April 13, 1964, has been in effect for over thirty-one years. Consistent with the Commission's Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. 6459.

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

It is further ordered, That the Commission's order in Docket No. 6459 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

THE SCOTTS COMPANY

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-3613. Complaint, Sept. 8, 1995--Decision, Sept. 8, 1995

This consent order requires, among other things, Scotts, an Ohio-based corporation, to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Company or another Commission-approved buyer by no later than December 31, 1995. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete the transaction. In addition, the Commission substituted a 10-year prior-notice provision for the 10-year prior-approval provision contained in the proposed consent agreement as it was published for public comment.

Appearances

For the Commission: *Howard Morse, Robert Cook* and *William Baer.*

For the respondent: *Jack Schafer, Covington & Burling*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Scotts Company ("Scotts") has entered into an agreement and plan of merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), whereby Scotts will acquire all of the outstanding voting securities of Miracle-Gro in exchange for voting securities of Scotts, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENT

1. Respondent Scotts is a corporation organized and existing under the laws of Ohio, with its principal place of business at 14111 Scottslawn Road, Marysville, Ohio. Scotts is a leading producer and marketer of consumer lawn care products. Its total revenues exceeded $600 million in its fiscal year ended October 31, 1994.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE PROPOSED MERGER

3. Miracle-Gro is a privately-held corporation organized and existing under the laws of New Jersey. Miracle-Gro is the leading marketer of water soluble fertilizer in the United States. Miracle-Gro earned profits of approximately $30 million on sales in excess of $100 million in 1994.

4. On or about January 26, 1995, Scotts and Miracle-Gro executed an Agreement and Plan of Merger, wherein Scotts and Miracle-Gro agreed that Scotts would acquire the voting securities of Miracle-Gro in exchange for voting securities of Scotts (the "Proposed Merger"). The transaction is valued at approximately $200 million.

III. THE RELEVANT MARKET

5. Water soluble fertilizer for consumer use ("consumer water soluble fertilizer") is one relevant line of commerce within which to analyze the effect of the Proposed Merger on competition. Water soluble fertilizer is a crystalline powder, easily dissolved in water, which is composed principally of nitrogen, phosphorous, and potash. Water soluble fertilizer for consumer use is typically sold in packages of less than 20 pounds; the five pound package is the most popular size. Water soluble fertilizer is typically applied to houseplants, gardens, shrubs, and flowers using a watering can or a hose-end

sprayer. Water soluble fertilizer produces noticeable effects on plants within a few days but lasts only a few weeks.

6. Consumer water soluble fertilizer is highly differentiated through branding. Scotts markets consumer water soluble fertilizer under the Peters brand name. Miracle-Gro markets consumer water soluble fertilizer under the Miracle-Gro brand name.

7. Fertilizer is also sold in granular form. Granular fertilizer is typically applied by dropping it onto the soil or, in some cases, mixing it with the soil. It takes several weeks for granular fertilizer to produce noticeable effects on plants; however, granular fertilizer does not have to be reapplied for two months to a year after application.

8. Consumers are not likely to switch from water soluble fertilizer to granular fertilizer in response to price changes because of differences between the two types of product in terms of convenience, method of application, and performance characteristics. Meaningful price comparisons between the various types of fertilizer are difficult to make.

9. Specialty fertilizers (such as liquid fertilizers, plant spikes, and organic fertilizers) also differ in characteristics and uses from water soluble fertilizer. Consumers are not likely to switch from water soluble fertilizer to those products in response to a price increase.

10. Water soluble fertilizers sold for agricultural and commercial use are sold in substantially larger packages than consumer water soluble fertilizer and are not alternatives for consumers.

11. The United States is one relevant geographic area within which to analyze the likely effect of the Proposed Merger on competition. The ability of domestic marketers of consumer water soluble fertilizer to engage in anticompetitive behavior is not significantly affected by the possible diversion of product produced overseas into the United States.

IV. CONCENTRATION

12. Miracle-Gro is by far the best selling consumer water soluble fertilizer in the United States. Scotts' Peters product is the third best selling consumer water soluble fertilizer in the United States. Miracle-Gro accounts for more than 70 percent and Scotts' Peters brand accounts for approximately six to seven percent of consumer water soluble fertilizer sales in the United States.

13. The United States consumer water soluble fertilizer market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Proposed Merger would increase the HHI by approximately 900 points, from approximately 5,500 to approximately 6,400.

14. Even if the relevant market is expanded to include other types of consumer garden fertilizer, or even consumer fertilizers generally, the market is highly concentrated with Scotts and Miracle-Gro having a combined market share of more than 35 percent of sales.

V. ENTRY CONDITIONS

15. Entry into the United States consumer water soluble fertilizer market would not be timely, likely, or sufficient to deter or offset the possible adverse effects of the Proposed Merger on competition.

16. Consumers typically purchase water soluble fertilizer on the basis of brand name and do so, in part, because the misapplication or overapplication of fertilizer can destroy the plants that the fertilizer is to benefit. The brand name is a signal that the product will consistently perform as it is expected to perform.

17. Consumers who purchase water soluble fertilizer on the basis of brand name are reluctant to try an unknown brand, even in response to a price change. That reluctance is, in part, based on the possibility of killing plants if the fertilizer does not perform as it is expected to perform. The price of the fertilizer is small relative to the replacement cost of the plants to which it is applied.

18. To achieve sufficient scale to affect competition in the United States consumer water soluble fertilizer market, and to do so in a timely manner, an entrant would have to employ a "pull" marketing strategy. A pull marketing strategy uses advertising to create a brand reputation to generate a high level of consumer demand to pull the product through retail distribution.

19. A pull marketing strategy involves a substantial sunk investment in advertising. In addition, a pull marketing strategy also involves a high degree of risk, because there is no guarantee that the marketing effort will succeed. The high sunk cost and high degree of risk would discourage the use of a pull marketing strategy by potential entrants or potential fringe expanders. Miracle-Gro spends approximately $25 million annually on national advertising. The cost

of entry to new entrants or fringe expanders is likely to be even greater than the cost of entry originally borne by existing competitors.

20. Entry using a "push" marketing strategy involves the use of point of purchase promotions to attract customers in the store, as well as the use of retailer incentives to encourage retailers to recommend the product to customers in the store. Entry using a push marketing strategy would not involve the high sunk cost or high degree of risk that is associated with a pull marketing strategy. However, entry using a push marketing strategy would require many years to achieve sufficient sales to significantly impact competition.

21. Even entry using a pull marketing strategy may require considerable time. Lawn and garden retailing, including fertilizer retailing, is a highly seasonal business in which most sales are made to consumers during the spring growing season. Products to be sold during the spring growing season typically must be presented to retailers during the preceding summer; orders for such products typically are taken during the fall; and delivery of such products typically is made during early winter. An entrant or fringe expander that fails to make significant sales during one year must wait until the next year to gain sales.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

22. Miracle-Gro already exercises market power in the consumer water soluble fertilizer market. Miracle-Gro refuses to negotiate its prices with retailers and earns substantial profits.

23. Miracle-Gro is the closest substitute for Scotts' Peters brand in the United States consumer water soluble fertilizer market. Consumers who purchase Scotts' Peters brand are more likely to switch to Miracle-Gro than to any other brand.

24. Scotts' marketing strategy for Peters included competing more aggressively with Miracle-Gro during 1995. That strategy included technical improvements to the Peters product, a reduction of the price of the Peters product, and the production of television commercials directly comparing Peters to Miracle-Gro.

25. The merger of Scotts and Miracle-Gro may substantially lessen competition or tend to create a monopoly in the United States consumer water soluble fertilizer market, because, among other things:

a. It will increase concentration substantially in a highly concentrated market;

b. It will eliminate actual, direct, substantial, and potentially increased competition between Scotts' Peters brand and Miracle-Gro;

c. It will facilitate coordinated interaction among sellers of water soluble fertilizer for United States consumer use;

d. It will facilitate the unilateral exercise of market power by the merged firm;

e. It will eliminate competition between the two closest substitutes among differentiated products in the consumer water soluble fertilizer market;

f. It will likely result in increased prices for consumer water soluble fertilizer; and

g. It will allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

26. The Agreement and Plan of Merger between Scotts and Miracle-Gro, described in paragraph three, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The Proposed Merger would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by proposed respondent, the Scotts Company ("Scotts") of Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The proposed respondent, its 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, 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 proposed 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 comment filed thereafter by an interested person 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 Scotts is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 14111 Scottslawn Road, Marysville, Ohio.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"Scotts"* means the Scotts Company, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by the Scotts Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"Miracle-Gro"* means Stern's Miracle-Gro Products, Inc., its predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Stern's Miracle-Gro Products, Inc.

C. *"Alljack"* means Alljack & Company and Celex Corporation, their predecessors, successors and assigns, subsidiaries, divisions, groups, and affiliates.

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

E. The term *"water soluble fertilizer"* means fertilizer that is sold as a powder, composed principally of nitrogen, phosphorous and potash, to be dissolved in water prior to application for use principally on houseplants, gardens, shrubs and flowers.

F. The term *"consumer water soluble fertilizer"* means water soluble fertilizer packaged for sale in containers of less than 20 pounds.

G. The term *"Peters Consumer Water Soluble Fertilizer"* means consumer water soluble fertilizer sold under the Peters brand name.

H. The term *"Peters Consumer Water Soluble Fertilizer Business"* means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of Peters Consumer Water Soluble Fertilizer in the United States, including, without limitation, the following:

1. All Peters trademarks;
2. Inventory;
3. The right to use the same packaging and trade dress that Peters has used for consumer water soluble fertilizer, provided that the right to use the Scotts trademark is limited to the right to sell existing inventory;
4. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas;
5. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

The term "Peters Consumer Water Soluble Fertilizer Business" does not include accounts receivable, the Peters production facilities located at Allentown, Pennsylvania, the use of intangible assets (including the use of the Peters trademarks on water soluble fertilizer in containers of 20 pounds of more) for the production or sale of agricultural or commercial products, or the use of the Peters trademarks on potting soil, perlite, or vermiculite.

I. The term *"Peters Business"* means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of all products that Scotts has sold under the Peters trademarks during the five (5) years preceding the date on which this agreement is accepted by the Commission, including, without limitation, the Allentown, Pennsylvania plant where Peters products are manufactured and including, without limitation, the following:

1. The Peters Consumer Water Soluble Fertilizer Business;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes, quality control data, and assets relating to research and development;
4. Inventory and storage capacity;
5. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
6. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
7. All rights under warranties and guarantees, express or implied;
8. All books, records, and files; and
9. All items of prepaid expense.

II.

It is further ordered, That:

A. Scotts shall divest, through sale or exclusive perpetual license, absolutely and in good faith, no later than December 31, 1995, the Peters Consumer Water Soluble Fertilizer Business as an ongoing business and shall also, at the time of such divestiture, divest such additional ancillary assets and ancillary businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Peters Consumer Water Soluble Fertilizer Business.

B. The divestiture shall be made either

1. No later than ten (10) days from the date this order becomes final, to Alljack, pursuant to the agreements between Scotts and Alljack, which are Confidential Appendices II and III, or

2. To an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the divestiture of the Peters Consumer Water Soluble Fertilizer Business is to ensure that the Peters Consumer Water Soluble Fertilizer Business continues to operate as an ongoing business in the same business in which it is engaged at the time this Agreement is accepted by the Commission and to remedy the lessening of competition resulting from the acquisition, as alleged in the Commission's complaint.

C. Pending divestiture of the Peters Consumer Water Soluble Fertilizer Business, respondent shall take such actions as are necessary to maintain the viability and marketability of the Peters Consumer Water Soluble Fertilizer Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any part of the Peters Consumer Water Soluble Fertilizer Business.

D. Unless the acquirer has its own source of supply, the divestiture shall include an agreement by Scotts (the "Supply Agreement") to supply water soluble fertilizer for a period of two (2) years from the date of the divestiture required by this paragraph II. The water soluble fertilizer supplied pursuant to the Supply Agreement shall, at the option of the acquirer, be of the same

chemical composition as, and of a quality equal to or greater than, the water soluble fertilizer marketed by the Peters Consumer Water Soluble Fertilizer Business at the time this agreement is accepted by the Commission for comment. The Supply Agreement shall obligate Scotts to supply such water soluble fertilizer at a price equal to direct cash cost of raw materials, packaging, and labor (based on expenses during the previous fiscal year), plus ten (10) percent. The Supply Agreement shall obligate Scotts to supply annually, at a minimum, at the option of the acquirer, an amount of water soluble fertilizer, in containers ready for sale or in bulk, equal to the greatest unit amount of Peters Consumer Water Soluble Fertilizer produced by or on behalf of the Peters Consumer Water Soluble Fertilizer Business during

1. The twelve (12) months prior to the divestiture required by this paragraph II, and
2. Each of the five (5) calendar years preceding the divestiture required by this paragraph II.

E. The divestiture shall include a non-exclusive perpetual license, with no continuing royalty, to manufacture Peters Consumer Water Soluble Fertilizer for sale in the United States as it has been manufactured at any time during the twelve (12) months preceding the date on which this agreement containing consent order is accepted by the Commission for public comment, as well as a royalty-free license for all improvements to Peters' Water Soluble Fertilizer technology that have been made up to the time of the divestiture required by this paragraph II. Such license shall give the acquirer the right to make any improvements to the licensed technology; provided, however, that such license need not give the acquirer rights in Scotts intellectual property that Scotts has not used in connection with Peters Consumer Water Soluble Fertilizer.

F. Respondent shall not offer consumer water soluble fertilizer (including, but not limited to, consumer water soluble fertilizer bearing the Miracle-Gro trademark) for sale using the Scotts trademark for a period of two (2) years following the divestiture required by this paragraph II; provided, however, during that two (2) year period, Scotts may continue to sell the following products using the Scotts trademark: