FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS JANUARY 1, 1995 TO JUNE 30, 1995

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 1995 TO JUNE 30, 1995

ROBERT PITOFSKY, *Chairman*
Took oath of office April 12, 1995.

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

JANET D. STEIGER, *Commissioner*
Took oath of office August 11, 1989.

ROSCOE B. STAREK, III, *Commissioner*
Took oath of office November 14, 1990.

CHRISTINE A. VARNEY, *Commissioner*
Took oath of office October 14, 1994.

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

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Unless otherwise indicated in parentheses, the names below refer to cases in which orders to cease and desist have been entered by the Commission. The names in *italics* refer to cases which the Commission has dismissed.

Findings, Opinions, and Orders

IN THE MATTER OF

AMERADA HESS CORPORATION, ET AL.

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

Docket C-2456. Consent Order, Sept. 18, 1973--Set Aside Order, Jan. 3, 1995

This order reopens a 1973 consent order (83 FTC 487) -- which required that the Clarco Pipe Line be divested and prohibited Amerada, VGS Corporation and Clarco Pipe Line Company from acquiring assets related to the transportation or refining of crude oil produced in either Mississippi or Alabama without prior Commission approval -- and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires setting aside competition orders in effect for more than 20 years.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On September 12, 1994, Amerada Hess Corporation ("Amerada Hess") filed a Request to Reopen and Vacate Order ("Request") in this matter.[1] Amerada Hess requests that the Commission set aside the 1973 consent order in this matter, pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Commission's July 22, 1994, 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 ("Sunset Policy Statement").[2]

Leon Hess, also a respondent in this matter, joined in Amerada Hess' Request, by letter dated September 21, 1994. Southland Oil Company, successor to respondent VGS Corporation, filed a Statement in Support of Request to Reopen and Vacate Order on October 21, 1994. In addition, on October 20, 1994, Hunt Refining Company, the purchaser of assets from respondent Clarco Pipe Line Company, filed a petition requesting, among other things, that the Commission reopen the proceeding and vacate the order as to Hunt

[1] *See Amerada Hess Corp.*, 83 FTC 487 (1973).

[2] The Sunset Policy Statement is published at 59 Fed. Reg. 45,286 (Sept. 1, 1994).

("Petition"). Amerada Hess' Request, Hunt's Petition and the information supplied by Leon Hess and Southland Oil Company were placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51.[3] No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[4]

The Commission's order in Docket No. C-2456 was issued on September 18, 1973, and has been in effect for more than twenty-one years. Consistent with the Commission's July 22, 1994, 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. C-2456.

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

It is further ordered, That the Commission's order in Docket No. C-2456 be, and it hereby is, set aside, as of the effective date of this order.

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[3] The fifth respondent named in the order died in 1989.

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

IN THE MATTER OF

THE AMERICAN TOBACCO COMPANY

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

Docket C-3547. Complaint, Jan. 3, 1995--Decision, Jan. 3, 1995

This consent order prohibits, among other things, a Connecticut-based company from disseminating advertising, for Carlton or any other cigarettes, that represents that consumers will get less tar or nicotine by smoking any number of cigarettes of any of its brands than by smoking one or more cigarettes of any other brand, unless such representations are both true and substantiated by competent and reliable scientific evidence.

Appearances

For the Commission: *Shira D. Modell.*

For the respondent: *Daniel O'Neill* and *Thomas Beazon, Chadbourne & Park*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that The American Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent The American Tobacco Company is a Delaware corporation, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut.

PAR. 2. Respondent has manufactured, labelled, promoted, offered for sale, sold, and distributed cigarettes, including Carlton brand cigarettes, to consumers.

PAR. 3. The acts or 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 its Carlton brand cigarettes, including, but not necessarily limited to, the attached Exhibits A-C,

which depict ten packs of Carlton brand cigarettes and single packs of other brands of cigarettes, with the tar and nicotine ratings for Carlton and the other brands of cigarettes under each pack. Exhibits A-C contain the following statements:

A. "10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit A.)

B. "A WHOLE CARTON OF CARLTON HAS LESS TAR THAN 1 PACK OF THESE BRANDS." (Exhibit B.)

C. "10 to 1. 10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit C.)

PAR. 5. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tar.

PAR. 6. In truth and in fact, consumers will not necessarily get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads. Although the cigarettes depicted are rated as having more than 10 mg. of tar, those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated that representation.

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

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Exhibit A

EXHIBIT B


1 mg. tar, 0.1 mg. nic.
Carlton
LOWEST SOFT PACK
Carlton
CARLTON IS LOWEST
A whole carton of Carlton has less tar than just 1 pack of these brands.
Marlboro
CAMEL FILTERS
Winston
KENT
VICEROY
16 mg. tar 1.1 mg. nic.
15 mg. tar 1.1 mg. nic.
18 mg. tar 1.5 mg. nic.
12 mg. tar 0.9 mg. nic.
17 mg. tar 1.2 mg. nic.
U.S. Gov't. Test Method confirms of all king soft packs:
Carlton is lowest in tar and nicotine.
1 mg. "tar", 0.1 mg. nicotine:
Lowest of all brands. Ultra Carlton: less than 0.5 mg. "tar",
less than 0.05 mg. nicotine av. per cigarette by FTC method.
SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

EXHIBIT C

EXHIBIT C

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, its attorney 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 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. Respondent The American Tobacco Company 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 281 Tresser Boulevard, Stamford, Connecticut.

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, The American Tobacco Company, 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 cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a carton of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

II.

It is further ordered, That respondent, The American Tobacco Company, 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 cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's

brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate paragraph I or II of this order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

IV.

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

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

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

V.

It is further ordered, That respondent shall 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 and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, 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 corporation which may affect compliance obligations under this order.

VII.

It is further ordered, That respondent 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 it has complied with this order.

IN THE MATTER OF

CREATIVE AEROSOL CORP.

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

Docket C-3548. Complaint, Jan. 13, 1995--Decision, Jan. 13, 1995

This consent order prohibits, among other things, a New Jersey manufacturer of children's bath soap from representing that certain products or packaging will not harm the environment or atmosphere, or that any product or package offers any environmental benefit, unless it possess competent and reliable evidence that substantiates the representation. The consent order also prohibits the respondent from misrepresenting the extent to which any product or packaging is capable of being recycled, or the availability of recycling collection programs.

Appearances

For the Commission: *Michael Dershowitz* and *Michael Ostheimer.*

For the respondent: *James Mulligan*, President, Freehold, N.J.

COMPLAINT

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

PARAGRAPH 1. Respondent Creative Aerosol Corp. is a New Jersey corporation with its principal office or place of business at 71 West Main Street, Freehold, New Jersey.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed foam soap products, including Funny Color Foam, and other products to the public.

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

PAR. 4. The product pictured in the attached Exhibit A contains the volatile organic compounds ("VOCs") isobutane and propane. The product was reformulated by substituting chlorodifluoromethane (HCFC-22) for isobutane and propane. The product pictured in the attached Exhibit B contains chlorodifluoromethane (HCFC-22), a hydrochlorofluorocarbon. The product is sold in an aluminum aerosol can. The can has a plastic cap which is made from high-density polyethylene. There is no indication on the cap of the type(s) of plastic resin from which it is made.

PAR. 5. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny Color Foam, including but not necessarily limited to the attached Exhibit A.

The aforesaid product labeling (Exhibit A) includes the following statements:

ENVIRONMENTALLY SAFE
Contains no fluorocarbons.
Non-Irritant • Non-Toxic

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Funny Color Foam does not contain any ingredients that harm or damage the environment.

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

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

PAR. 9. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny

Color Foam, including but not necessarily limited to the attached Exhibit B.

The aforesaid product labeling (Exhibit B) includes the following statement:

NO FLUOROCARBONS

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the product labeling attached as Exhibit B, respondent has represented, directly or by implication, that because Funny Color Foam contains no fluorocarbons, it will not deplete the earth's ozone layer or otherwise harm or damage the atmosphere.

PAR. 11. In truth and in fact, Funny Color Foam contains the harmful ozone-depleting ingredient chlorodifluoromethane (HCFC-22), which harms or causes damage to the atmosphere by contributing to the depletion of the earth's ozone layer. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny Color Foam, including but not necessarily limited to the attached Exhibits A and B.

The aforesaid product labeling (Exhibit A) includes the following statements and depiction:

RECYCLABLE

CAN & CAP

The aforesaid product labeling (Exhibit B) includes the following statement:

RECYCLABLE WHERE
FACILITIES EXIST

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the product labeling attached as Exhibits A and B, respondent has represented, directly or by

implication, that Funny Color Foam's aluminum aerosol can is recyclable.

PAR. 14. In truth and in fact, while the aluminum aerosol can is capable of being recycled, the vast majority of consumers cannot recycle it because there are virtually no collection facilities that accept aluminum aerosol cans for recycling. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Funny Color Foam's plastic cap is recyclable.

PAR. 16. In truth and in fact, while the plastic cap is capable of being recycled, the vast majority of consumers cannot recycle it because there are only a few collection facilities nationwide that accept the high-density polyethylene cap for recycling. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine and twelve, including but not necessarily limited to the product labeling attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs ten, thirteen and fifteen, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 18. In truth and in fact, at the time it made the representations set forth in paragraphs ten, thirteen and fifteen, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

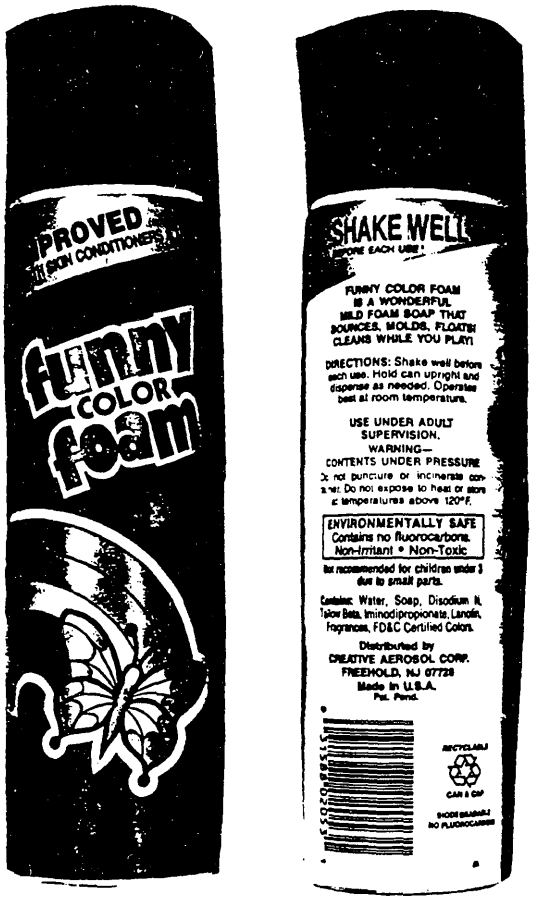


Exhibit A

EXHIBIT B

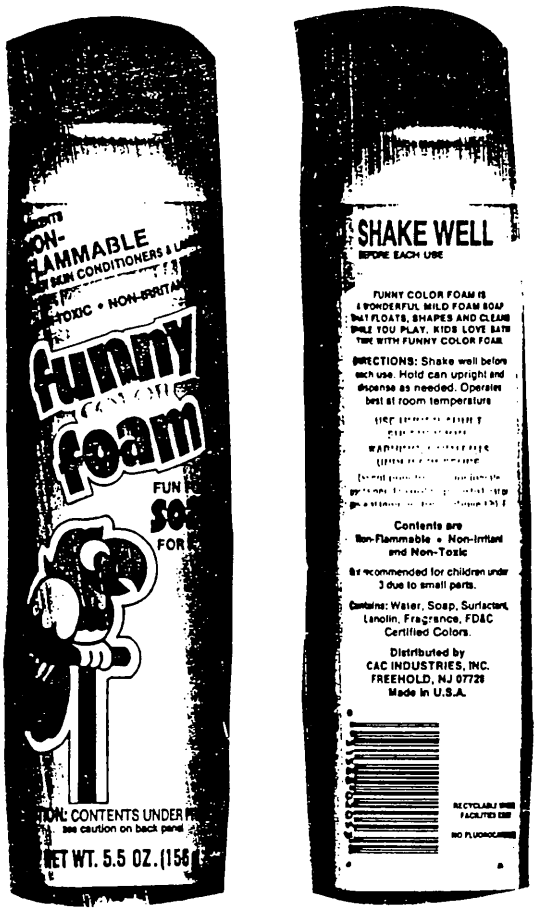


Exhibit B

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 violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Creative Aerosol Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 71 West Main Street, in the City of Freehold, State of New Jersey.

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

ORDER

DEFINITIONS

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

"*Volatile Organic Compound*" ("VOC") means any compound of carbon which participates in atmospheric photochemical reactions as defined by the U.S. Environmental Protection Agency at 40 CFR 51.100(s), and as subsequently amended. When the final rule was promulgated, 57 Fed. Reg. 3941 (February 3, 1992), the EPA definition excluded carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and certain listed compounds that EPA has determined are of negligible photochemical reactivity.

"*Class I ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride, and 1,1,1-trichloroethane.

"*Class II ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

"*Product or package*" means any product or package that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the Funny Color Foam brand name or any other brand name of respondent, its successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

"*Competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using

procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent, Creative Aerosol Corp., 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package containing any volatile organic compound, 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, through the use of such terms as "environmentally safe," "environmentally safe, contains no fluorocarbons," or any other term or expression, that any such product or package will not harm the environment, or through the use of such terms as "no fluorocarbons," or any other term or expression, that any such product or package will not harm the atmosphere, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

II.

It is furthered ordered, That respondent, Creative Aerosol Corp., 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package containing any Class I or Class II ozone-depleting substance, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any such product or package contains "no fluorocarbons" or representing, in any manner, directly or by implication, that any such product or package will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere or otherwise harm the atmosphere.

III.

A. *It is further ordered,* That respondent, Creative Aerosol Corp., 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication the extent to which:

1. Any such product or package is capable of being recycled; or,

2. Recycling collection programs for such product or package are available.

B. Provided, however, respondent will not be in violation of Part III(A)(2) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any high-density polyethylene cap or aluminum aerosol can, if it truthfully represents that such packaging is recyclable, provided that:

1. Respondent discloses clearly, prominently, and in close proximity to such representation:

(a.) In regard to any high-density polyethylene cap, that it is recyclable in the few communities with recycling collection programs for high-density polyethylene caps; and in regard to any aluminum aerosol can, that such packaging is recyclable in the few communities with recycling collection programs for aluminum aerosol cans; or

(b.) The approximate number of U.S. communities with recycling collection programs for such high-density polyethylene cap or aluminum aerosol can; or

(c.) The approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such high-density polyethylene cap or aluminum aerosol can are available; and

2. In addition, in the case of a high-density polyethylene cap, such cap itself bears a clear identification of the specific plastic resin(s) from which it is made.

For purposes of this order, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

IV.

It is further ordered, That respondent, Creative Aerosol Corp., 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 labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package 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 any such product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

V.

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

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

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

VI.

It is further ordered, That respondent shall 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 and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VII.

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

VIII.

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

IN THE MATTER OF

RN NUTRITION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3549. Complaint, Jan. 13, 1995--Decision, Jan. 13, 1995

This consent order prohibits, among other things, the California marketers of the calcium supplement product, BoneRestore, from making unsubstantiated claims that any food, drug, or food or dietary supplement products will treat or cure any disease or condition; prohibits the respondents from using the name BoneRestore in a misleading way; and restricts the use of testimonial endorsements that do not represent typical results.

Appearances

For the Commission: *Phoebe D. Morse* and *Barbara E. Bolton.*

For the respondents: *Andrew J. Strenio, Jr., Hunton & Williams*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition ("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 RN Nutrition is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office or place of business at 3402-M West MacArthur, Santa Ana, California.

Respondent George Page Rank is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition, including the acts and practices alleged in

this complaint. His business address is 3402-M West MacArthur, Santa Ana, California.

Respondent James W. Nugent is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition, including the acts and practices alleged in this complaint. His business address is 3402-M West MacArthur, Santa Ana, California.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed an orally-ingested product containing microcrystalline hydroxyapatite ("MCHC"), minerals and protein, under the name BoneRestore (hereinafter "MCHC" or "BoneRestore"). BoneRestore is a food and/or drug, as the terms "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

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 BoneRestore, including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements:

1. Clinical tests by the world-famous Royal Free Hospital show ... Natural BONE-RESTORE from Europe builds bone better than estrogen or calcium (with NO bad side effects!) (Exhibit A).

2. And some doctors feel MCHC could very well be the ultimate answer for people who want to stop bone loss and build strong bones, without the risk of drugs. (Exhibit A).

3. According to 7 clinical studies MCHC does...different things that help people with weak or weakening bones:

(1) MCHC seems to have the unique ability to slow down or stop bone loss dead in its tracks!

* * *

[D]ue to MCHC, it's possible to slow down or even halt bone loss. Even if you're already suffering from osteoporosis!

(2) Unlike estrogen and calcium, MCHC has been clinically shown to actually build new bone!

* * *

[S]cientific studies have shown that with MCHC you may not only be able to stop bone loss: you may actually be able to build new bone! (Exhibit A).

4. Increase in bone. "In September my bone densitometry test showed bone loss. It was then that I started using BoneRestore. I had been using calcium, and it was obviously not working at all. Well, to my doctor's and my surprise, the latest bone test, performed in December (only two months on your product) showed an actual increase in the bone...." (Exhibit A: Consumer Testimonial).

5. Osteoporosis healed. "Don't let anyone tell you osteoporosis can't be healed. Two weeks ago I went to my doctor for a check-up. Well, two days later he gave me the results of my tests. He said that they showed no new bone deterioration (osteoporosis) and that healing was taking place. Now I can run and I've been caught dancing a little. BoneRestore is my friend for life." (Exhibit A: Consumer Testimonial).

6. You see, in addition to the clinical studies mentioned above, 7 other scientific studies and papers have been done that confirm BoneRestore with MCHC is amazingly effective at halting bone loss and building bones. Here's a brief description of these reports:

1. Significant bone gain.
2. Restored bone.
3. Eliminated pain.
4. Nearly twice as much absorption.
5. 95% of back pain eliminated.
6. No fractures.
7. Significantly prevents osteoporosis.
(Exhibit A).

7. Natural BONE RESTORE from Europe builds bone 4 times better than calcium alone! (Exhibit B).

8. Help slow down or stop bone loss and perhaps even rebuild bones safely -- with this revolutionary product from Europe. (Exhibit B).

9. Breakthrough technology means more of these nutrients actually get absorbed. Clinical tests prove it works better than calcium. (Exhibit B).

10. We recommend it especially for women and men over 40 as a safe, proven way to fight bone loss and in some cases restore bone. (Exhibit B).

11. Straightened up 10 degrees. "I don't often write testimonials, but I do want to tell you how pleased I am with the results of BoneRestore. My head was protruding from my neck at shoulder height. Now after taking it, it has come up at least 10 degrees if not more. After being told to "straighten up" since my sub-teens, I feel it has done remarkably. Thank you for a wonderful product!" (Exhibit B: Consumer Testimonial).

12. Really helped back. "My husband and I both are taking BoneRestore and it has really helped our backs. I have arthritis in my back and since I've been taking it I feel so much better. I can work better. Thank you so much." (Exhibit B: Consumer Testimonial).

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 and B, respondents have represented, directly or by implication, that BoneRestore or MCHC:

1. Builds new bone, builds strong bones, increases bone and causes significant bone gain;
2. Builds bone better than estrogen or other forms of calcium;
3. Slows or stops bone loss;
4. Helps persons who suffer from weak or weakening bones;
5. Prevents and heals osteoporosis;
6. Rebuilds and restores lost bone;
7. Eliminates pain associated with bone ailments;
8. Is absorbed by the body better than other forms of calcium;
9. Prevents bone fractures; and
10. Straightens spinal curvatures.

PAR. 6. Through the use of 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 and B, 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. 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 and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in the advertisements and promotional materials for BoneRestore reflect the typical or ordinary experiences of members of the public who have used the product.

PAR. 9. 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 and B, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph eight, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 10. In truth and in fact, at the time they made the representation set forth in paragraph eight, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph nine, was, and is, false and misleading.

PAR. 11. 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 and B, respondents have represented, directly or by implication, that scientific research, including clinical tests, scientific papers and/or scientific studies, proves that the use of BoneRestore or MCHC:

1. Builds bone better than estrogen or better than other forms of calcium;
2. Builds new bone, builds strong bones, and causes significant bone gain;
3. Slows or stops bone loss associated with bone ailments;
4. Restores lost bone;
5. Eliminates pain associated with bone ailments;
6. Is absorbed by the body better than other forms of calcium;
7. Prevents fractures;
8. Prevents osteoporosis; and
9. Helps persons who suffer from weak or weakening bones.

PAR. 12. In truth and in fact, the representations set forth in paragraph eleven have not been proven by scientific research, including clinical tests, scientific papers and/or scientific studies. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. Through the use of the trade name of the product, BoneRestore, including but not necessarily limited to its use in 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

and B, respondents have represented, directly or by implication, that the product restores, builds or increases bone.

PAR. 14. Through the use of the trade name of the product, BoneRestore, including but not necessarily limited to its use in 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 and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph thirteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

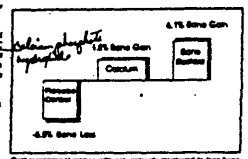
Clinical tests by the world-famous Royal Free Hospital in London show...

RN
EXHIBIT A

Natural BONE-RESTORE from Europe builds bone better than estrogen or calcium

(with NO bad side effects!)

DATELINE LOS ANGELES, CA:

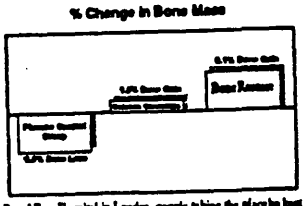


THIS PRODUCT WORKS!

EXHIBIT B

RN
EXHIBIT B

Natural BONE RESTORE from Europe builds bones 4 times better than calcium alone! —



In a clinical test at famous Royal Free Hospital in London, people taking the placebo kept losing bone; those taking calcium stopped bone loss but gained only insignificant amounts of bone; whereas those taking BoneRestore showed a 6.1% gain in bone.

Help slow down or stop bone loss and perhaps even rebuild bones safely — with this revolutionary product from Europe. Not a drug, not merely calcium or ordinary bone meal. It contains dozens of nutrients your bones need, in one easy-to-use tablet. Breakthrough technology means more of these nutrients actually get absorbed. Clinical tests prove it works better than calcium. In fact, researchers at the famous Royal Free Hospital in London did a controlled test on women with primary biliary cirrhosis. According to The British Medical Journal, these women always have osteoporosis. Women who took the placebo kept on losing bone — but women who took BoneRestore not only stopped bone loss: they had a NET GAIN in their bone of 6.1%! (*American Journal of Clinical Nutrition, 36: Sept. 82, pp. 426-430*)

After 12 years of successful use in Europe, Bone Restore is now available in the U.S. We recommend it especially for women and men over 40 as a safe, proven way to fight bone loss and in some cases restore bone.

Straightened up 10". "*I don't often write testimonials, but I do want to tell you how pleased I am with the results of BoneRestore. My head was protruding from my neck at shoulder height. Now after taking it, it has come up at least 10" if not more. After being told to "straighten up" since my sub-teens, I feel it has done remarkably. Thank you for a wonderful product!*"
—Gladys Byham, TX

Pain in knees and neck almost gone. "*I am very impressed with BoneRestore. At 78 years of age my neck hurt so that each step was one jar too much. It will be two weeks since I started and the pain is almost gone. Along with that relief came an unexpected release from stiff swollen knees of long standing. I expect to be doing deep knee bends shortly with caution.*"
— Helene Dawson, CA

Truly a miracle. "*This is truly a miracle. I injured the sacrum in my back in November of 1988. I have suffered excruciating pain every day since, i.e. for nearly two years. Last year I went to a doctor who discovered I had osteoporosis. I was sure I was doomed. But thanks to your sending me BoneRestore so promptly the pain started going away within 2 weeks. May God Bless you.*" *— Vallerie Hebert, LA*

Really helped back. "*My husband and I both are taking BoneRestore and it has really helped our backs. I have arthritis in my back and since I've been taking it I feel so much better. I can work better. Thank you so much.*"
— P.B., Chapel Hill NC

BoneRestore did so much good. "*I am 83 years old. I had two heart attacks. I tried BoneRestore recently. It did me so much good. Every bone in my body was hurting at that time. I am ordering more bottles.*"
—A.B. Berwyn IL

Bone Restore:
240 Tablets.....~~39.95~~

Holiday Sale....31.45

3 bottles: 89.85
SAVE $15

R & N ASSOCIATES HOLIDAY CATALOG 1991

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 Boston 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 attorney, 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 RN Nutrition is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office or place of business at 3402-M West MacArthur, Santa Ana, California.

2. Respondent George Page Rank is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition. His business address is 3402-M West MacArthur, Santa Ana, California.

3. Respondent James W. Nugent is an individual who has been, and is now, a general partner of RN Nutrition. As such, he

formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition. His business address is 3402-M West MacArthur, Santa Ana, California.

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

ORDER

I.

It is ordered, That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 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 product:

1. Builds new bone, builds strong bones, increases bone and causes significant bone gain;
2. Builds bone better than estrogen or other forms of calcium;
3. Slows or stops bone loss;
4. Helps persons who suffer from weak or weakening bones;
5. Prevents and heals osteoporosis;
6. Rebuilds bone and restores lost bone;
7. Eliminates pain associated with bone ailments;
8. Is absorbed by the body better than other forms of calcium;
9. Prevents bone fractures;
10. Straightens spinal curvatures; and
11. Provides any benefit in the prevention, treatment, or cure of osteoporosis, arthritis, back pain, or any other bone ailment or condition;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 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 product represents the typical or ordinary experience of members of the public who use the 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 RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or

distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "BoneRestore," or any other name, in a manner that represents, directly or by implication, that such product has the ability to restore, build, or increase bone unless, at the time of making the representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation that it restores, builds, or increases bone. This provision does not otherwise affect respondents' ability to use the trade name "BoneRestore," or any other brand name, to make a qualified representation that is substantiated by competent and reliable scientific evidence.

IV.

It is further ordered, That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with

the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such product will treat, cure, alleviate the symptoms, prevent, or reduce the risk of developing any disease, disorder, or condition, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VI.

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

VII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VIII.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IX.

It is further ordered, That respondents shall forthwith distribute a copy of this order to all principals and managers and to all personnel, agents, licensees and distributors, engaged in the preparation or placement of advertisements or promotional materials covered by this order and shall obtain from each such employee, agent, licensee and distributor a signed statement acknowledging receipt of the order.

X.

It is further ordered, That for a period of five (5) years from the date of entry of this order, respondents George Page Rank and James W. Nugent shall provide written notice to the Federal Trade Commission within thirty (30) days of:

A. Any change in his business or employment that may affect compliance obligations arising out of this order;

B. The discontinuance of his business or employment; and

C. His affiliation with any new business or employment; each such notice to include his business address and telephone number, home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XI.

It is further ordered, That respondents shall, within sixty (60) days after service upon them 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 they have complied with this order.

IN THE MATTER OF

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2858. Consent Order, Jan. 6, 1977--Modifying Order, Jan. 17, 1995

This order reopens a 1977 consent order (89 FTC 15) that settled allegations that the respondents deceptively advertised that sugar derived from Hawaiian sugar cane is different from or superior to other sugars, particularly those derived from beets. This order modifies the consent order so that the respondents may make claims about objective differences in granulated white sugars with respect to health, safety, nutritional quality, or purity, as long as they have competent and reliable evidence to substantiate such claims. The Commission found that the public interest warranted reopening and modifying the 1977 order.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On July 20, 1994, the California and Hawaiian Sugar Company ("C&H") filed a request to reopen the proceeding in Docket No. C-2858, *California & Hawaiian Sugar Co.,* 89 FTC 15 (1977), and to set aside or modify the order issued ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The Request was placed on the public record for 30 days for comment. C&H submitted additional material in support of its Request on September 12, 1994, November 16, 1994, and January 6, 1995.

I. THE ORDER

The Commission issued the complaint and its final decision and order in Docket No. C-2858 on January 6, 1977. The complaint alleged that C&H and its advertising agency misrepresented that there are differences in granulated sugars and that C&H sugar derived from Hawaiian sugar cane is different from and superior to other sugars in quality and purity. The complaint also alleged that the respondents failed to specify any consumer use of C&H sugar for

which C&H sugar is significantly different from, or superior to, other sugar. Finally, the complaint alleged that the respondents misrepresented that the failure of competitors to disclose the origin of their sugar is a material fact from which consumers could infer that the competing sugar comes from an inferior source.

Part 1(A)(i) of the order prohibits C&H from representing that:

> there are differences in granulated sugars, or that C&H granulated sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless: (a) such represented difference or superiority relates to a consumer use of such sugar which is specified in the advertisement, (b) the difference or superiority is substantiated by competent and reliable evidence prior to making the representation, and (c) such substantiation includes competent and reliable evidence that the difference or superiority is discernible to or of benefit to the class of consumers to whom the representation is directed.

Part l (A)(ii), however, permits C&H to use the phrase "pure cane sugar from Hawaii" in any context where the quality of C&H sugar is not expressly or implicitly compared with the quality of any other sugar. Part l (A)(iii) of the order also states that an advertisement will not be deemed to contain an implied comparison as long as it does not make a representation regarding any competitor's sugar or a representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitors' sugar. Part 1 (B) prohibits C&H from representing that competitors do not disclose the source or origin of their sugar, unless C&H specifies a consumer use of sugar with respect to which C&H sugar is different from such competing sugar and the difference is substantiated.

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the FTC Act provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent "makes a satisfactory showing that changed conditions of law or fact" require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a petition to reopen identifies significant changes in circumstances and demonstrates that such changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. S. Rep. No. 500, 96th Cong., 2d Sess. 9

(1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.,* Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); Pay Less Drugstores Northwest, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.,* 286 U.S. 106, 119 (1932) ("clear showing" of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified.[1] If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying Bowman Transportation standard to FTC order).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require

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[1] The legislative history of amended Section 5(b), S. Rep. No. 500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. Generally, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983), at 2 (unpublished) ("Damon Letter"); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart, Esq. (June 5, 1986); *see Reader's Digest Ass'n, Inc.*, Docket Nos. C-626 and C-2075, 111 FTC 758-59 (1989) (reopening justified if "respondent demonstrates that the order impedes competition"). *See also Damon Corp.*, Docket No. 2916, 101 FTC 689, 692 (1983) (reopening in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order").[2]

When a satisfactory showing of affirmative need is made, the Commission has balanced the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2; *accord Reader's Digest Ass'n*, 111 FTC at 759; *see, e.g., Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) ¶ 22,239 (Mar. 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

III. PETITIONER'S REQUEST

A. *C&H States Reopening Required by Changes in Law*

C&H believes that changes in law and Commission policy since issuance of the order and consideration of the public interest warrant its reopening. C&H does not state that changed facts require that the order be modified or set aside. Because we also conclude that reopening the order is in the public interest, we do not address the respondent's views regarding a change of law.

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[2] *Cf. Service Corp. Int'l*, Docket No. 9071, (May 12, 1994), 59 Fed. Reg. 37,045 (July 20, 1994); *Tarra Hall Clothes, Inc.*, Docket No. C-2797 (Oct. 27, 1992), 57 Fed. Reg. 54,598 (Nov. 19, 1992). *Cf. United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

B. *C&H Argues Reopening Warranted in the Public Interest*

C&H asserts that the public interest supports reopening the order. The company states that its share of the consumer granulated white sugar market in its primary market west-of-Chicago declined from approximately 36% in 1980 to 29% in 1993. In addition, on page 4 of its submission of January 6, 1995, C&H states, "Beginning in the late 1980's, American Crystal Sugar Company has been running an aggressive advertising program in the Upper Midwest focusing on the (unsubstantiated) claimed superiority of American Crystal granulated sugar."[3] The claims in this campaign were similar to those barred under the C&H order, and C&H states that these advertisements were largely responsible for C&H's precipitous loss of market share in areas affected by the campaign.

Specifically, whereas the C&H and American Crystal shares were approximately equal in 1988 in Minneapolis at a little over 30% apiece, American Crystal today possesses a 55% share in this area versus an 18% share for C&H. This drop in share for C&H marked a reversal of an upward trend the company had experienced throughout the 1980's; its share of sales in Minneapolis had risen from about 12% in 1981 to about 32% in 1988. American Crystal's share, in contrast, had fluctuated between 35% and 25% until its 1988 advertising campaign, after which its share rose to 55%. *See* Affidavit of Thomas J. Wilson, Vice President, Grocery Sales and Marketing, C&H, appended to submission of January 6, 1995, and Exhibit D thereto. In Milwaukee, also in the Upper Midwest, C&H's share of sales had risen from about 10% in 1981 to about 24% in 1984, where it remained until 1988 and then began a gradual decline to about 16%. American Crystal, which in 1981 had only about a 2% share, increased that to about 25% in 1985. Following the introduction of its advertising campaign in the late 1980's, its share increased to about 30%. *Id.*, Exhibit D. The Affidavit details similar shifts occurring at about the same time in Dallas, where Imperial-Holly, another C&H competitor, had mounted a similar campaign. *Id.*

These assertions also find support in the Wilson Affidavit and its exhibits. C&H's request included some comparative advertisements

[3] Memorandum of C&H Sugar Co. to Federal Trade Commission at 4 (Jan. 6, 1995).

from other companies,[4] including Imperial-Holly, the competitor that successfully increased its share of the Dallas market, at least in part, at the expense of C&H. *See also* Request, Exhibits K-O.[5]

C&H states that these facts show that the order has not simply limited its ability to make comparative superiority claims touting its "pure cane sugar from Hawaii" over granulated sugar made from beets or granulated cane sugar from sources other than Hawaii, but that it also precludes it from making claims that generally would be considered "puffery."[6] C&H states that the order has precluded the company from defending its product against claims of this same nature disseminated by its competitors. Therefore, C&H contends, the order improperly discriminates among competitors and places C&H at an undue competitive disadvantage.

C. *Reopening Warranted in the Public Interest*

The Commission believes that C&H has made a showing sufficient to warrant reopening the order in the public interest. We do not intend to suggest that a respondent may obtain reopening of an order merely by showing that its conduct is restricted while that of its competitors not under order is not limited. For example, the costs of complying with a disclosure requirement to cure past deception ordinarily will not warrant reopening, even though the cost of making the disclosure falls only on the petitioner. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 760 (1992) (reopening not warranted simply because "it is no longer convenient to live with the terms of the consent order"). In this instance, however, the product being advertised is fungible, and the nature of

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[4] For example, an ad for Crystal Sugar shows a taste test with a grandmotherly spokesperson affirming that "It's not the same." An ad for Holly Sugar describes "Sugar that made everything taste better . . . A Sweet Little Secret Born in the Hills of Colorado." Imperial Sugar Company's advertisement features a consumer who says, "I'm here as a baking expert to tell you that Imperial Sugar is the finest sugar made." An ad for Dixie Crystal Sugar informs consumers that there is "no other sugar that stirs up, cooks up, bakes up better than Dixie Crystal" and that "the difference is crystal clear." Florida Crystal Sugar Company advertises its "minimally processed . . . Unbleached Cane Sugar" and informs consumers that "they'll love the difference! Smart & Sweet. Naturally."

[5] Although the dates of the advertisements included in these exhibits are in the 1990's, we understand that earlier versions of similar advertising materials were disseminated in the late 1980's as C&H asserts.

[6] The term "puffery" as used by the Commission here generally includes representations that ordinary consumers do not take literally, expressions of opinion not made as a representation of fact, subjective claims (taste, feel, appearance, smell) and hyperbole that are not capable of objective measurement. Deception Policy Statement, 103 FTC 110, 181 & n.42 (1984) (citing *Pfizer, Inc.*, 81 FTC 23, 64 (1972)).

competitive harm shown is related to this homogeneity as discussed below.

As alleged in the complaint accompanying the order and recognized both by C&H and the United States Beet Sugar Association ("USBSA"), which opposed the request for modification, white granulated sugar is a homogeneous product consisting of 99.9% sucrose. The remaining .1% comprises sulfites and other residue in trace amounts.[7] Although objective claims of differences among such products would be difficult, if not impossible, to substantiate, it does not follow that the Commission should continue to ban comparative claims that are subjective, or product source or origin claims that appeal to the peculiarities of consumer preference as long as the advertising claims do not imply without substantiation material differences in the health, safety, nutritional quality, or purity of the product. Indeed, the Commission, in the past, has found that the origin of products may be material to consumers. *See Leonard F. Porter*, 88 FTC 546, 628 (1974) ("some substantial group [of consumers] would, all things being equal, prefer authentic Eskimo-crafted gifts and souvenir items to non-native made imports from other parts of the United States"). *Cf. FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) ("the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance").

C&H states that the order improperly discriminates among competitors, since other companies freely make claims that C&H is prohibited from making under the order, or that it may make only under certain conditions. For example, C&H arguably cannot include in its advertising a subjective testimonial claim such as "I love C&H the best," or "C&H tastes best," without having to substantiate that consumers can typically and ordinarily discern the difference between C&H and other granulated sugars. The material in the Wilson Affidavit and its exhibits supports a conclusion that the order,

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[7] As C&H states in its request to reopen, "[T]here are some minor physiological differences between cane and beet sugars; the most important one being the photosynthesis carbon pathway, C_3 for beet and C_4 for cane. This distinction is responsible for the different constituent elements found in the final products in very trace amounts. Sugar refined from sugar beets will have traces (parts per million) of raffinose and betaine (a non-saccharide). Sugar refined from sugar cane will have traces (parts per million) of reducing sugars and high molecular weight polysaccharides . . . . C&H has no intention of basing an advertising campaign on minor physiological differences between granulated sugars or different methods used in the refining process." Request at 13. *See also* Opposition of the USBSA to Revised Request and Restated Petition of C&H to Modify or Vacate Consent Order at 4-5.

by restricting these sorts of claims, is impeding rather than encouraging competition. The effect of the competing advertising campaigns of companies, such as American Crystal, in Minneapolis and Milwaukee and of Imperial-Holly in Dallas, is to take advantage of C&H's inability to counter claims that either constitute puffery or relate to the source or origin of the product, or are other claims that should be substantiated.

Therefore, the Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the request. Having reopened the order, the Commission will consider whether the order should be modified.

IV. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE C&H ORDER

C&H states that the public interest justifies setting aside the order, or modifying its terms. It asserts that consumers have a constitutional right to receive uncensored truthful information and that market efficiency requires that consumers be given access to truthful information. Neither of these assertions supports setting aside the order.

The Commission believes, however, that the public interest warrants modification of the order to permit C&H to make limited comparative claims. This modification is justified on the narrow facts of this matter. In particular, the homogeneous nature of the product means that there are few truthful, nondeceptive comparisons that can be made among competing products. In order to promote their brands, sugar refiners must rely on the sort of subjective endorsement claims described above, or objective product source and origin claims that may appeal to individual consumer preferences. These are precisely the kinds of claims prohibited by the existing order. We believe, therefore, that these facts suggest strongly that the order as currently structured inhibits competition in the granulated sugar industry. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

The order against C&H was intended to protect consumers from misleading claims about the alleged superiority or difference of C&H sugar, not to stifle the respondent's ability to participate in healthy competition on the basis of truthful, nondeceptive advertising. We

are persuaded, therefore, that modification to permit puffery is warranted. The order will permit truthful and nondeceptive product source or product origin claims and claims of health, safety, nutritional quality, or purity, if supported by a reasonable basis consistent with the Commission's Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30,999 (Aug. 2, 1984), *appended to Thompson Medical Co.,* 104 FTC 648, 639 (1984).

The Commission denies the request that the order be set aside in its entirety, because C&H has not demonstrated why it should not continue to be required to substantiate objective product claims. The Commission also denies the request that the order be modified by adding to paragraph l(B) a safe harbor allowing C&H to advertise that its competitors do not disclose the source or origin of their sugar, unless the advertisement claims that C&H sugar is different from other sugar with regard to health, safety, nutritional quality, or purity, although the modification ordered, the Commission believes, addresses the thrust of C&H's request.

Specifically, the Commission modifies the order by deleting Parts l (A) (i) (a) and (c) as requested by C&H and by amending paragraph 1(B) of the original order to permit the company to represent truthfully that (1) C&H's granulated white sugar is derived from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as such claims do not represent directly or by implication that C&H's granulated white sugar is superior to, or different from, sugar derived from sugar beets or derived from sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity. This modification will limit the order so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors, or truthful, nondeceptive product source or origin claims while continuing to bar C&H from making deceptive comparative claims regarding health, safety, nutritional quality, or purity.

In addition, the Commission adds the word "objective" in paragraph 1 to clarify that the substantiation requirement applies to "objective" differences in granulated white sugars. The duty to substantiate will apply to such claims of differences and also to claims relating to health, safety, nutritional quality, or purity of any competitor's granulated sugar product. The words "granulated" and

"white" have been added to new paragraph 1(C) and throughout this order to clarify that the order does not apply to brown sugar.[8] Finally, the phrase "health, safety, nutritional quality and purity" has been added in the provisions originally appearing as paragraphs 1 (A) (i), (ii) and (iii), consistent with the Request.

These modifications differ in part from those sought by C&H. The Request, however, sought in the alternative that the Commission grant "such other relief as it may deem fitting and just." Inasmuch as the Commission understands the thrust of the Request to achieve a modification that is less restrictive of the company's ability to make comparative advertising claims concerning the source and origin of various brands of granulated white sugar, the Commission believes this modification accomplishes that goal.

V. CONCLUSION

The Commission concludes that the order in this matter should be reopened and modified. Accordingly,

It is therefore ordered, That the proceeding is hereby reopened and the order issued on January 6, 1977, is hereby modified to read as follows:

ORDER

It is ordered, That respondents California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of granulated white

[8] The Commission's action here is consistent with its approach in *Firestone Tire & Rubber Co.*, 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), in which the Commission issued an advisory opinion interpreting an order it previously issued that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. 112 FTC 609 (1989). The Commission determined that the provision "was not intended to apply to all representations regarding tire safety," and that it did not apply to generalized claims such as "Quality you can trust," and "Because so much is riding on your tires." *Id.* Instead, the provision applied to claims relating to a "specific, objectively verifiable tire characteristic" such as "Tests show our tires are 30% less likely to blow out on the highway" or "the indestructible tire." *Id.* at 610. Similarly, in this case, the complaint challenged quality and purity claims, but the order was not so limited. Here, therefore, as in Firestone, when the order is interpreted in light of the complaint, the resulting modification is consistent with the Commission's original intentions.

sugar packaged for retail consumption, forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mail or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that there are objective differences with respect to health, safety, nutritional quality, or purity in granulated white sugars, including that C&H granulated white sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless the difference or superiority is substantiated by competent and reliable evidence prior to making the representation.

A. Provided, however, that it shall not be a violation of this order to use the phrase "pure cane sugar from Hawaii" as a means of identifying the geographic origin and type of granulated white sugar marketed under the C&H brand name in any context wherein the quality of the sugar marketed under the C&H brand is not expressly or implicitly compared with the health, safety, nutritional quality, or purity of any other sugar. Where an advertisement contains the phrase "pure cane sugar from Hawaii" and a depiction of C&H sugar, without any representation referring to the health, safety, nutritional quality, or purity of any competitor's sugar product, or any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitive brands of sugar, the advertisement will not be deemed to contain an implied comparison.

B. It is further provided, that if an advertisement makes a positive or absolute and truthful representation concerning C&H sugar without any representation concerning the health, safety, nutritional quality, or purity of any competitor's sugar product, or without any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitors' brands of sugar, the advertisement will not be deemed to contain an implied comparison under this order.

C. It is further provided, however, that the respondents may truthfully represent that (1) C&H's granulated white sugar is derived

from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label, advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as any such claims do not represent, directly or by implication, that C&H's granulated white sugar is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in paragraph one above.

Provided, however, that it shall not be considered a violation of this order for Foote, Cone & Belding/Honig, Inc., to make what would otherwise be a false or misleading claim or representation concerning the qualities of C&H sugars or competitive sugars if that respondent shows that it neither had any knowledge of the falsity of or misleading character of such representation nor had any reason to know, nor upon reasonable inquiry could have known its false, deceptive or misleading nature.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents 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 corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Starek and Commissioner Varney concurring in the result.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the result the Commission reaches in modifying the order in this matter -- because I believe the modification to be in the public interest -- but I do not join in the analysis the Commission uses to reach that result. For the first time and without explanation, the Commission extends the application of the so-called "affirmative need threshold" to consumer protection order modifications. Then, as it has in certain competition matters, the Commission drains that threshold of any content by finding, on selective and flimsy evidence, that the order has resulted in "competitive harm."

I. THE COMMISSION HAS NOT PREVIOUSLY APPLIED THE "AFFIRMATIVE NEED THRESHOLD" TO CONSUMER PROTECTION ORDERS

The majority states that when a petitioner seeks to reopen and modify an order on public interest grounds, "[g]enerally, the [petitioner] must demonstrate as a threshold matter some affirmative need to modify the order," and when a satisfactory showing of affirmative need is made, the Commission balances the reasons favoring the requested modification against any reasons not to make the modification.[1] The Commission cites as precedent an unpublished letter to counsel in Damon Corporation.[2] As I noted in my concurring statement in Service Corporation International, this "affirmative need threshold" is not required by any statute, rule of Commission practice, or judicial precedent; nor is it articulated consistently in Commission rulings.[3] Indeed, this is the first time that the Commission has required a petitioner seeking modification of a consumer protection order on public interest grounds to demonstrate affirmative need.[4]

Even in modifications of competition orders, where the affirmative need threshold is cited, the Commission frequently has

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[1] Order Reopening the Proceeding and Modifying Cease and Desist Order at 4.

[2] *Id.* (citing Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983) (unpublished)).

[3] Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

[4] *See, e.g.*, Service Corp. Int'l, Docket No. 9071 (Order, May 12, 1994) ("SCI"); Tarra Hall Clothes, Inc., Docket No. C-2797 (Order, October 27, 1992); *Reader's Digest Assoc., Inc.*, 111 FTC 758 (1989); *Encyclopedia Britannica, Inc.*, 111 FTC 1 (1988); *Redman Indus., Inc.*, 110 FTC 636 (1988). Given that SCI and Tarra Hall make no mention either of affirmative need or of Damon, the majority's citation to these cases to support the Damon affirmative need standard is puzzling.

made no attempt to quantify the cost of the order or its impact on the petitioner's viability.[5] For example, the Commission has found a showing of affirmative need based on the fact that the order might cause injury.[6] In at least two antitrust order modifications, the Commission recited the Damon letter's affirmative need standard, but modified the order without finding affirmative need.[7]

Accordingly, the Commission's statement cited above is plainly wrong, and I am perplexed by the Commission's insistence on injecting the Damon letter's affirmative need threshold into this consumer protection order. The Commission offers absolutely no explanation for its departure from established practice.[8] As I stated in SCI, rather than declare a separate affirmative need requirement and then find it satisfied by tenuous showings, the Commission should -- as it did in SCI -- integrate affirmative need and the interest in the repose and finality of Commission orders into the array of costs and benefits that we must weigh under the public interest rubric of Section 2.51.[9] I believe that such an analysis supports the conclusion that the order in this case should be modified.

II. THE FINDING OF "AFFIRMATIVE NEED" IN THIS CASE DEMONSTRATES THE THRESHOLD'S LACK OF CONTENT

The Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the petition.[10] The

[5] *E.g.*, U.S. Pioneer Elecs. Corp., Docket No. C-2755 (Order, April 8, 1992); *Lenox, Inc.*, 111 FTC 612 (1989); *Liquid Air Corp.*, 111 FTC 135 (1988); *National Tea Co.*, 111 FTC 109 (1988).

[6] *Union Carbide Corp.*, 114 FTC 250 (1991).

[7] American Medical Assoc., Docket No. 9064 (Order, October 10, 1991); *Midcon Corp.*, 111 FTC 100 (1988).

[8] Indeed, that this case spells a departure from the very recent SCI decision is illustrated by Commissioner Azcuenaga's dissenting statement in that matter, which stated that the Commission's order "fail[ed] to apply the correct legal standard under which the Commission addresses petitions to reopen and modify its orders," and "virtually ignore[d] the standard of 'affirmative need' ordinarily applied to petitions to reopen in the public interest." Dissenting Statement of Commissioner Mary L. Azcuenaga in SCI (May 16, 1994), at 1, 5.

[9] Although there appears to be no principled basis for distinguishing between antitrust and consumer protection orders for purposes of modification law, the Commission has tended to apply differing analyses in these areas. If the Commission intends to establish a uniform legal framework for all order modifications, the better approach would be to adopt the integrated cost-benefit analysis employed in consumer protection orders rather than the convoluted framework of the Damon letter.

[10] Order Reopening the Proceeding and Modifying Cease and Desist Order at 6. Although the Commission does not expressly state that C&H has demonstrated affirmative need, from its recitation of the affirmative need standard and its conclusion that the order should be reopened, one may infer a finding of affirmative need.

Commission recites C&H's statement that other sugar refiners advertise that their sugar is better than or different from other sugar and further states that a C&H affidavit and its exhibits support a conclusion that by restricting these sorts of claims, the order is impeding rather than encouraging competition. The Commission notes that the competing advertising campaigns take advantage of C&H's inability to counter claims that constitute puffery, relate to the source or origin of the product, or require substantiation. Accordingly, the Commission concludes that the order should be modified to permit C&H to make limited comparative claims.

In my view, the evidence C&H has proffered falls short of demonstrating that the order has caused it competitive harm. Although C&H has submitted an affidavit with exhibits showing that its share of sales in Minneapolis, Milwaukee, and Dallas declined once competitors began running advertising campaigns in those cities, this evidence does not support a conclusion that the campaigns were the cause (or even a cause) of the decline in C&H's sales or that the Commission's order precluded C&H from competing effectively. With respect to the Dallas market, the affidavit did not indicate what the companies' respective shares were before C&H's competitor began its campaign; C&H's loss of sales could easily have been the extension of a continuing trend. The affidavit presented no evidence to exclude the possibility that changes in price or any other competitive variable may also have been responsible for changes in sales in those three areas. C&H presented no data on any changes in its own advertising during the time period or in its couponing or other incentive policies that may have affected sales. It presented no evidence on the arrival of any other competitors in those areas. Moreover, although C&H's petition noted changes in the Hawaiian cane sugar industry, it did not explain why those changes or other factors may not have also contributed to the purported decline in its sales.

Furthermore, the evidence presented is highly selective: C&H did not present any data from other areas in its west-of-Chicago market where competitors may be advertising, so it is impossible to know the effect, if any, of such advertising on C&H's sales in areas other than Minneapolis, Milwaukee, and Dallas. Indeed, in its opposition to C&H's petition, the U.S. Beet Sugar Association claims that C&H is the leading producer of sugar west of Chicago and asserts that C&H's sales in the nine western states constituting its

primary market increased from 49% in 1985 to 52% in 1993. The sales data submitted by C&H appear to be inconsistent with the data submitted by the Association. Given this conflicting evidence, I cannot conclude that C&H has lost sales since issuance of the order in 1977. In short, although C&H presents some evidence suggesting an association between its competitors' advertising and sales of C&H sugar in three cities, this evidence is not sufficient to conclude that the order's restrictions have been responsible for the decline in C&H's sales.

III. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE ORDER

Notwithstanding its failure to demonstrate competitive hardship or a decline in sales due to the order, in my view C&H has made a persuasive case that the order prevents it from making certain nondeceptive, subjective preference claims that are being made by competitors. The Commission has previously held that the public interest can warrant an order modification on fairness grounds. Tarra Hall Clothes, Inc., Docket No. C-2797, slip op. at 9, 10 n.24 (October 27, 1992) ("The Commission also may examine the entirety of circumstances to determine whether intrinsic fairness dictates that an order be modified. ... [M]aintaining a level playing field among competitors, to the extent practicable and justified by the facts, is of concern to the Commission."). In Tarra Hall, the Commission modified the order even though the petitioner failed to demonstrate that the order's bond requirement relating to imported wool products imposed a competitive hardship. Likewise, the Commission can modify the C&H order even though C&H has failed to demonstrate competitive hardship or a decline in sales stemming from the order's requirements.[11]

The order's broad scope prohibits C&H from making comparative claims similar to those its competitors are making unless it can demonstrate that consumers discern or benefit from any claimed difference. Because the order limits C&H's ability to combat appealing image advertisements mounted by its competitors, C&H is not competing on a level playing field. C&H's submission on its sales in Minneapolis, Milwaukee, and Dallas provides at least some

[11] Tarra Hall is arguably distinguishable in that the Commission had already modified a similar bond requirement in several other orders imposed on Tarra Hall's competitors. However, the public interest in ensuring a level playing field applies here as well.

support for this proposition. Furthermore, consumers may have an idiosyncratic preference for cane sugar over beet sugar, even if both products are 99.9%. sucrose. Indeed, the vigor of the Beet Sugar Association's opposition to the requested modification suggests that this may be the case. Yet the current order prohibits C&H from informing consumers that other brands of sugar come from beet sugar.

Accordingly, I believe the order should be modified so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors or truthful, nondeceptive claims about the source or origin of sugar. Such a modification would be consistent with the Commission's prior interpretations of its orders. For example, the Commission made a similar modification in General Motors,[12] in which the order prohibited GM from representing that any automobile is superior in handling to any other automobile (with "handling" defined in a particular way) unless it had a reasonable basis for such representation. GM requested that the order be modified to re-define "handling" and to permit it to advertise specific aspects of the comparative handling of motor vehicles, without having to prove overall handling superiority. The Commission concluded, without any finding of affirmative need, that "to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions, the petitions are in the public interest and should be granted."[13]

Similarly, in Firestone Tire & Rubber Co.,[14] the Commission issued an advisory opinion[15] interpreting an order that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. The Commission determined that the provision "was not intended to apply to all representations regarding tire safety" and that it did not apply to generalized claims such as "Quality you can trust" and "Because so much is riding on your tires."[16] Instead, the provision applied to claims relating to a "specific, objectively verifiable tire

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[12] *General Motors Corp.*, 85 FTC 27 (1975), *modified*, 104 FTC 511 (1984).

[13] 104 FTC at 512. The modified order retained the requirement that GM have a reasonable basis for vehicle handling claims.

[14] 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[15] 112 FTC 609 (1989).

[16] *Id.*

characteristic," such as "[t]ests show our tires are 30%' less likely to blow out on the highway" or "the indestructible tire."[17]

In like manner, the complaint against C&H challenged quality and purity claims, but the order was not so limited. If one interprets the order in light of the complaint, as was done in Firestone, it is appropriate to modify the order to narrow the claims covered from general claims to specific, objectively verifiable claims. The arbitrary application of a demonstrably hollow legal framework is not necessary to reach this result.

Accordingly, I concur in the result, but not in the reasoning, of the Commission's decision to modify the order in Docket No. C-2858.

[17] *Id.* at 610.

IN THE MATTER OF

BEE-SWEET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3550. Complaint, Jan. 17, 1995--Decision, Jan. 17, 1995

This consent order prohibits, among other things, a North Carolina corporation and its officer from representing that bee pollen products are effective as a cure or in mitigating certain conditions and physical ailments, and from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study. In addition, the consent order requires the respondents to notify all sellers of the products, for the last 12 months, about the settlement with the Commission.

Appearances

For the Commission: *Ronald Waldman, Michael Bloom* and *Christian White.*

For the respondents: *Christopher D. Lane, Womble, Carlyle, Sandridge & Rice*, Winston-Salem, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bee-Sweet, Inc., a corporation, and Benny G. Morgan, individually and as an officer and director of said corporation, 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 Bee-Sweet, Inc., is a North Carolina corporation, with its principal office or place of business at 10370 North, NC Highway 150, Clemmons, North Carolina.

Respondent Benny G. Morgan is an owner, officer, and director of the corporate respondent. Individually or in concert with others, Benny G. Morgan formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. Respondent Benny G. Morgan's 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 bee pollen, bee propolis, and other products to consumers. These products are "foods" or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

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, 15 U.S.C. 44.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for various products containing bee pollen and bee propolis, including but not necessarily limited to the attached Exhibits A-D. These advertisements contain the following statements:

A. "For centuries, people have been using nature's perfect food [bee pollen] as nutritional enhancement or as an aid in the treatment of: Anemia, Sexual Stamina, Back Pain, Allergies, Weight Control, Digestive Problems, Arthritic Symptoms, [and] Pulse Rate Control." (Exhibit A)

B. "Many find bee pollen aids the treatment of: anemia, sexual stamina, back pain, allergies, weight control, digestive problems, arthritic symptoms, pulse rate control." (Exhibit B)

C. "Studies performed by doctors around the world have shown bee pollen to be effective in treating illnesses from allergies to arthritis, anorexia to overweight, fatigue to arteriosclerosis.*
(* From 'Pollen in Natural Therapeutics' by Dr. Yves Donadieu from Le Faculte de Medicine de Paris.)" (Exhibit C)

D. "Propolis . . . has shown remarkable healing abilities. This natural antibiotic has been the study of numerous physicians.*
* 'Propolis: The Natural Antibiotic by Ray Hill.' " (Exhibit C)

E. "Many doctors now prescribe propolis to help treat illnesses such as sore throats, colds, acne, burns, urinary infections, and more." (Exhibit D)

F. "[P]ropolis is used as an antibiotic by physicians in Europe and Asia, to treat the following conditions: Ulcers, Acne, Tonsilitis [sic], Bleeding, Burns, Sore throats, Urinary infections, [and] Allergies." (Exhibit B)

G. "Doctors find: 15 ulcer patients were treated exclusively with propolis. Only one returned for hospitalization. In the test group using traditional medicine, 11 of 17 returned for hospitalization. A study by Dr. F.K. Feiks, M.D." (Exhibit B)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not

necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that:

A. Consumption of bee pollen is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, and (11) pulse irregularities.

B. Competent and reliable scientific studies have proved that consumption of bee pollen is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, and (6) arteriosclerosis.

C. Bee propolis is an effective antibiotic for human use.

D. Consumption of bee propolis is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) acne, (2) allergies, (3) bleeding, (4) burns, (5) colds, (6) sore throats, (7) tonsillitis, (8) ulcers, and (9) urinary infections.

E. Competent and reliable scientific studies have proved that consumption of bee propolis is effective in the mitigation and treatment of ulcers.

PAR. 6. In truth and in fact:

A. Consumption of bee pollen is not effective in the mitigation or treatment of numerous diseases or conditions including: (1) allergies, (2) arthritis,(3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, or (11) pulse irregularities.

B. Competent and reliable scientific studies have not proved that consumption of bee pollen is effective in the mitigation or treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, or (6) arteriosclerosis.

C. Bee propolis is not an effective antibiotic for human use.

D. Consumption of bee propolis is not effective in the mitigation or treatment of numerous diseases and conditions including: (1) acne, (2) allergies, (3) bleeding, (4) burns, (5) colds, (6) sore throats, (7) tonsillitis, (8) ulcers, or (9) urinary infections.

E. Competent and reliable scientific studies have not proved that consumption of bee propolis is effective in the mitigation and treatment of ulcers.

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

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, 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. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph five, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Golden Goodness That Offers A Wealth Of Nutrition

Some treasures are not hard to find if you know where to look. That's the case with Bee-Sweet natural bee products, which are sold in this establishment. Start enjoying the wealth of good health with pure whole grain Bee Pollen and Bee Propolis.

Bee Pollen

All the riches of nature are found in Bee Pollen. Bee Pollen contains 16 vitamins, 18 enzymes, 28 minerals and 18 protein and amino acids; every ingredient required for a balanced diet. Bee Pollen is also rich in protein – up to seven times the protein of beef. For centuries, people have been using nature's perfect food as nutritional enhancement or as an aid in the treatment of:

- Anemia
- Sexual Stamina
- Back Pain
- Allergies
- Weight Control
- Digestive Problems
- Arthritic Symptoms
- Pulse Rate Control

Many athletes use Bee Pollen to increase their stamina and provide quick energy bursts. Among those athletes that advocate pollen are Muhammed Ali, Bob McAdoo, Archie Griffin, Bill Walton, Julianne McNamara and Larry Pacifico.

Bee Propolis

Nature's healer, Bee Propolis, is a natural antibacterial, antimold, antibiotic agent. For example, researchers have found that honey rarely spoils because it is virtually free of bacteria. Bees sterilize bacteria that enter the hive with a neutralizing substance called Propolis. Gathered from the leaf buds and bark of trees, Propolis is used as an antibiotic by physicians in Europe and Asia. Propolis is a natural treatment for skin afflictions or bacteria-caused infections such as:

- Ulcers
- Acne
- Tonsillitis
- Bleeding
- Burns
- Sore Throats
- Urinary Infections
- Allergies

A study by Dr. F. K. Felks, M. D. found that out of 15 ulcer patients treated exclusively with Propolis, only one returned for hospitalization. In the test group using traditional medicine, 11 of 17 returned for hospitalization.

This information was gathered from the publications "About Pollen" by G.J. Binding, 1980, "Propolis The Natural Antibiotic" by Ray Hill, 1977, Thorsons Published Limited, and "Propolis The Eternal Natural Healer" by Dr. Felix Mural, 1962.

Grapefruit Diet

Everyone is looking for a way to control their weight. Now, here's the key to safe, sensible weight loss. Bee-Sweet has combined the natural fat-burning properties of grapefruit with the excellent food supplement Bee Pollen. The Grapefruit Diet naturally controls your appetite while providing you with necessary vitamins and minerals. This diet is even safe and nutritious enough for children. It contains no drugs and produces no side effects. When it comes to weight control, the Grapefruit Diet is worth its weight in gold.

Bee Awake

The value of sleep is immeasurable, yet sometimes jobs or late night study demand that we stay alert. Now with Bee-Sweet's Bee Awake, you can naturally increase your endurance. The unique combination of natural caffeine found in the Guarana plant and energy-packed Bee-Pollen creates a natural non-addictive stimulant. Unlike artificial stimulants, there are no side effects or harmful chemicals.

Orange Chewable Bee Pollen

All the tangy flavor of oranges teams up with all the nutrition of pure Bee Pollen. Orange Chewable Bee Pollen provides the perfect food supplement for you and your family. You'll get more than 16 essential vitamins recognized in the prevention of illness in one delicious, chewable tablet.

When searching for just the right instant energy lotion, look no further. Bee Sweet provides the finest quality Bee Pollen and Bee Propolis on the market. Just look for our display in this eating establishment

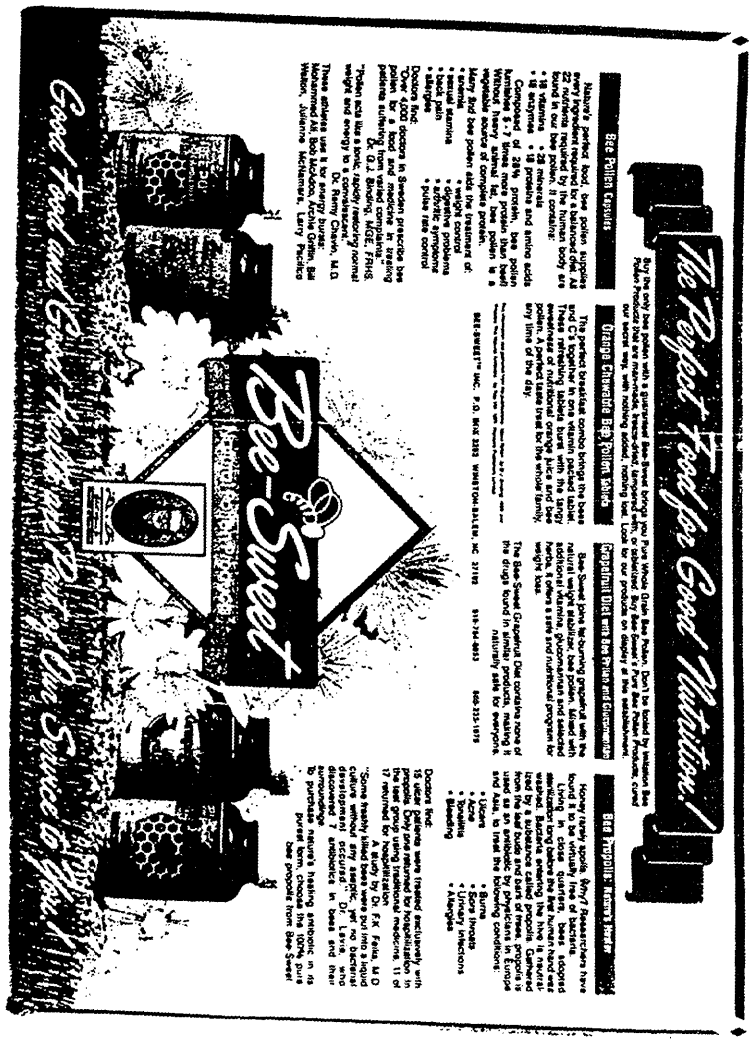
Bee-Sweet

Unlock The Treasures Of Good Health

Bee-Sweet™ Inc. P.O. Box 2252 Winston-Salem, NC 27102 (919) 764-0853 or 1-800-233-1070

REDUCED FROM ACTUAL SIZE

EXHIBIT B


The Perfect Food for Good Nutrition!
Bee Pollen Granules
Orange Chewable Bee Pollen Tablets
Grapefruit Diet with Bee Pollen and Glucomannan
Bee Propolis Honey Spread
Bee-Sweet
Good Food and Good Health Are Our Service to You!

Bee-Sweet
Apiary Nature's Bounty

EXHIBIT

6

Bee Healthy with Bee-Sweet

Neither a miracle drug nor a magic potion, bee pollen is a natural food substance packed with vitamins, minerals, enzymes, amino acids and trace elements. Studies performed by doctors around the world have shown bee pollen to be effective in treating illnesses from allergies to arthritis, anorexia to overweight, fatigue to arteriosclerosis.*

(* From "Pollen in Natural Therapeutics" by Dr. Yves Donadieu from La Faculte de Medicine de Paris.)

Buzzing with Activity

The makers of Bee-Sweet products are dedicated to bringing you the finest natural products for your health. Our company is based on the principle of helping others, so we're constantly searching for new ways to offer you the nutritional richness of nature. Our full line of products from Bee Pollen to Propolis, Orange Chewable Bee Pollen Tablets to the Grapefruit Diet, Bee-Awake to Oat Bran are all formulated for healthful living.

Truck drivers and athletes, with their grueling hours and hard work, buy our products by the thousands. They are convinced of Bee-Sweet's contribution to their health and stamina. Join the people who have started on the road to good health with Bee-Sweet Products. Look for our line of products on sale in restaurants and truck stops across the country.

Robert Moore, Jr.

Not many men get a chance to start life over again after 65. Robert Moore, Jr. did. Virtually disabled from a heart attack, suffering with high blood pressure and painful rheumatism, Mr. Moore had started to give up on life, thinking there was no hope that he could be productive again. Then he learned of two promising food supplements, bee pollen and bee propolis, and his life was changed. To share this secret, he founded Bee-Sweet, Incorporated.

Join Robert Moore, Jr. and the thousands like him, who are enjoying life through the healthy benefits of Bee-Sweet Products.

Gathering Nature's Bounty

Complaint

EXHIBIT D

A

Bee Pollen

Pure, whole grain bee pollen is packed into a Bee-Sweet Tamper-proof capsule. We select the finest pollen available from the purest sources. To this natural food, we do not add fillers, sugar, sodium, or artificial ingredients. Available in 50 capsules for $10.95, 100- $15.00, 200- $21.00, 325- $28.00, or 11 oz. loose granules for $20.00.*

D

Orange Chewable Bee Pollen

Vitamin rich bee pollen joins America's favorite breakfast drink in a delicious chewable tablet. Supplement your diet with these two powerful disease preventing vitamin sources. The tangy taste of these all natural tablets is easy for the entire family to enjoy. Available in 50 tablets for $8.95, 100- $11.95, 200- $18.00.*

B

Bee Propolis

Modern scientists are learning what the ancients already knew, that bees gather an amazing natural antibiotic: propolis. Many doctors now prescribe propolis to help treat illnesses such as sore throats, colds, acne, burns, urinary infections, and more. Bee-Sweet provides propolis in a convenient capsule for an exceptional healing aid in a natural food supplement. Available in 50 capsules for $12.95, 100- $21.00 or buy our convenient Trial Pack containing 50 capsules of Bee Propolis and 50 capsules of Bee Pollen for $17.95.*

E

Bee-Awake

For the long haul, truckers need extra endurance. Bee-Awake combines energizing bee pollen with the natural caffeine found in the Guarana plant. These two food supplements are combined in one tablet to produce a natural stimulant. One Bee-Sweet Bee-Awake tablet can give you a wholesome, fast acting energy pick up, without the side effects of artificial stimulants. A perfect booster for late night studying or athletic training. Available in a 40 tablet bottle for $7.95.*

C

The Grapefruit Diet

Bee-Sweet offers a natural way to control your appetite, without losing precious vitamins and minerals. The metabolic regulating bee pollen works with fat burning grapefruit to help you lose weight. Blended with special herbs and Glucomannan, the Bee-Sweet diet pill is a natural product and an excellent food supplement, safe for any dieter. As with any weightloss program, you should consult your physician. Available in 50 tablets for $12.95, 100- $21.00, 200- $29.00.*

F

Oat Bran

Finally there is help available for your battle with high blood cholesterol levels. Oat Bran has been shown to reduce these levels when used as part of a total high fiber, low cholesterol diet. Oat Bran with Bee Pollen gives you the advantage of a water soluble fiber supplement and the vitamins and minerals found in natural Bee Pollen. This nutritious combination is NEW from Bee Sweet. Available in 100 chewable tablets for $7.95.*

* PRICES INCLUDE SHIPPING AND HANDLING

Bee-Sweet, Inc.
P.O. Box 2252
Winston-Salem, NC 27102
Toll Free 1-800-233-1010
In NC 1-919-764-0853

• Call To Order Cases

CUSTOMER ORDER FORM

Name
Address
City State
Zip Phone ( )

ITEM LETTER	DESCRIPTION	BOTTLE SIZE	BOTTLE QUANTITY	BOTTLE PRICE	SUBTOTAL

SUBTOTAL
5% Sales Tax (If NC Residents)
C.O.D. $2.50 (If Applicable)
TOTAL

☐ SEND ME A DISTRIBUTOR PRICE LIST

☐ CHECK ☐ MONEY ORDER ☐ VISA ☐ MASTER CARD

CARD #
EXP DATE

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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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. Respondent Bee-Sweet, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office or principal place of business located at 10370 North, NC Highway 150, Clemmons, North Carolina.

Respondent Benny G. Morgan is an officer of said corporation. Individually and in concert with others, he formulates, directs, and controls the acts and practices of corporate respondent. Respondent Benny G. Morgan's business address is 10370 North, NC Highway 150, Clemmons, North Carolina.

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. "*Bee pollen product*" shall mean any product intended for human consumption or use consisting in whole or in part of bee pollen and/or bee propolis in any form.

B. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any bee pollen product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Consumption of any bee pollen product is effective in the cure or mitigation of: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, (11) pulse irregularities, (12) acne, (13) bleeding, (14) burns, (15) colds, (16) sore throats, (17) tonsillitis, (18) ulcers, or (19) urinary infections.

B. Any bee pollen product is an effective antibiotic for human use.

II.

It is further ordered, That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or service for human consumption or use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such product or service for human consumption will have any effect on a user's health or physical condition, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or service for human consumption or use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any bee

pollen product by regulations promulgated by the Food and Drug Administration pursuant to the Nutritional Labeling and Education Act of 1990.

V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VI.

It is further ordered, That respondents, or their successors and assigns, within thirty (30) days of the date of service of this order, shall send to each person or company that purchased for resale any bee pollen product from any respondent during the twelve (12) month period preceding the date of issuance of this order, a letter in the form set forth in Appendix I hereto. Each such letter shall be sent via the United States Postal Service, first class mail, postage pre-paid, to the last known address of the intended recipient.

VII.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: .

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

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

VIII.

It is further ordered, That:

A. Within thirty (30) days of the date of service of this order respondents shall distribute a copy of this order to respondents' officers, agents, representatives, and employees engaged in the marketing or sale of any bee pollen product; and

B. For a period of seven (7) years from the date of service of this order respondents shall distribute a copy of this order to each of respondents' officers, agents, representatives, and employees who become engaged in the marketing or sale of any bee pollen product. Such distribution shall be made within three (3) days of each such person's becoming so engaged.

IX.

It is further ordered, That:

A. Respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, creation or dissolution of a subsidiary, or any other change in the corporation that may affect compliance obligations arising out of this order; and

B. For seven (7) years from the date of service of this order, Benny G. Morgan shall notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his new business or employment the activities of which include the advertising, offering for sale, sale, or distribution of: (1) any bee pollen product or (2) any product or service advertised, offered for sale, sold, or distributed for effect on a user's health or physical condition. Each such notice shall include Benny G. Morgan's new business address and a statement of the nature of the business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with the business or employment.

X.

It is further ordered, That respondents shall, within sixty (60) days of the date of service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX I

(To be Printed on Bee-Sweet, Inc. Letterhead)

[Date]

Dear Customer,

We at Bee-Sweet have voluntarily entered into an agreement with the Federal Trade Commission ("FTC"). We have agreed to a cease and desist order under which we are writing to each of our purchasers for resale of bee pollen products. The purpose of this letter is to inform you that according to the FTC, health claims previously made by Bee-Sweet for bee pollen products are unsubstantiated by competent and reliable scientific evidence and, according to the FTC, are false.

The FTC order requires that for any representation to be made that a product or service will affect a user's health or physical condition, we must have competent and reliable scientific evidence that substantiates the representation. Bee-Sweet's promotional literature must comply with these FTC requirements.

Sincerely,

Benny G. Morgan
President
Bee-Sweet, Inc.

IN THE MATTER OF

NOTATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3551. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995

This consent order prohibits, among other things, a Pennsylvania company and its president from misbranding any textile product by mentioning or implying that the product contains a fiber without using the generic fiber name required by the Textile Fiber Products Identification Act and the Federal Trade Commission rules, or by mentioning or implying that it contains a fiber when it, in fact, does not. The respondents also are required to file with the Commission a continuing guaranty applicable to all textile products they handle in the future.

Appearances

For the Commission: *Katharine B. Alphin.*

For the respondents: *Debra Klebanoff, Wolf, Block, Schorr & Solis-Cohen*, Philadelphia, PA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Notations, Inc., a corporation, and Kurt Erman, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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 Notations, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and

principal place of business located at 109 Pike Circle, Huntingdon Valley, Pennsylvania.

PAR. 2. Respondent Kurt Erman is sole shareholder and president of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His office and principal place of business are the same as that of respondent Notations, Inc.

PAR. 3. Respondent Notations, Inc., is engaged in the manufacture, importation and sale of women's blouses.

PAR. 4. Respondents have in the past and presently continue to import, sell and introduce into commerce textile fiber products and otherwise have been engaged in commerce with textile fiber products as "commerce" and "textile fiber products" are defined in the Textile Fiber Act and the Rules and Regulations under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," as promulgated by the Federal Trade Commission.

PAR. 5. Certain of said textile products were misbranded by the respondents within the intent and meaning of Sections 3(a), 3(b), 3(c) and 4(a), 15 U.S.C. 70a(a), 70a(b), 70a(c), and 70b(a), of the Textile Fiber Act and Rules 16(c), 17 and 18, 16 CFR 303.16(c), 303.17 and 303.18, thereunder, in that on a hangtag attached to blouses made of 100% polyester, respondents used a trade name, "Micro Silk," thereby supplying non-required information that conflicted with the required disclosure of fiber content. The use of this trade name was false and deceptive, and stated or implied the blouses contained a fiber not present therein. Respondents have, therefore, violated Section 3 of the Textile Fiber Act, 15 U.S.C. 70a, and Rule 2, 16 CFR 303.2. The sections of the Textile Fiber Act and Rules referred to in this paragraph five and paragraph six hereafter are attached hereto as Appendix A and incorporated herein as if fully set forth verbatim.

PAR. 6. The acts and practices of respondents as set forth in paragraph five were, and are, in violation of the Textile Fiber Act and the Rules promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), as amended.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in

substantial competition in or affecting commerce with corporations, firms and individuals engaged in the importation, manufacture and sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 8. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and respondents' competitors. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

APPENDIX A

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

Misbranding and False Advertising Declared Unlawful
15 U.S.C. 70a.

(a) The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the Untied States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

* * *

Misbranding and False Advertising of Textile Fiber Products
15 U.S.C. 70b.

(a) Except as otherwise provided in sections 70 to 70k of this title, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

***

RULES AND REGULATIONS UNDER
THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT
16 CFR 303

Rule 2 - General requirements.
[16 CFR 303.2]

(a) Each textile fiber product, except those exempted or excluded under section 12 of the Act, shall be labeled or invoiced in conformity with the requirements of the Act and regulations.

(b) Any advertising of textile fiber products subject to the Act shall be in conformity with the requirements of the Act and regulations.

(c) The requirements of the Act and regulations shall not be applicable to products required to be labeled under the Wool Products Labeling Act of 1939 (Pub. L. 76-850, 15 U.S.C. 68, 54 Stat. 1128).

(d) Any person marketing or handling textile fiber products who shall cause or direct a processor or finisher to label, invoice, or otherwise identify any textile fiber product with required information shall be responsible under the Act and regulations for any failure of compliance with the Act and regulations by reason of any statement or omission in such label, invoice, or other means of identification utilized in accordance with his direction: Provided, That nothing herein shall relieve the processor or finisher of any duty or liability to which he may be subject under the Act and regulations.

Rule 16 - Arrangement and disclosure of information on labels.
[16 CFR 303.16(c)]

(c) Subject to the provisions of Section 303.17 of this part, if non-required information or representations are placed on the label or elsewhere on the product, such non-required information or representation shall be set forth separate and apart from the required information and shall not interfere with, minimize, detract from, or conflict with such required information, nor shall such non-required information in any way be false or deceptive as to fiber content.

Rule 17 - Use of fiber trademarks and generic names on labels.
[16 CFR 303.17]

(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and regulations the first time the generic name or fiber trademark appears on the label.

(c) If a fiber trademark is not used in the required information, but is used elsewhere on the label as non-required information, the generic name of the fiber shall accompany the fiber trademark in legible and conspicuous type or lettering the first time the trademark is used.

(d) No fiber trademark or generic name shall be used in non-required information on a label in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate directly or indirectly that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

Rule 18 - Terms implying fibers not present.
[16 CFR 303.18, as amended, effective October 25, 1965.]

Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.

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 Atlanta 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 Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and of the Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*; 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 the 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 acts and rules, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Notations, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 109 Pike Circle, Huntingdon Valley, Pennsylvania.

2. Respondent Kurt Erman is the sole shareholder and president of Notations, Inc. He formulates, directs and controls the policies, acts and practices of said corporation, and his office and principal place of business are the same as Notations, Inc.

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

ORDER

I.

It is ordered, That respondents Notations, Inc., a corporation, its successors and assigns, and its officers, and Kurt Erman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any

corporation, subsidiary, division or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product, as "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and the Rules and Regulations under the Textile Fiber Products Identification Act, 16 U.S.C. 303, hereinafter "Rule(s)," do forthwith cease and desist from misbranding or falsely or deceptively advertising any such product by:

A. Mentioning or implying fiber content without using the generic fiber names in a manner consistent with the Textile Fiber Act and the Rules thereunder; and

B. Mentioning or implying fiber content for a fiber that is not present in such textile fiber product.

II.

It is further ordered, That respondents shall forthwith file with the Commission a continuing guaranty applicable to all textile products handled by respondents, in the form prescribed by Rule 38, 16 CFR 303.38.

III.

It is further ordered, That respondent Notations, Inc., shall:

A. For a period of five (5) years after the service of this order, keep copies of each stamp, tag, label or other form of identification that shows information required by the Textile Fiber Act as well as such records as will show the textile fiber products in which each stamp, tag, label or other form of identification was affixed for each product it introduces, manufactures for introduction, sells, advertises, offers for sale or imports; and

B. For a period of five (5) years after the service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, the documents in paragraph

III.A. above and such other documents and materials as shall demonstrate full compliance with this order.

IV.

It is further ordered, That respondent Notations, Inc., shall within thirty (30) days after the date of service of this order, provide a copy of this order to each of its current directors and officers, and to each employee, agent and representative having managerial, purchasing, importing, sales, advertising, or policy responsibility with respect to the subject matter of this order.

V.

It is further ordered, That respondent, Notations Inc., shall, in writing, notify the Federal Trade 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 such change in the corporation that may affect compliance obligations arising out of the order.

VI.

It is further ordered, That, for a period of five (5) years from the date of service of this order, respondent Kurt Erman shall, in writing, notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with a new business or employment, each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, submit a verified report in writing, to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NEW ENGLAND JUVENILE RETAILERS ASSOCIATION, ET AL.

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

Docket C-3552. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995

This consent order prohibits, among other things, a Massachusetts association of retailers from combining, agreeing or conspiring to: fix or maintain prices or the terms of sale for juvenile products; engage in or threaten boycotts in order to influence a manufacturer's decision as to how or to whom it distributes its products; or use coercion by means of actual or threatened refusals to deal in order to compel a juvenile products manufacturer to adopt or refrain from adopting any marketing method for its products. The consent order also requires the dissolution of the association within sixty days and requires the association to send a letter, acknowledging the consent order with the Commission and outlining its terms, to the manufacturers it allegedly threatened to boycott.

Appearances

For the Commission: *Phoebe D. Morse, Gary S. Cooper* and *Mary Lou Steptoe*.

For the respondents: *Arthur Goldberg, Nathanson & Goldberg*, Boston, MA. and *Robert Colby*, Alexandria, VA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named above have violated the provisions of Section 5 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, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent New England Juvenile Retailers Association ("NEJRA") is an unincorporated association of retailers of juvenile products doing business in New England, with an office

and principal place of business located in Boston, Massachusetts. The NEJRA's designated agent is Arthur Goldberg, Esq., c/o Nathanson & Goldberg, 10 Union Wharf, Boston, Massachusetts.

PAR. 2. Respondents Elliot Young ("E. Young") and Susan Young ("S. Young") have done business as and are proprietors of The Baby Place, Inc., a retail store engaged in the sale of juvenile products, with a principal place of business located at 50 Worcester Road, Natick, Massachusetts. Individually or in concert with others, they formulate, direct, control and participate in the acts and practices of The Baby Place, Inc., including the acts and practices of said proprietorship alleged in this complaint. Their principal offices or places of business are the same as that of The Baby Place, Inc.

PAR. 3. Respondent Baby's Room, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office located at 20 Garden Street, Danvers, Massachusetts. Baby's Room, Inc. is engaged in the business of the retail sale of juvenile products.

Respondent Stephen Brass ("Brass") is president of respondent Baby's Room, Inc. Individually or in concert with others, he formulates, directs, controls and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 4. Respondent Baby Specialties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Grove Street, Worcester, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Baby Specialties of Natick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1276 Worcester Road, Natick, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent George Koury ("Koury") is treasurer of respondents Baby Specialties, Inc. and Baby Specialties of Natick, Inc. Individually or in concert with others, he formulates, directs, controls and participates in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this

complaint. His principal office or place of business is 100 Grove Street, Worcester, Massachusetts.

PAR. 5. Respondent Boston Baby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 30 Tower Road, Newton, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Boston Baby of Avon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 15 Stockwell Drive, Avon, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Boston Baby of Hingham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Derby Street, Hingham, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Michael Slobodkin ("M. Slobodkin") is treasurer of respondents Boston Baby, Inc., Boston Baby of Avon, Inc., and Boston Baby of Hingham, Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this complaint. His principal office or place of business is located at 30 Tower Road, Newton, Massachusetts.

PAR. 6. Respondent Chapin Specialties Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1140 Main Street, Springfield, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Allan Broverman ("Broverman") is president of respondent Chapin Specialties Co., Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal

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

PAR. 7. Respondent Crib-N-Cradle Juvenile Furniture Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1000 Bald Hill Road, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

Respondent Louis Avarista, Sr. ("Avarista") is president and treasurer of respondent Crib-N-Cradle Juvenile Furniture Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 8. Respondent Cribs And Cradles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Cribs And Cradles, Inc. maintained an office and principal place of business located at 623 Broadway, Route 1, Saugus, Massachusetts, where, until approximately January 1992, it was engaged in the business of the retail sale of juvenile products.

Respondent Robert Newhouse ("Newhouse") is president and treasurer of respondent Cribs And Cradles, Inc. Individually or in concert with others, he formulated, directed, controlled, and participated in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. Mr. Newhouse resides at 34 Garvey Road, Framingham, Massachusetts.

PAR. 9. Respondent Juveniles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Juveniles, Inc. maintained an office and principal place of business located at 8 Bourbon Street, W. Peabody, Massachusetts, where, until approximately May 1, 1991, it was engaged in the business of the retail sale of juvenile products.

Respondent Waltham Slumber Shop, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Waltham Slumber Shop, Inc. maintained an office and principal place of business located at 879 Main Street, Waltham, Massachusetts, where, until approximately

May 1, 1992, it was engaged in the business of the retail sale of juvenile products.

Respondent Timothy Precourt ("Precourt") is president of respondents Juveniles, Inc. and Waltham Slumber Shop, Inc. Individually or in concert with others, he formulated, directed, controlled, and participated in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this complaint. Mr. Precourt resides at 998 Summer Street, Lynnfield, Massachusetts.

PAR. 10. Respondent Normand Poirier is an individual trading and doing business as Norm's Discount, with an office and principal place of business located at 55 Airport Road, Fitchburg, Massachusetts, where he is engaged in the business of the retail sale of juvenile products. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of Norm's Discount, including the acts and practices of said proprietorship alleged in this complaint. His principal office or place of business is the same as that of Norm's Discount.

PAR. 11. Respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 117 Chestnut Street, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

Respondent Henry Ritchotte ("Ritchotte") is manager of the Warwick, Rhode Island, store of respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 12. Respondent Tiny Totland, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 1111 Elm Street, Manchester, New Hampshire, where it is engaged in the business of the retail sale of juvenile products.

Respondent Jack Resnick ("Resnick") is president of respondent Tiny Totland, Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices

of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 13. Respondent Rudolph Mosesso ("R. Mosesso") is an individual whose address is 132 Pine Street, Holbrook, Massachusetts. Mr. Mosesso was president of Welcome Baby Boutique Inc., a corporation that was organized, existed and did business under and by virtue of the laws of the Commonwealth of Massachusetts until approximately April 27, 1993, when it was formally dissolved. While it was in operation, Welcome Baby Boutique Inc. maintained an office and principal place of business located at 1500 Main Street, S. Weymouth, Massachusetts, where it was engaged in the business of the retail sale of juvenile products. Individually or in concert with others, respondent R. Mosesso formulated, directed, controlled, and participated in the acts and practices of Welcome Baby Boutique Inc., including the acts and practices of said corporation alleged in this complaint.

PAR. 14. At all times relevant to this complaint, the corporations and proprietorships named above were members of respondent NEJRA. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, members of respondent NEJRA are or were in competition among themselves and with other retailers of juvenile products in New England.

PAR. 15. Respondent NEJRA is, and has been at all times relevant to this complaint, organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 16. Respondents' general businesses or activities, including the acts and practices described below, are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 17. New Hampshire Buyer's Service, Inc. ("NHBS") operates a mail order catalog through which it sells juvenile products at discount prices up to 20-40 % below juvenile specialty store prices.

PAR. 18. In June 1990, NHBS began distributing its mail order catalog to consumers located in respondent retailers' trade areas. During December 1990, in response to the distribution of the NHBS catalog in their trade areas, the respondents named above met in Braintree, Massachusetts, with counsel present. They discussed the NHBS catalog and the economic impact it was having on their

individual businesses. As a result of this discussion, they agreed to act in concert to restrict the competition they faced from the NHBS catalog. In furtherance of this plan, they agreed to form respondent NEJRA. They also agreed to send letters to certain manufacturers whose products were in the NHBS catalog to complain about the "unfair competition" the catalog posed to their individual businesses.

PAR. 19. Pursuant to the agreements arrived at during the above-referenced meeting, on December 27, 1990, respondents, through their attorney, sent letters to thirteen manufacturers of juvenile products. All but one of these manufacturers distributed their products through the NHBS catalog. The letters directly or impliedly threatened that respondent NEJRA and its individual members would refuse to deal with these manufacturers if they continued to do business with NHBS or with retail stores affiliated with NHBS.

PAR. 20. By engaging in the acts and practices described in paragraphs eighteen and nineteen, respondents have combined or conspired with each other to threaten to boycott juvenile product manufacturers that do business with the NHBS mail order catalog, and otherwise to restrain competition among retailers of juvenile products in the New England area.

PAR. 21. The actions of respondents described in paragraphs eighteen through twenty have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among members of respondent NEJRA;

B. By restraining competition between respondent NEJRA's members and other retailers of juvenile products, including the NHBS mail order catalog;

C. By restraining the ability of manufacturers of juvenile products to distribute their products through mail order catalogs; and

D. By depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of juvenile products.

PAR. 22. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such

combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondents of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Boston 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 and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent New England Juvenile Retailers Association ("NEJRA") is an unincorporated association of retailers of juvenile products doing business in New England, with an office and principal place of business located in Boston, Massachusetts.

2. Respondents Elliot Young ("E. Young") and Susan Young ("S. Young") have done business as and are proprietors of The Baby Place, Inc., a retail store engaged in the sale of juvenile products. Their principal offices or places of business are 50 Worcester Road, Natick, Massachusetts.

3.(a) Respondent Baby's Room, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office located at 20 Garden Street, Danvers, Massachusetts. Baby's Room, Inc. is engaged in the business of the retail sale of juvenile products.

(b) Respondent Stephen Brass ("Brass") is president of proposed respondent Baby's Room, Inc. His principal office is located at 20 Garden Street, Danvers, Massachusetts.

4.(a) Respondent Baby Specialties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Grove Street, Worcester, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Baby Specialties of Natick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1276 Worcester Road, Natick, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(c) Respondent George Koury ("Koury") is treasurer of proposed respondents Baby Specialties, Inc. and Baby Specialties of Natick, Inc. His principal office or place of business is 100 Grove Street, Worcester, Massachusetts.

5.(a) Respondent Boston Baby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 30 Tower Road, Newton, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Boston Baby of Avon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 15 Stockwell Drive, Avon, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(c) Respondent Boston Baby of Hingham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Derby Street, Hingham,

Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(d) Respondent Michael Slobodkin ("M. Slobodkin") is treasurer of proposed respondents Boston Baby, Inc., Boston Baby of Avon, Inc., and Boston Baby of Hingham, Inc. His principal office or place of business is located at 30 Tower Road, Newton, Massachusetts.

6.(a) Respondent Chapin Specialties Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1140 Main Street, Springfield, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Allan Broverman ("Broverman") is president of proposed respondent Chapin Specialties Co., Inc. His principal office or place of business is 1140 Main Street, Springfield, Massachusetts.

7.(a) Respondent Crib-N-Cradle Juvenile Furniture Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1000 Bald Hill Road, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Louis Avarista, Sr. ("Avarista") is president and treasurer of proposed respondent Crib-N-Cradle Juvenile Furniture Inc. His principal office or place of business is 1000 Bald Hill Road, Warwick, Rhode Island.

8.(a) Respondent Cribs And Cradles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Cribs And Cradles, Inc. maintained an office and principal place of business located at 623 Broadway, Route 1, Saugus, Massachusetts, where, until approximately January 1992, it was engaged in the business of the retail sale of juvenile products.

(b) Respondent Robert Newhouse ("Newhouse") is president and treasurer of proposed respondent Cribs And Cradles, Inc. Mr. Newhouse resides at 34 Garvey Road, Framingham, Massachusetts.

9.(a) Respondent Juveniles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Juveniles, Inc. maintained an office and principal place of business located at 8 Bourbon Street, W. Peabody,

Massachusetts, where, until approximately May 1, 1991, it was engaged in the business of the retail sale of juvenile products.

(b) Respondent Waltham Slumber Shop, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Waltham Slumber Shop, Inc. maintained an office and principal place of business located at 879 Main Street, Waltham, Massachusetts, where, until approximately May 1, 1992, it was engaged in the business of the retail sale of juvenile products.

(c) Respondent Timothy Precourt ("Precourt") is president of proposed respondents Juveniles, Inc. and Waltham Slumber Shop, Inc. Mr. Precourt resides at 998 Summer Street, Lynnfield, Massachusetts.

10. Respondent Normand Poirier is an individual trading and doing business as Norm's Discount. Mr. Poirier maintains an office and principal place of business located at 55 Airport Road, Fitchburg, Massachusetts, where he is engaged in the business of the retail sale of juvenile products.

11.(a) Respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 117 Chestnut Street, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Henry Ritchotte ("Ritchotte") is manager of the Warwick, Rhode Island, store of proposed respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow. His principal office or place of business is 117 Chestnut Street, Warwick, Rhode Island.

12.(a) Respondent Tiny Totland, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 1111 Elm Street, Manchester, New Hampshire, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Jack Resnick ("Resnick") is president of proposed respondent Tiny Totland, Inc. His principal office or place of business is 1111 Elm Street, Manchester, New Hampshire.

13. Respondent Rudolph Mosesso ("R. Mosesso") is an individual whose address is 132 Pine Street, Holbrook, Massachusetts. Mr. Mosesso was president of Welcome Baby

Boutique Inc., a corporation that was organized, existed and did business under and by virtue of the laws of the Commonwealth of Massachusetts until approximately April 27, 1993, when it was formally dissolved. While it was in operation, Welcome Baby Boutique Inc. maintained an office and principal place of business located at 1500 Main Street, S. Weymouth, Massachusetts, where it was engaged in the business of the retail sale of juvenile products.

14. 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

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

A. "*New England Juvenile Retailers Association*" means New England Juvenile Retailers Association, and its directors, committees, officers, representatives, agents, employees, successors and assigns.

B. "*Retailer respondents*" means the corporate and individual respondents named in paragraphs two through thirteen of the complaint.

C. "*Juvenile products*" means products or accessories to products that are used by or are intended for use by babies, children or juveniles.

I.

It is ordered, That each retailer respondent, directly or indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue any combination, agreement or understanding, express or implied, with any other retailer respondent(s), or with any competing retailer(s) of juvenile products, to:

A. Fix, maintain, or stabilize prices, or terms or conditions of sale of juvenile products;

B. Take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s); and

C. Coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, or attempt to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s).

Provided that this order shall not be construed to prohibit any individual retailer respondent from becoming or remaining a member of a *bona fide* trade association, buying cooperative, or joint venture, or from participating in any such organization's activities that are lawful under the antitrust laws.

II.

It is further ordered, That the retailer respondents shall dissolve the New England Juvenile Retailers Association within sixty (60) days after the date on which this order becomes final.

III.

It is further ordered, That respondent New England Juvenile Retailers Association shall:

A. Within thirty (30) days after the date on which this order becomes final, and prior to the dissolution provided for in paragraph II of this order, mail to each manufacturer enumerated in "Appendix A" to this order a copy of the Commission's complaint and order in this matter and a letter, on the letterhead of its attorney, Arthur Goldberg, Esq., and signed by each of the respondent retailers, in the form shown as "Appendix B" to this order; and

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

IV.

It is further ordered, That:

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

B. For a period of five (5) years after this order becomes final, each retailer respondent that is an individual shall notify the Commission in writing of each new affiliation with a business or employment, including self-employment, within seven (7) calendar days of such affiliation or employment. Each such notice shall include the individual retailer respondent's current business address and a statement of the nature of the business affiliation or employment which defines his/her duties and responsibilities in connection with such business affiliation or employment.

V.

It is further ordered, That, within ninety (90) days after the date on which this order becomes final, the retailer respondents shall file with the Commission a verified written report setting forth in detail the manner and form in which they have complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission or its staff may, by written notice to the retailer respondents, require.

Commissioner Azcuenaga dissenting.

APPENDIX A

Aprica U.S.A., Inc.
P.O. Box 25408 - Zip 92825-5408
1200 Howell Avenue
Anaheim, CA 92805
Attn: Douglas W. Dolansky, Executive Vice President

Bandaks Emmaljunga Incorporated
737 South Vinewood Street
Escondido, CA 92029
Attn: Sami Bandak, President

Bassett Furniture Industries, Inc.
P.O. Box 626
Bassett, VA 24055
Attn: R. H. Spilman, President

Carlson Children's Products, Inc.
122 Kirkland Circle
Oswego, IL 60543
Attn: Mark Flannery, President

Century Products Company
9600 Valley View Road
Macedonia, OH 44056-9989
Attn: Frank Rumpeltin, President

Child Craft Industries, Inc.
P.O. Box 444
Salem, IN 47167-0444
Attn: David E. Branaman, President

COMBI International Corporation
1401 N. Wood Dale Road
Wood Dale, IL 60191
Attn: Takashi Osato, President

Dutalier, Inc.
298 Chaput St. Pie
Quebec, CANADA J0H IW0
Attn: Pierre Cloutier, President

Graco Children's Products, Inc.
Rt 23, Main Street
Elverson, PA 19520
Attn: Derial Sanders, President

Lambs & Ivy
5978 Bowcroft Street
Los Angeles, CA 90016-4302
Attn: Barbara Laiken, President

Noel Joanna Inc.
22942 Arroyo Vista
Rancho Santa Margarita, CA 92688
Attn: Shirley A. Pepys, President

The Red Calliope & Associates, Inc.
13003 South Figueroa Street
Los Angeles, CA 90061
Attn: Neil Fohrman, President

Simmons Juvenile Products Co.
613 E. Beacon Avenue
P.O. Box 287
New London, WI 54961
Attn: John Moeller, President

APPENDIX B

Dear _____

As you may be aware, the Federal Trade Commission ("FTC") has been investigating certain activities of the New England Juvenile Retailers Association ("NEJRA") and its member retailers. The NEJRA has voluntarily entered into an agreement with the FTC which resulted in the issuance by the FTC on (date) of a complaint and the entry of a consent order. The order requires that you be sent a copy of the complaint, the order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that NEJRA will be dissolved. In addition, among other things, the retailers that were members of the NEJRA will cease and desist from entering into any agreement or understanding, express or implied, with any other retailer respondent(s), or with any competing retailer(s) of juvenile products, to:

A. Fix, maintain, or stabilize prices, or terms or conditions of sale of juvenile products;

B. Take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s); and

C. Coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, or attempt to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s).

A copy of the complaint and the order are enclosed.

Sincerely,

_____

Arthur Goldberg, Esq.
Attorney for the NEJRA

Signatures of Members
Enclosures

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

In these cases, two trade associations complained to manufacturers about free riding by a catalogue seller, and the Commission charges them and the retailer members of one association with directly or impliedly threatening a concerted refusal to deal with the manufacturers. Although the letters of complaint were ill-advised, evidence that the retailers (many of whom were not represented by counsel during our investigation) were committed "to a common scheme designed to achieve an unlawful objective"[1] (*i.e.*, a coercive, concerted refusal to deal) is thin at best. Given the dearth of evidence of unlawful agreement, the arguably procompetitive purpose, and the absence both of market power and of anticompetitive effects, I do not find reason to believe that the challenged conduct unreasonably restrained trade or that the imposition of an order is in the interest of the public. I dissent.

[1] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).

IN THE MATTER OF

BABY FURNITURE PLUS ASSOCIATION, INC.

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

Docket C-3553. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995

This consent order prohibits, among other things, an Alabama-based buying cooperative and trade association from taking any action on behalf of its members, or encouraging them to take any action, that interferes with a juvenile product manufacturer's decision as to how or to whom to distribute its products. The consent order also prohibits the respondent from coercing -- by means of actual or threatened refusals to deal -- any juvenile products manufacturer to abandon or adopt -- or to refrain from abandoning or adopting -- any marketing method for its products.

Appearances

For the Commission: *Phoebe D. Morse* and *Gary S. Cooper.*

For the respondent: *Jack Sanders*, *Sanders & McDermott*, Hampton, N.H.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Baby Furniture Plus Association, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 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, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Baby Furniture Plus Association, Inc. ("BFPAI") is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Suite 1, 1020 Montgomery Highway, Birmingham, Alabama.

Respondent is a voluntary association of retailers of juvenile products doing business in approximately twenty-five States.

PAR. 2. Respondent is a corporation organized for the purpose, among others, of serving the interests of its members by associating them into a practical business organization and is engaged in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Respondent's members are engaged in the business of the retail sale of juvenile products. Except to the extent that competition has been restrained herein, respondent's members have been and are now in competition with other retailers of juvenile products in various States of the United States.

PAR. 4. The acts and practices of the BFPAI, including those alleged herein, are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. New Hampshire Buyer's Service, Inc. ("NHBS") operates a mail order catalog through which it sells juvenile products at discount prices up to 20-40 % below juvenile specialty store prices.

PAR. 6. In June 1990, NHBS began distributing its mail order catalog to consumers located in the trade areas of some of respondent's members. At a general meeting of the membership on April 9, 1991, respondent's administrator circulated a copy of the NHBS catalog to respondent's members. Following a discussion of the NHBS catalog and the economic impact it was having on some of the members' individual businesses, the BFPAI's members agreed to act in concert to restrict the competition that some of the members faced from the NHBS catalog. In furtherance of this plan, the members agreed to send letters to certain manufacturers whose products were in the NHBS catalog to complain about NHBS's price discounting.

PAR. 7. Pursuant to the agreements arrived at during the above-referenced meeting, on April 22, 1991, respondent sent letters to thirty-seven manufacturers of juvenile products. All but two of these manufacturers distributed their products through the NHBS catalog. The letters directly or impliedly threatened that respondent BFPAI and its individual members would refuse to deal with these manufacturers if they continued to do business with NHBS.

PAR. 8. By engaging in the acts and practices described in paragraphs six and seven, respondent has combined or conspired with at least some of its members to threaten to boycott juvenile product manufacturers that do business with the NHBS mail order catalog, and otherwise to restrain competition among retailers of juvenile products in various States of the United States.

PAR. 9. The actions of respondent described in paragraphs six through eight have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition between respondent BFPAI's members and other retailers of juvenile products, including the NHBS mail order catalog;

B. By restraining the ability of manufacturers of juvenile products to distribute their products through mail order catalogs; and

C. By depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of juvenile products.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondent of appropriate relief.

Commissioner Azcuenaga dissenting.

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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, by its duly authorized officer, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Baby Furniture Plus Association, Inc. is a voluntary association of retailers of juvenile products, and is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Suite 1, 1020 Montgomery Highway, Birmingham, Alabama.

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

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

A. "*Baby Furniture Plus Association, Inc.*" means Baby Furniture Plus Association, Inc., and its directors, committees, officers, representatives, agents, employees, successors and assigns.

B. "*Juvenile products*" means products or accessories to products that are used by or are intended for use by babies, children or juveniles.

I.

It is ordered, That BFPAI, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith cease and desist from:

A. Taking any action, directly or indirectly, on behalf of its members, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s);

B. Coercing, compelling, inducing, or intimidating by means of actual or threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s); and

C. Requesting, urging, recommending or suggesting that BFPAI members take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s).

Provided that this order shall not be construed to prevent BFPAI from engaging in trade association or buying cooperative activities that are lawful under the antitrust laws.

II.

It is further ordered, That BFPAI shall:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of BFPAI's members within thirty (30) days after the date on which this order becomes final;

B. For a period of five (5) years after the date on which this order becomes final, provide each new BFPAI member with a copy of this

order and the accompanying complaint at the time the member is accepted for membership; and

C. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail to each manufacturer enumerated in "Appendix A" to this order a copy of the Commission's complaint and order in this matter and a letter, on BFPAI letterhead and signed by BFPAI's president, in the form shown as "Appendix B" to this order.

III.

It is further ordered, That, for a period of five (5) years after this order becomes final, BFPAI shall maintain in its files a copy of the minutes of each meeting of its membership and of each meeting of its board of directors and a copy of all correspondence received from, or sent to, any mail order dealer of juvenile products, any manufacturer of juvenile products, or any association representing manufacturers of juvenile products and that such copies of minutes and correspondence be made available to Commission staff for inspection and copying upon reasonable notice.

IV.

It is further ordered, That, within sixty (60) days after the date on which this order becomes final, BFPAI shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission or its staff may, by written notice to BFPAI, require.

V.

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

Commissioner Azcuenaga dissenting.

APPENDIX A

A.D.I. Lamps
P.O. Box 6357
Phoenix, AZ 85005
Attn: National Sales Manager

Aprica U.S.A., Inc.
P.O. Box 25408 - Zip 92825-5408
1200 Howell Avenue
Anaheim, CA 92805
Attn: National Sales Manager

Baby Trend, Inc.
1928 W. Holt Avenue
Pomona, CA 91768
Attn: National Sales Manager

Bandaks Emmaljunga Incorporated
737 South Vinewood Street
Escondido, CA 92029
Attn: National Sales Manager

Bassett Furniture Industries, Inc.
P.O. Box 626
Bassett, VA 24055
Attn: National Sales Manager

Carlson Children's Products, Inc.
122 Kirkland Circle
Oswego, IL 60543
Attn: National Sales Manager

Century Products Company
9600 Valley View Road
Macedonia, OH 44056-9989
Attn: National Sales Manager

Chicco Artsana of America
200 Fifth Ave., Rm 910
New York, NY 10010
Attn: National Sales Manager

Child Craft Industries, Inc.
P.O. Box 444
Salem, IN 47167-0444
Attn: National Sales Manager

Children on the Go
1670 S. Wolf Road
Wheeling, IL 60090
Attn: National Sales Manager

Cosco, Inc.
2525 State St.
Columbus, IN 47201
Attn: National Sales Manager

Dutalier, Inc.
298 Chaput St. Pie
Quebec, Canada JOH 1WO
Attn: National Sales Manager

Evenflo Juvenile Furniture Co.
1801 Commerce Drive
Piqua, OH 45356
Attn: National Sales Manager

FBS, Inc.
1071 Batesville Rd.
Greer, SC 29650
Attn: National Sales Manager

Fisher-Price, Inc.
636 Girard Ave.
East Aurora, NY 14052
Attn: National Sales Manager

Gerry Baby Products
12520 Grant Drive
Denver, CO 80233
Attn: National Sales Manager

Glenna Jean Mfg.
P.O. Box 2187
Petersburg, VA 23804
Attn: National Sales Manager

Graco Children's Products, Inc.
Rt 23, Main St.
Elverson, PA 19520
Attn: National Sales Manager

Jolly Jumper
P.O. Box M
Woonsocket, RI 22895
Attn: National Sales Manager

Lambs & Ivy
5978 Bowcroft St.
Los Angeles, CA 90016
Attn: National Sales Manager

The Little Tikes Co.
2180 Barlow Rd.
Hudson, OH 44236
Attn: National Sales Manager

Newborne Company
River Rd.
Worthington, MA 01098
Attn: National Sales Manager

Noel Joanna Inc.
22942 Arroyo Vista
Rancho Santa Margarita, CA 92688
Attn: National Sales Manager

Nu-Line
214 Nu-Line St.
Suring, WI 54174
Attn: National Sales Manager

Omron Marshall Products
600 Barclay Blvd.
Lincolnshire, IL 60069
Attn: National Sales Manager

Pansy Ellen Products
1245 Old Alpharetta Rd.
Alpharetta, GA 30202
Attn: National Sales Manager

Perego, USA
3625 Independence Drive
Fort Wayne, IN 46808
Attn: National Sales Manager

Prince Lionheart
3070 Skyway Dr., Bldg. 502
Santa Maria, CA 93455
Attn: National Sales Manager

The Red Calliope & Associates, Inc.
13003 S. Figueroa St.
Los Angeles, CA 90061
Attn: National Sales Manager

Rochelle Furniture
722 North Market St.
Duncannon, PA 17020
Attn: National Sales Manager

Safety 1st, Inc.
210 Boylston St.
Chestnut Hill, MA 02167
Attn: National Sales Manager

Sandbox Industries
P.O. Box 477
Tenafly, NJ 07670
Attn: National Sales Manager

Sassy, Inc.
1534 College SE
Grand Rapids, MI 49507
Attn: National Sales Manager

Simmons Juvenile Products Co.
613 E. Beacon Avenue
New London, WI 54961
Attn: National Sales Manager

Snugli, Inc.
12520 Grant Drive
Denver, CO 80233
Attn: National Sales Manager

Summer Infant Products
33 Meeting Street
Cumberland, RI 02864
Attn: National Sales Manager

Welsh Company
1535 S. Eighth St.
St. Louis, MO 63104
Attn: National Sales Manager

APPENDIX B

Dear _____

As you may be aware, the Federal Trade Commission ("FTC") has been investigating certain activities of the Baby Furniture Plus Association, Inc. ("BFPAI"). The BFPAI has voluntarily entered into an agreement with the FTC which resulted in the issuance by the FTC on (date) of a complaint and the entry of a consent order. The order requires that you be sent a copy of the complaint, the order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that, among other things, the BFPAI will cease and desist from:

A. Taking any action, directly or indirectly, on behalf of its members, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s);

B. Coercing, compelling, inducing, or intimidating by means of actual or threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s); and

C. Requesting, urging, recommending or suggesting that BFPAI members take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s).

A copy of the complaint and the order are enclosed.

Sincerely,

_____

President

Enclosures

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

In these cases, two trade associations complained to manufacturers about free riding by a catalogue seller, and the Commission charges them and the retailer members of one association with directly or impliedly threatening a concerted refusal to deal with the manufacturers. Although the letters of complaint were ill-advised, evidence that the retailers (many of whom were not represented by counsel during our investigation) were committed "to a common scheme designed to achieve an unlawful objective"[1] (*i.e.*, a coercive, concerted refusal to deal) is thin at best. Given the dearth of evidence of unlawful agreement, the arguably procompetitive purpose, and the absence both of market power and of anticompetitive effects, I do not find reason to believe that the challenged conduct unreasonably restrained trade or that the imposition of an order is in the interest of the public. I dissent.

[1] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).

IN THE MATTER OF

MEDICAL STAFF OF GOOD SAMARITAN REGIONAL MEDICAL CENTER

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

Docket C-3554. Complaint, Feb. 1, 1995--Decision, Feb. 1, 1995

This consent order prohibits, among other things, the members of the medical staff from agreeing, or attempting to enter into an agreement, to prevent or restrict the services offered by Good Samaritan, the clinic, or any other health care provider by refusing to deal with others offering health care services, or by withholding patient referrals.

Appearances

For the Commission: *Mark J. Horoschak, Garry H. Gibbs, Steven J. Osnowitz* and *Gary H. Schorr.*

For the respondent: *Robert J. Milligan, Gallagher & Kennedy*, Phoenix, AZ.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Medical Staff of Good Samaritan Regional Medical Center has violated and is violating Section 5 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, hereby issues this complaint, stating its charges as follows:

THE SAMARITAN ORGANIZATION AND RESPONDENT MEDICAL STAFF

PARAGRAPH 1. Samaritan Health Systems ("SHS"), formerly operated as two separate corporations (Samaritan Foundation and its subsidiary Samaritan Health Services), is a nonprofit corporation organized and existing under the laws of the State of Arizona. SHS operates nine full service medical and surgical hospitals in the United States, including four hospitals in Maricopa County, Arizona. Good

Samaritan Regional Medical Center ("Good Samaritan" or "the Hospital"), one of the hospitals operated by SHS, is a 571-bed tertiary, teaching hospital. Good Samaritan is the largest hospital in Arizona. The principal physical facilities of Good Samaritan are located at 1111 E. McDowell Road, Phoenix, Arizona.

PAR. 2. Respondent Medical Staff of Good Samaritan Regional Medical Center ("respondent Medical Staff" or "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Arizona, with its mailing address at 1111 E. McDowell Road, Phoenix, Arizona. The Medical Staff is composed of over 500 physicians and other practitioners who have privileges to attend patients at Good Samaritan.

PAR. 3. The overwhelming majority of physicians in Maricopa County and on the Medical Staff practice medicine in individual or small group practices on a fee-for-service basis. Under this traditional form of practice, when a patient's illness is beyond the capability or outside the medical specialty of an individual physician, the physician refers the patient to another independent physician. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and with other health care practitioners in Maricopa County.

PAR. 4. The Medical Staff is engaged in substantial activities for the economic benefit of its members. By virtue of its purposes and activities, the Medical Staff is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. The acts and practices of the Medical Staff, 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.

THE FORMATION OF THE SAMARITAN PHYSICIANS CENTER

PAR. 6. In early 1986, SHS began investigating the concept of developing a physician-hospital clinic joint venture. The idea for the joint venture was prompted by the anticipated opening of the Mayo Clinic in nearby Scottsdale, which was expected to offer significant competition for SHS hospitals in Maricopa County. While SHS was

still studying the idea, several members of Good Samaritan's medical staff independently approached the Hospital with the idea of opening a hospital-affiliated physician group practice. After a feasibility study showed that the group practice could be expected to significantly increase patient admissions to Good Samaritan, the Hospital and the physicians who approached the Hospital concerning the group practice agreed to implement their plans.

PAR. 7. In March 1987, Good Samaritan announced its plans to open the Samaritan Physicians Center ("SPC" or "the Clinic"), a multispecialty clinic in the Phoenix area. As originally planned, the Clinic was to have 39 physicians within five years and was to be a patient-oriented practice, benefitting patients by providing one-stop shopping for various medical specialties, extended hours, preventive care, house calls, and a single set of records and billing for each patient. Representatives of Good Samaritan and the SPC physicians believed that the Clinic had the potential for holding down medical costs.

THE CONSPIRACY TO RESTRICT COMPETITION

PAR. 8. Respondent Medical Staff, acting as a combination of its members and in conspiracy with at least some of its members and others, joined in a common plan to coerce, intimidate, and threaten to boycott Good Samaritan in order to induce termination of the Hospital's involvement with SPC. At various times during, and in furtherance of, the combination and conspiracy, respondent Medical Staff:

A. Agreed to boycott and threatened to boycott Good Samaritan by representing to Good Samaritan that doctors would jointly withhold patient admissions from Good Samaritan if Good Samaritan continued its relationship with SPC; and

B. Solicited physicians on the Medical Staff to threaten to withhold patient admissions from Good Samaritan if Good Samaritan continued its relationship with SPC.

CONDUCT FURTHERING THE CONSPIRACY

PAR. 9. Beginning in March 1987, Good Samaritan administrators and the SPC physicians presented their plans for the

new multispecialty clinic to various medical departments at the Hospital. Physicians at the March 10, 1987, Obstetrical/Gynecology Department meeting passed a motion "to inform [the] administration that this department condemns the development of a multispecialty care clinic on the [Good Samaritan] campus to capture patients." Physicians at this meeting commented that direct action by physicians would be beneficial in making known to the administration their feelings about the SPC, and there was general discussion regarding a physician boycott of the hospital.

PAR. 10. In December 1987, the Executive Committee of Samaritan Health Services approved Good Samaritan's request to broaden the size and scope of practice at the proposed SPC. The revised plan provided for SPC to eventually be located at two different sites having a total of 84 to 100 physicians.

PAR. 11. SPC began operations in a limited capacity in February 1988 with approximately four physicians. By July 1988, SPC had nineteen physicians on staff, and was continuing to expand.

PAR. 12. Physicians at a Medicine Department meeting on July 21, 1988, passed a motion to create a subcommittee "to discuss the economic impacts [of SPC] on [physicians'] offices in the vicinity of [Good Samaritan]." According to one physician who attended the meeting, "everyone [at the meeting] was wondering how this [the Clinic] would affect them economically."

PAR. 13. At a special meeting of the Medical Staff to discuss SPC on November 14, 1988, physicians complained that they had not approved the Clinic and that the venture would compete with members of the Medical Staff, and threatened to withhold patient admissions to Good Samaritan if the Hospital continued its relationship with SPC. Physicians asked "why should [they] continue to support a hospital that is putting up a clinic to compete with them?" Physicians stated that they had choices as to where to admit their patients and if the Hospital continued to give support to the Clinic they would take their patients elsewhere. Physician opposition to the Clinic at this meeting resulted in the Medical Staff passing a motion to advise the Boards of Samaritan Foundation and its subsidiaries that "these plans [to open a clinic] were instituted without the approval of any Medical Staff member or committee." After learning about the motion, Samaritan administrators, fearing a Medical Staff boycott of Good Samaritan, immediately put further

development of the SPC project on hold and froze physician staffing levels and Samaritan's financial support for further planned development.

PAR. 14. At the July 24, 1989, meeting of the Good Samaritan Medical Staff Executive Committee, members of the Medical Staff continued to express anger and hostility over the Clinic. Physicians stated that there is a continuing schism between the Medical Staff and the Hospital over the Clinic. Physicians stated that members of the Medical Staff wanted to know if Good Samaritan had reduced its financial commitment to the Clinic, so that they could make a decision on whether to continue their practices at Good Samaritan. A Medical Staff Advisory Committee, made up of physicians and hospital administrators, was created to provide the Hospital with physician input regarding the Clinic and other physician sensitive issues.

PAR. 15. On August 24, 1989, the Medical Staff Advisory Committee met to discuss the Clinic. Hospital representatives at this meeting agreed to downsize the Clinic by reducing the number of physicians at the Clinic from 100 to 50 and by reducing the Hospital's financial commitment to the project. Physicians at the meeting stated that there was still great unrest in the Medical Staff, and that this unrest would become apparent at the September 13th Quarterly Medical Staff Meeting.

PAR. 16. At the September 13, 1989, Quarterly Medical Staff Meeting, due to concerns about SPC, an Ad Hoc Committee was formed to conduct a vote of no-confidence in the Corporate Administration and the Governing Board of Samaritan Foundation. The results of the vote were findings of no-confidence in the Corporate Administration and the Governing Board of the Samaritan Foundation. Because of the two no-confidence votes by the Medical Staff, the President/Chief Executive Officer of the Samaritan Foundation resigned.

PAR. 17. As a result of the combination, conspiracy, acts and practices herein described, Good Samaritan halted further development of SPC from November 1988 through July 1, 1991, and then severed its relationship with SPC.

EFFECTS

PAR. 18. The purpose, effects, tendency, or capacity of respondent Medical Staff's conduct described in paragraphs eight through sixteen are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in Maricopa County in the following ways, among others:

A. Depriving consumers of the price and quality benefits of competition between the SPC integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that Good Samaritan sought to offer consumers in Maricopa County;

C. Hindering SPC's ability to offer health care services to consumers by raising its costs, reducing its efficiency, and delaying or preventing SPC from offering specialty and sub-specialty services;

D. Limiting competition among physicians in Maricopa County to the extent that physicians agreed not to compete with each other, but rather act only on collectively determined terms, in deciding whether to admit patients to Good Samaritan, to refer patients to SPC physicians, or otherwise to deal with Good Samaritan; and

E. Raising impediments to entry into the physician services market by innovative or nontraditional providers of health care services.

VIOLATION

PAR. 19. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Competition Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

Commissioner Starek dissenting.

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Medical Staff of Good Samaritan Regional Medical Center is an unincorporated association, organized and existing under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 1111 E. McDowell Road, Phoenix, Arizona.

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

A. "*Medical Staff*" means the Medical Staff of Good Samaritan Regional Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. "*Good Samaritan*" means Samaritan Health Systems, formerly operated as two separate corporations (Samaritan Foundation and its subsidiary Samaritan Health Services), doing business as Good Samaritan Regional Medical Center, a non-profit corporation with its principal offices located at 1111 E. McDowell Road, Phoenix, Arizona, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. "*SPC*" means Samaritan Physicians Center, Inc., an Arizona Corporation, its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

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

II.

It is ordered, That respondent Medical Staff, directly or indirectly, or through any device, shall cease and desist from entering into, maintaining, or continuing, or attempting to enter into, maintain, or continue, any agreement or understanding, either express or implied, between or among its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by Good

Samaritan, SPC or any other provider of health care services, including any agreement to:

A. Refuse to deal, threaten to refuse to deal, or attempt to induce others to refuse to deal or threaten to refuse to deal; and

B. Withhold patient referrals, threaten to withhold patient referrals, or attempt to induce others to withhold patient referrals or threaten to withhold patient referrals.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the Medical Staff or its members from offering to participate or participating with other physicians, pursuant to the Medical Staff's bylaws, in *bona fide* utilization review, quality assurance, or credentialling activities in connection with the provision of physician services.

B. *It is further ordered*, That this order shall not be construed to prohibit any individual member of the Medical Staff from entering into an agreement or combination with any other physician or health care practitioner with whom the individual Medical Staff member practices in partnership or in a professional corporation, or who is employed by the same person as said Medical Staff member.

C. *It is further ordered*, That this order shall not be construed to prohibit respondent Medical Staff from forming, facilitating the formation of, or participating in, an "integrated joint venture" that limits the number of participating physicians, as long as the physicians participating in the joint venture remain free to deal with other persons or entities other than through the joint venture.

IV.

It is further ordered, That the Medical Staff shall:

A. Within thirty (30) days after the date this order becomes final, mail a copy of this order and the accompanying complaint to each member of the Medical Staff as of the date this order becomes final, and for a period of three (3) years after the date this order becomes final, distribute to each new member of the Medical Staff a copy of

this order and the accompanying complaint within thirty (30) days after he or she is officially admitted to the Medical Staff.

B. For a period of three (3) years after the date this order becomes final, maintain records adequate to describe in detail any action taken in connection with the activities covered by this order and, upon reasonable notice, make such records available to the Federal Trade Commission staff for inspection and copying.

C. Within sixty (60) days after the date this order becomes final, annually for three (3) years on the anniversary of the date this order becomes final, and at such other times as the Federal Trade Commission may by written notice require, file with the Federal Trade Commission a report setting forth in detail the manner and form in which it has compiled and is complying with this order.

D. 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 or association, or any other change in the association which may affect compliance obligations arising out of this order.

Commissioner Starek dissenting.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I do not agree with the Commission's decision to issue the final order in this matter because I continue to find the evidence insufficient to support reason to believe that the respondent violated the law.

As I noted in my earlier dissenting statement, the centerpiece of this case is a resolution adopted by the medical staff of Good Samaritan Regional Medical Center concerning plans under consideration by the Medical Center to develop a multispecialty medical clinic that would compete with staff members' private practices. That resolution -- approved on November 14, 1988, following certain medical staff members' complaints about plans for the clinic -- declared that those plans "were instituted without the approval of any [m]edical [s]taff member or committee." In the wake of the resolution, the Medical Center decided to "freeze" the development and planned expansion of the clinic, and eventually the Medical Center severed its financial and other ties to the clinic.

Neither the language of the medical staff resolution nor the other information unearthed in this investigation has established the validity of the core allegation here -- that in order to end the Medical Center's involvement with the clinic, medical staff members combined to threaten a boycott of the Medical Center (which they would effect by referring patients to other area hospitals). Although individual physicians on the medical staff made clear the Medical Center's administration their displeasure with the Medical Center's role in support of the clinic, the November 14, 1988 resolution and the other evidence in this case are insufficient to show an agreement to threaten a boycott.

Nothing that has come to the Commission's attention during the public comment period disturbs my view that this case rests almost exclusively -- and precariously -- on the purported boycott victims' characterization of the medical staff's collective state of mind. Because of the ambiguities and weaknesses that have plagued the evidence in the present case, I respectfully dissent from the Commission's decision to issue the final order.

IN THE MATTER OF

OERLIKON-BUHRLE HOLDING AG

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-3555. Complaint, Feb. 1, 1995--Decision, Feb. 1, 1995

This consent order permits, among other things, a Switzerland-based corporation to acquire Leybold AG, a German firm, but requires the respondent to divest both the Leybold compact disc metallizer business and the Balzers-Pfeiffer turbomolecular pump business, within 12 months, to Commission approved entities. If the divestitures are not completed within 12 months, the Commission is permitted to appoint trustees to complete them. In addition, the respondent is required, for ten years, to obtain Commission approval before acquiring any interest in any entity engaged in either of the two markets at issue.

Appearances

For the Commission: *Ann B. Malester, Michael R. Moiseyev* and *Mary Lou Steptoe.*

For the respondent: *Tim Fieghery, Kaye, Scholer, Fierman, Hays & Handler*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Oerlikon-Buhrle Holding AG ("Oerlikon-Buhrle"), a Swiss corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the voting stock of Leybold AG ("Leybold"), a wholly-owned subsidiary of Degussa Aktiengesellschaft, ("Degussa"), a German corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 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 Oerlikon-Buhrle is a corporation organized and existing under the laws of Switzerland, with its principal place of business located at Hofwiesenstrasse 135, CH - 8021, Zurich, Switzerland.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. Leybold, a wholly-owned subsidiary of Degussa, is a corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business located at Wilhelm-Rohn-Strasse 25, D-6450 Hanau 1, Federal Republic of Germany.

4. Leybold is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. Oerlikon-Buhrle proposes to acquire 99.5 percent of the voting stock of Leybold for consideration of DM 99,500,000 ("Acquisition").

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, one relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture, distribution and sale of turbomolecular pumps.

7. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the turbomolecular pump market is the United States.

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

9. Entry into the turbomolecular pump market would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen because of the difficulty of developing competitive turbomolecular pump designs, establishing manufacturing facilities, organizing a sales and service network, and gaining customer acceptance in the marketplace.

10. Oerlikon-Buhrle and Leybold are actual competitors in the relevant market.

11. For purposes of this complaint, another relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture, distribution, and sale of compact disc metallizers.

12. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the compact disc metallizer market is the world.

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

14. Entry into the compact disc metallizer market would not be timely, likely and sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen because of the difficulty of developing competitive compact disc metallizer designs, establishing a sales and service presence, and gaining customer acceptance in the marketplace.

15. Oerlikon-Buhrle and Leybold are actual competitors in the relevant market.

V. EFFECTS OF THE ACQUISITION

16. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in each relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Oerlikon-Buhrle and Leybold;

b. By increasing the likelihood that Oerlikon-Buhrle would unilaterally exercise market power;

c. By increasing the likelihood of collusion or coordinated interaction in the relevant markets;

d. By increasing the likelihood that consumers would be forced to pay higher prices for turbomolecular pumps and compact disc metallizers;

e. By increasing the likelihood that technological innovation would be reduced.

VI. VIOLATIONS CHARGED

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of Degussa Aktiengesellschaft ("Degussa"), 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 Oerlikon-Buhrle AG ("Oerlikon-Buhrle") is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Hofwiesenstrasse 135, CH - 8021 Zurich, Switzerland.

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. "*Oerlikon-Buhrle*" means Oerlikon-Buhrle Holding AG, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Oerlikon-Buhrle; their directors, officers, employees, agents (including, but not limited to, SKA), and representatives; and their successors and assigns.

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

C. "*SKA*" means Schweizerische Kreditanstalt, a banking corporation organized, existing and doing business under, and by virtue of the laws of Switzerland. Pursuant to the Trust Agreement dated October 6, 1994, SKA will hold all of the outstanding shares of Balzers-Pfeiffer GmbH in trust and for the account and risk of Oerlikon-Buhrle as of the time Leybold is acquired by Oerlikon-Buhrle, and will be an agent of Oerlikon-Buhrle.

D. "*Balzers-Pfeiffer*" means Balzers-Pfeiffer GmbH, a German corporation, its predecessors, subsidiaries, divisions, and groups and

affiliates controlled by Balzers-Pfeiffer; their directors, officers, employees, agents, and representatives; and their successors and assigns.

E. "*Respondent*" means Oerlikon-Buhrle.

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

G. "*Acquisition*" means Oerlikon-Buhrle's acquisition of voting securities of Leybold pursuant to the Purchase Agreement dated January 21, 1994.

H. "*Assets and Businesses*" means all assets, properties, business and goodwill, tangible and intangible, including, without limitation, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, copyrights, trademarks, trade names, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. Inventory and storage capacity;

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

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

6. All books, records, and files; and

7. All items of prepaid expense.

I. "*Trust Agreement*" means the trust agreement dated October 6, 1994, between Oerlikon-Buhrle and SKA, attached hereto as Attachment 1, pursuant to which SKA will hold all of the outstanding shares of Balzers-Pfeiffer GmbH in trust and for the account and risk of Oerlikon-Buhrle, as of the time Leybold is acquired by Oerlikon-Buhrle, and will be an agent of Oerlikon-Buhrle.

J. "*Leybold Compact Disc Metallizer Business*" means all of Leybold's rights, title and interest in and to:

1. Compact disc metallizers, including, but not limited to, Singulus, and all patents, trademarks, intellectual property, production technology and know-how related to the manufacture, distribution and sale of compact disc metallizers; and

2. All of Leybold's Assets and Businesses as further delineated in Schedule A, attached hereto and made a part hereof.

K. "*Leybold Thin Film Coating Systems Business*" means all of Leybold's rights, title and interest, as of the date this agreement is accepted by the Commission, in all Assets and Businesses relating to the development, manufacture, distribution, marketing or sale of vacuum systems and equipment for the deposition of thin films, including without limitation, vacuum web coating systems, architectural glass coaters, compact disc metallizers, compact disc replication lines, compact disc mastering equipment, precision optics coating systems, ophthalmic lens coating systems, decorative hard coating systems, silicon crystal growing systems, and vacuum coating systems for research and development. Such Assets and Businesses shall include all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits. The Leybold Thin Film Coating Systems Business excludes magnetic and magneto-optical disc coating systems, systems for the manufacture of thin film heads for magnetic drives, vacuum systems for the coating of plastic parts, and vacuum systems for the coating of automotive parts.

L. "*Balzers-Pfeiffer Assets*" means all of the Assets and Businesses of Balzers-Pfeiffer and all of the other Oerlikon-Buhrle Assets and Businesses relating to the development, manufacture, distribution, marketing, or sale of turbomolecular pumps, as delineated in Schedule B, attached hereto and made a part hereof.

M. "*Ophthalmic Coating Business*" means all of Oerlikon-Buhrle's rights, title and interest in all Assets and Businesses relating to the development, manufacture, distribution, marketing, or sale of equipment used in the application of coatings to ophthalmic lenses, including all interests in such Assets and Businesses as acquired from Leybold.

N. "*Compact Disc Metallizers*" means vacuum systems for the deposition of reflective coatings on audio compact discs and CD-ROMs.

O. "*Turbomolecular Pumps*" means vacuum pumps employing turbomolecular processes to generate high vacuum environments.

II.

It is further ordered, That:

A. Oerlikon-Buhrle shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Leybold Compact Disc Metallizer Business, and shall also divest such additional ancillary Assets and Businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Leybold Compact Disc Metallizer Business; provided that Oerlikon-Buhrle is not required to divest any of the assets identified in Part 2 of Schedule A unless such assets are required by the acquirer.

B. Oerlikon-Buhrle shall divest the Leybold Compact Disc Metallizer Business 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 is to ensure the continuation of the Leybold Compact Disc Metallizer Business as an ongoing, viable operation, engaged in the same business in which the Leybold Compact Disc Metallizer Business is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Upon reasonable notice from the acquirer to Oerlikon-Buhrle, for a period of six months following the date of divestiture, Oerlikon-Buhrle shall provide such personnel, information, technical assistance, advice and training to the acquirer as is necessary to transfer the Leybold Compact Disc Metallizer Business pursuant to paragraph II. A. and establish such business as a viable, ongoing concern. Such assistance shall include reasonable consultation with knowledgeable employees of Oerlikon-Buhrle to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture of compact disc metallizers to the extent Oerlikon-Buhrle has the ability to do so after the divestiture is complete. Oerlikon-Buhrle shall not charge the acquirer a rate more than its own direct costs for providing such technical assistance.

D. Pending divestiture of the Leybold Compact Disc Metallizer Business, Oerlikon-Buhrle shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Leybold Compact Disc Metallizer Business and to prevent the destruction, removal, wasting, deterioration or impairment of the Leybold Compact Disc Metallizer Business except for ordinary wear and tear.

E. At the time of the execution of a purchase agreement between Oerlikon-Buhrle and a proposed acquirer of the Leybold Compact Disc Metallizer Business, Oerlikon-Buhrle shall provide the acquirer with a complete list of all non-clerical, salaried employees of the Leybold Compact Disc Metallizer Business, who have been involved in the development, production, distribution, or sale of Leybold compact disc metallizers at any time during the period from September 1, 1992, until the date of the purchase agreement. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with any compact disc metallizer product developed, produced, or distributed by Leybold.

F. Oerlikon-Buhrle shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II. E. of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, Oerlikon-Buhrle shall further provide the Commission-approved acquirer with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Oerlikon-Buhrle shall provide the individuals identified in paragraph II. E. of this order with ample financial incentives to continue in their employment positions during the period covered by the Leybold Hold Separate Agreement, hereto attached, and to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Leybold until the date of the divestiture; and

2. A bonus equal to 25 percent of an employee's annual salary (including any other bonuses) as of the date this order becomes final for any individual who agrees to employment with the Commission-

approved acquirer, payable upon the beginning of their employment by the Commission-approved acquirer.

H. For a period of one (1) year commencing on the date of the individual's employment by the Commission-approved acquirer, Oerlikon-Buhrle shall not re-hire any of the individuals identified in paragraph II.E. of this order who accept employment with the Commission-approved acquirer.

III.

It is further ordered, That:

A. Respondent Oerlikon-Buhrle shall divest, and shall direct SKA to take all steps necessary to divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Balzers-Pfeiffer Assets, and Oerlikon-Buhrle shall also divest such additional ancillary Assets and Businesses and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of Balzers-Pfeiffer; provided that Oerlikon-Buhrle is not required to divest any of the assets identified in Part 2 of Schedule B, unless such assets are required by the acquirer.

B. Oerlikon-Buhrle shall divest, and shall direct SKA to take all steps necessary to divest, the Balzers-Pfeiffer Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Balzers-Pfeiffer Assets is to ensure the continuation of Balzers-Pfeiffer as an ongoing, viable operation, engaged in the same business in which it is engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Provided, however, that nothing in this order shall prevent Oerlikon-Buhrle from transferring the stock and share capital of Balzers-Pfeiffer to SKA at the time Oerlikon-Buhrle acquires Leybold pursuant to the Trust Agreement. However, such transfer shall not fulfill Oerlikon-Buhrle's obligation under this order to divest the Balzers-Pfeiffer Assets.

C. Pending divestiture of the Balzers-Pfeiffer Assets, Oerlikon-Buhrle shall take such actions, and shall direct SKA to take such actions, as are necessary to maintain the viability and marketability of Balzers-Pfeiffer and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Balzers-Pfeiffer Assets except for ordinary wear and tear.

D. Oerlikon-Buhrle shall take all steps necessary to ensure that SKA complies with the Trust Agreement, including, without limitation, pursuing any legal action it may have against SKA for monetary and equitable damages arising from any breach of the Trust Agreement by SKA. Oerlikon-Buhrle shall not agree to any alteration, reformation, amendment or other change to the Trust Agreement without the prior approval of the Commission. In addition to the requirements of this paragraph III, Oerlikon-Buhrle shall direct SKA to take all steps necessary to accomplish the requirements of this order pertaining to the Balzers-Pfeiffer Assets.

IV.

It is further ordered, That:

A. If Oerlikon-Buhrle has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Leybold Compact Disc Metallizer Business within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Leybold Thin Film Coating Systems Business.

B. If Oerlikon-Buhrle and SKA have not divested, absolutely and in good faith, and with the prior approval of the Commission, the Balzers-Pfeiffer Assets within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Balzers-Pfeiffer Assets.

C. 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, Oerlikon-Buhrle and in the case of the Balzers-Pfeiffer Assets, SKA, at the direction of Oerlikon-Buhrle, 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 IV 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 Oerlikon-Buhrle to comply with this order.

D. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A. or paragraph IV.B., Oerlikon-Buhrle 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 Oerlikon-Buhrle and in the case of the Balzers-Pfeiffer Assets, SKA, at the direction of Oerlikon-Buhrle, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Oerlikon-Buhrle or in the case of the Balzers-Pfeiffer Assets, SKA, at the direction of Oerlikon-Buhrle, 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 Oerlikon-Buhrle of the identity of any proposed trustee, Oerlikon-Buhrle 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 Leybold Thin Film Coating Systems Business and/or the Balzers-Pfeiffer Assets.

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

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Leybold Thin Film Coating Systems Business and/or the Balzers-Pfeiffer Assets, or to any other relevant information, as the trustee may request. Oerlikon-Buhrle shall develop, and in the case of the Balzers-Pfeiffer Assets, Oerlikon-Buhrle shall direct SKA to develop, such financial or other information as such trustee may request and shall cooperate with the trustee. Oerlikon-Buhrle shall take no action, and Oerlikon-Buhrle shall direct SKA to take no action, to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Oerlikon-Buhrle or SKA 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 Oerlikon-Buhrle's absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to the acquirer(s) as set out in paragraphs II and III of this order, as appropriate; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Oerlikon-Buhrle from among those approved by the Commission. If requested by the trustee or acquirer, Oerlikon-Buhrle shall provide the acquirer with the assistance required by paragraph II.C. of this order.

7. The trustee shall serve, without bond or other security, at the cost and expense of Oerlikon-Buhrle, 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 Oerlikon-Buhrle, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture(s) 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 Oerlikon-Buhrle, 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 Leybold Thin Film Coating Systems Business and/or the Balzers-Pfeiffer Assets.

8. Oerlikon-Buhrle 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 IV 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(s) required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Leybold Thin Film Coating Systems Business or the Balzers-Pfeiffer Assets.

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

V.

It is further ordered, That, until the earlier of ten (10) years from the date this order becomes final or until Oerlikon-Buhrle has sold all of the Assets and Businesses of either Balzers' ophthalmic lens coating business or Leybold's ophthalmic lens coating business, Oerlikon-Buhrle shall not transfer any interest in the stock, share capital, or assets of the Ophthalmic Coating Business to any third party, other than to a subsidiary of Oerlikon-Buhrle, without providing advance written notification to the Federal Trade Commission. Said notification 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 "the

Notification"). Oerlikon-Buhrle shall provide to the Federal Trade Commission, at least thirty days prior to transferring any interest in the stock, share capital, or assets of the Ophthalmic Coating Business, both the Notification and supplemental information either in Oerlikon-Buhrle's possession or reasonably available to Oerlikon-Buhrle. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of Oerlikon-Buhrle and of the firm who proposes to acquire the stock, share capital, or assets of the Ophthalmic Coating Business who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed transaction. If, within the thirty-day period, representatives of the Federal Trade Commission make a written request for additional information, Oerlikon-Buhrle shall not consummate the transaction until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VI.

It is further ordered, That Oerlikon-Buhrle shall comply with all terms of the Balzers-Pfeiffer Agreement to Hold Separate and the Leybold Systems Business Agreement to Hold Separate, attached to this order and made a part hereof as Appendices I and II. The Balzers-Pfeiffer Agreement to Hold Separate the Balzers-Pfeiffer Assets shall continue in effect until Oerlikon-Buhrle and SKA have divested all of the Balzers-Pfeiffer Assets. The Leybold Systems Business Agreement to Hold Separate shall continue in effect until Oerlikon-Buhrle has divested all of the Leybold Compact Disc Metallizer Business or the Leybold Thin Film Coating Systems Business as required by this order.

VII.

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

A. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in, the manufacture of turbomolecular pumps;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of turbomolecular pumps;

C. Acquire any of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in, the manufacture of compact disc metallizers; or

D. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale of compact disc metallizers.

Provided, however, that this paragraph VII shall not apply to the acquisition of products or services acquired in the ordinary course of business, or of any non-exclusive license to any patent or other form of intellectual property (excluding assets of the Leybold Compact Disc Business and Balzers-Pfeiffer).

VIII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Oerlikon-Buhrle has fully complied with paragraphs II, III, IV, and VI of this order, Oerlikon-Buhrle 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 VI of this order. Oerlikon-Buhrle 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 VI of this order, including a description of all substantive contacts or negotiations for the divestiture(s) required by this order, including the identity of all parties contacted. Oerlikon-Buhrle shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, Oerlikon-Buhrle 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 paragraphs V and VII of this order.

IX.

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. Officers and employees of respondent whose places of employment are outside the United States shall be made available on reasonable notice.

X.

It is further ordered, That

A. Oerlikon-Buhrle shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

SCHEDULE A

Oerlikon-Buhrle shall divest all of the Assets and Businesses of the Leybold Compact Disc Metallizer Business pursuant to the terms

of this order. The assets identified in paragraph I.J. of this order shall include all assets, properties, business and goodwill, tangible and intangible, of Leybold in or relating to the development, manufacture, sale, distribution and marketing of compact disc metallizers, compact disc lines, and compact disc mastering systems, including without limitation, the following:

PART 1

1. All Leybold compact disc metallizers, including, but not limited to, equipment and documentation;

2. All Leybold compact disc metallizer inventory (including work in progress);

3. All lists or other information necessary to source materials, parts, components and other inputs involved in the production of Leybold compact disc metallizers;

4. All rights, title and interest in and results of all research and development efforts by Leybold relating to improvements, developments, and variants of Leybold compact disc metallizer products;

PART 2

5. All Assets and Businesses of Leybold relating solely to the development, manufacture, sale, distribution and/or marketing of compact disc lines and/or compact disc mastering systems, including equipment, documentation, inventory, work in process, information necessary to source materials, parts, components, and other inputs, all rights, title and interest and results of all research and development efforts by Leybold relating solely to improvements, developments, and variants or Leybold compact disc line and or mastering system products, and employment contracts to the extent permissible under applicable law.

SCHEDULE B

Oerlikon-Buhrle shall divest all of the Assets and Businesses of the Balzers-Pfeiffer Assets pursuant to the terms of this order. The assets identified in paragraph I.L. of this order shall include all assets, properties, business and goodwill, tangible and intangible, of Oerlikon-Buhrle as of the date this order is accepted by the

Commission, in or relating to the development, manufacture, marketing, sale, and distribution of turbomolecular pumps, including without limitation, the following:

PART 1

1. All of the stock and share capital, or participation held by Oerlikon-Buhrle of Balzers-Pfeiffer, including, without limitation, all stock, share capital, or participation held in trust by SKA for the account and risk of Oerlikon-Buhrle as of the date Leybold is acquired by Oerlikon-Buhrle;

2. All patents, intellectual property, trademarks, production technology, and know-how related to the development, manufacture, marketing, sale, or distribution of turbomolecular pumps;

3. All rights, title and interest in and results of all research and development efforts relating to improvements, developments, and variants of turbomolecular pump products;

4. All rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits used in the manufacture of turbomolecular pumps;

PART 2

5. All Assets and Businesses of Oerlikon-Buhrle (excluding Balzers-Pfeiffer) in or relating to the sale, distribution or marketing of turbomolecular pumps.

ATTACHMENT 1

TRUST AGREEMENT

PREAMBLE

A. OBH owns 100% of the shares of stock of BHAG.

BHAG is the unrestricted owner of 95.5% of the capital of Balzers Deutschland Holding GmbH with registered seat in Asslar, Germany ("BDH"), which equals a nominal value of DM 38'200'000.--. BHAG controls BDH by votes. The remaining 4.5% of the capital of BDH is owned by IHAG Holding AG.

BDH is the unrestricted owner of 99.5% of the capital of a nominal total value of DM 14'925'000.-- of Balzers-Pfeiffer GmbH

with registered seat in Asslar, Germany ("B-P"). The remaining 0.5% of the capital of B-P is owned by IHAG Holding AG, Zurich.

For the purposes of the following provisions of this Trust Agreement, "Capital Contributions" and/or "Capital Contributions of BDH" shall mean the 95.5% of the capital of BDH owned by BHAG.

The Capital Contributions are not subject to any restrictions regarding their transfer by agreement or through inheritance. According to the Articles of BDH any transfer of Capital Contributions is only subject to the approval of the shareholders (majority of votes recorded).

B. On January 21, 1994, OBH and the German company Degussa AG signed a sales contract under which Degussa AG sold all shares of Leybold AG in Hanau (Germany) to OBH and IHAG Holding AG, Zurich. The effectiveness of that sales contract is subject to the condition that the acquisition of Leybold AG is not prohibited by the German Bundeskartellamt in accordance with Section 24 sec. 2 first sentence GWB.

The sales contract is further subject to the condition that all other competent antitrust authorities which have jurisdiction over this transaction (especially the one of the United States) approve the transaction.

In order to prevent a possible negative decree of both the German Bundeskartellamt ("BKA") and the Federal Trade Commission ("FTC") and in order to ensure that the division turbomolecular pumps of B-P is placed outside the Oerlikon-Buhrle group of companies, BHAG intends to transfer the Capital Contributions to an unrelated third party within twelve (12) months of the date on which the consent order of the FTC enters into force. In the meantime the Capital Contributions shall be held by CS as a trustee of BHAG.

This procedure has been discussed by OBH with both the BKA and the FTC.

C. Under a consent order of the FTC (the text and content of which is unknown to CS), OBH will be required to elect a three-person management committee for the Balzers-Pfeiffer business ("Balzers-Pfeiffer Management Committee"). The Balzers-Pfeiffer Management Committee shall consist of the President, the financial officer of B-P and a financial officer of OBH whose responsibilities with OBH do not involve direct management of OBH's turbomolecular pumps. The Chairman of the Balzers-Pfeiffer Management Committee shall be [name to be inserted by OBH]

(provided he agrees, or a comparable, knowledgeable person among the managers of Balzers-Pfeiffer), who shall remain independent of OBH and competent to assure the continued viability and competitiveness of the B-P assets.

The consent order will provide that OBH shall not exercise, and OBH shall direct CS not to exercise direction or control over, or influence directly or indirectly, B-P, the Balzers-Pfeiffer Management Committee, or any of its operations or businesses; provided, however, that OBH may exercise only such direction and control over B-P as is necessary to assure compliance with the consent order and with all applicable laws.

D. The consent order of the FTC shall further provide as follows:

If OBH and CS have not absolutely and in good faith, and with the prior approval of the FTC, divested B-P within twelve (12) months of the date the order becomes effective, the FTC (or a court upon motion by the FTC) may appoint a trustee to divest B-P (the "FTC Trustee").

Subject to the prior approval of the FTC, the FTC Trustee shall have the exclusive power and authority to divest B-P.

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

The FTC Trustees shall have full and complete access to the personnel, books, records and facilities related to the B-P assets, or to any other relevant information, as the FTC Trustee may request. OBH shall take no action, and OBH shall direct CS to take no action to interfere with or impede the FTC Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by OBH or CS shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the FTC or, for a court-appointed FTC Trustee, by the court.

The FTC Trustee shall have no obligation or authority to operate or maintain B-P.

Based on these declarations and confirmations the Parties hereto agree to follows:

ART. 1 - TRANSFER OF THE CAPITAL CONTRIBUTIONS OF BDH TO CS

BHAG herewith request CS and CS accepts to purchase the Capital Contributions on a fiduciary basis at the purchase price of SFr. 1.-- (subject to Art. 5 para. 4) in accordance with the respective formal requirements (public deed). CS further agrees to hold and administrate the Capital Contributions in accordance with this Trust Agreement.

ART. 2 - FIDUCIARY HOLDING AND ADMINISTRATION OF THE CAPITAL CONTRIBUTIONS

CS will hold the Capital Contributions as a trustee in its own name, but for the account and risk of BHAG.

CS shall exercise its fiduciary rights as a shareholder of BDH, including but not limited to the right to vote and the right to elect, exclusively in accordance with the directions of BHAG or of any other party duly authorized by BHAG. CS accepts that BHAG for the purposes of this Trust Agreement has already authorized OBH to give its own directions to CS. For that reason the following provisions emphasize the relationship between CS and OBH, however, without changing the contractual position of BHAG as the trustor.

CS has taken note of the obligations of OBH under the consent order of the FTC set forth hereabove under paragraphs C, and D, and accepts that accordingly OBH will give directions to CS. CS will use its best efforts to comply in good faith with the directions received from OBH, without, however, assuming any direct liability to the FTC for its (CS') own acts, or, quite generally, for the acts of OBH or BHAG or the Balzers-Pfeiffer Management Committee.

Any directions given to CS are subject to the applicable laws and to bonos mores and shall always take the standing and reputation of CS into consideration. CS shall not be obliged to comply with any directions which do not meet the requirements of this provision.

In particular, CS shall:

a) Not make use of its right to vote without having first obtained the directions of OBH. The same shall apply to all other rights of CS consistent with the management of BDG;

b) Transmit immediately all documents which CS receives as a shareholder of BDH without any delay to OBH and CS shall further inform OBH on at least a quarterly basis in writing regarding all matters concerning BDH and B-P to the extent CS has knowledge of such matters as a fiduciary shareholder of BDH and to the extent such transmittal and disclosure of information is not subject to any legal and corporate restrictions;

c) Transfer without any undue delay all performances which CS receives as a shareholder of BDH including but not limited to dividends on the Capital Contributions to BHAG;

d) Subject to Art. 5 para. 3 hereafter, not dispose of the Capital Contributions held by CS without the prior written approval of OBH;

e) Transfer the Capital Contributions on first demand of OBH to a third party named by OBH;

f) Not incur any extraordinary expenses and not enter into any extraordinary obligations without the prior written approval of OBH;

g) At all times act in good faith in the exclusive economic interest of BHAG even if it is impossible for CS to obtain directions from OBH in time for any other reason whatsoever;

h) To treat the present Trust Agreement strictly confidential. Exemptions from this obligation to special confidentiality and from bank secrecy obligations are however permitted if CS wold suffer substantial disadvantages (i.e. as a result of an imputation of the Capital Contributions to the taxable assets of CS) or in cases where CS is obligated by law to disclose this Trust Agreement (i.e. under binding orders issued in the course of a criminal procedure, antitrust procedure, procedures of supervising authorities or securities (SEC) authorities). In the event of any such exemption CS shall immediately inform OBH regarding its duty to disclose. The parties hereto agree, however, that each of them or both of them will inform the German Bundeskartellamt and the FTC and the German, Swiss and US tax authorities of this Trust Agreement.

ART. 3 - INDEMNIFICATION OF CS

BHAG shall reimburse CS any and all costs and expenses (with interest) incurred by CS in the course of the correct performance of CS' duties and obligations under this Trust Agreement. The reimbursement shall in particular include any costs and expenses incurred in connection with the transfer, administration and sale of

the Capital Contributions as well as for instance the costs of external legal counsel to CS in connection with the conclusion and performance of this Trust Agreement.

OBH indemnifies and holds CS harmless against any and all claims of third parties, including claims of tax authorities and labor unions, and holds CS free of any obligations which CS might incur in the course of the correct performance of this Trust Agreement.

ART. 4 - NON-DEPRIVAL OF B-P OF ASSETS

OBH and BHAG shall not undertake any activities and shall not direct CS to undertake any activities which would deprive B-P of any of its assets belonging to the business of high vacuum pumps or which otherwise might impair the competitiveness of B-P in this field. In any event, OBH and BHAG shall not give any such directions to CS either. However, this interdiction does not apply to activities in the field of laboratory equipment and pre-vacuum pumps.

ART. 5 - NON-TRANSFER OF CAPITAL CONTRIBUTIONS TO OBH AND/OR BHAG

In full knowledge of Art. 404 of the Swiss Code of Obligations ("CO"), OBH and BHAG represent that they shall in no event request the transfer of the Capital Contributions of BDH and also the capital contributions of B-P held by BDH to OBH, BHAG or to any other company of the Oerlikon-Buhrle Group of Companies as long as the Capital Contributions of B-P held by BDH are not yet transferred to an unrelated third party. This interdiction shall become ineffective as soon as it becomes clear that OBH will not be permitted to acquire the Leybold-Group for antitrust reasons or if the German Bundeskartellamt confirms in writing that it waives the requirement to sell the Capital Contributions to an unrelated third party.

Subject to the pending authorizations of FTC and BKA for the acquisition of Leybold AG by the Oerlikon-Buhrle Group, BHAG will use its best efforts to sell the Capital Contributions to an unrelated third party within twelve (12) months of the date on which the consent order of the FTC enters into force.

If BHAG is unable to find a suitable unrelated third party as buyer for the Capital Contributions within twelve (12) months of the date on which the consent order of the FTC becomes final, CS shall

continue to hold and administrate the Capital Contributions until the FTC Trustee sells the Capital Contributions to such unrelated third party in accordance with the consent order of the FTC.

In any event CS shall pay the full purchase price paid by such unrelated third party to BHAG without any deductions, other than the purchase price of SFr. 1.-- stipulated in Art. 1 and any claims CS may have under the present Trust Agreement.

ART. 6 - FEES

As consideration for its performance under this Trust Agreement until February 28, 1995 CS has received from OBH a contingent fee of SFr. 70'000.--. In addition, CS shall receive a further contingent fee of SFr. 130'000.-- at the date of the closing of the acquisition of Leybold AG by the Oerlikon-Buhrle Group of Companies. If CS shall continue to hold the Capital Contributions as a trustee of BHAG after that date, CS shall further receive a quarterly contingent fee of SFr. 50'000.--, payable at the end of each three months period starting March 1, 1995. Such quarterly contingent fee shall be paid pro rata temporis in the event that the fiduciary relationship under this Trust Agreement between CS and OBH/BHAG ends before any running period of three months.

In addition to the contingent fees mentioned above, CS shall receive an additional contingent fee of SFr. 100'000.-- payable on the date of the signature of a sales contract for the sale of the Capital Contributions to an unrelated third party or (subject to the approval of the competent antitrust authorities) to a company of the Oerlikon-Buhrle Group.

ART. 7 - JOINT LIABILITY

OBH and BHAG shall be jointly and severally liable with respect to the performance of all of their obligations under this Trust Agreement. It is in the sole discretion of CS to decide if it wishes to fulfill its obligations towards BHAG or OBH and CS shall be released from any obligation which it has performed to either BHAG or OBH respectively.

ART. 8 - GENERAL CONDITIONS

This Trust Agreement has been concluded for an unlimited period of time and can be terminated by each party in accordance with Art. 404 CO.

Any termination of this Trust Agreement by CS shall not entitle BHAG or OBH to any claim against CS, even if such termination occurs at an unreasonable time in the meaning of Art. 404 II CO.

In the event of any termination of this Trust Agreement, BHAG shall accept the transfer of the Capital Contributions from CS to BHAG against consideration of SFr. 1.--, provided that on the date of such termination the Capital Contributions are still owned by CS as a trustee of BHAG.

The Board of Directors of OBH has approved this Trust Agreement.

Any amendments of this Trust Agreement shall be made in writing.

This Trust Agreement supersedes and replaces the Agreement between the parties dated May 26, 1994.

If any provision of this Trust Agreement shall be held ineffective, the validity of the remaining provisions hereof shall not be challenged thereby and the parties shall use their best efforts to substitute any such ineffective provision by a provision allowing to maintain the purpose of the replaced provision.

ART. 9 - ARBITRATION

Any disputes arising out of the present Trust Agreement are to be submitted to a court of three arbitrators of Zurich Chamber of Commerce with seat in Zurich, one arbitrator to be appointed by each of the parties, for final decision pursuant to the provisions of its Conciliation and Arbitration Rules.

ART. 10 - APPLICABLE LAW

This Trust Agreement shall be subject to and construed in accordance with Swiss law, in particular sec. 394 *et seq.* CO.

APPENDIX I

BALZERS-PFEIFFER AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Oerlikon-Buhrle Holding AG ("Oerlikon-Buhrle"), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Hofwiesenstrasse 135, CH-8021 Zurich, Switzerland 4002; 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, on January 21, 1994, Oerlikon-Buhrle entered into an Agreement with Degussa Aktiengesellschaft ("Degussa") to acquire all the voting stock of Leybold AG ("Leybold") (hereinafter "Acquisition"); and

Whereas, Leybold, a wholly-owned subsidiary of Degussa, with its principal office and place of business located at Wilhelm-Rohn-Strasse 25, D-6450 Hanau 1, Federal Republic of Germany, manufactures and markets, among other things, turbomolecular pumps; and

Whereas, Oerlikon-Buhrle, with its principal office and place of business located at Hofwiesenstrasse 135, CH-8021 Zurich, Switzerland, through its subsidiary Balzers-Pfeiffer GmbH ("Balzers-Pfeiffer"), manufactures and markets, among other things, turbomolecular pumps; and

Whereas, Schweizerische Kreditanstalt ("SKA"), with its principal office and place of business located at Paradeplatz, CH-8001 Zurich, Switzerland, will hold all outstanding shares of Balzers-Pfeiffer GmbH in trust and for the account and risk of Oerlikon-Buhrle at the time Oerlikon-Buhrle acquires Leybold pursuant to the trust agreement attached to the proposed order as Attachment 1; and

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

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

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Balzers-Pfeiffer Assets and the Commission's right to have Balzers-Pfeiffer continue as a viable competitor; and

Whereas, the purpose of the Hold Separate is:

A. To preserve Balzers-Pfeiffer as a viable, competitive, and independent business pending divestiture of the Balzers-Pfeiffer Assets,

B. To remedy any anticompetitive effects of the Acquisition, and

C. To preserve the Balzers-Pfeiffer Assets as viable, ongoing assets engaged in the turbomolecular pump business until divestiture is achieved; and

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

Whereas, Oerlikon-Buhrle understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the proposed order for public comment it will

grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from Oerlikon-Buhrle with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate, the Agreement Containing Consent Order to which it is annexed and made a part thereof, and the order, once it becomes final, and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Balzers-Pfeiffer Assets pursuant to the Consent Order, as follows:

1. Oerlikon-Buhrle agrees to execute and be bound by the Consent Agreement.

2. Oerlikon-Buhrle agrees that from the date this Hold Separate is accepted until the earliest of the times listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph three. of this Hold Separate.

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

b. The time that the divestiture of the Balzers-Pfeiffer Assets required by paragraph II and/or paragraph IV of the Consent Agreement is completed.

3. Oerlikon-Buhrle shall hold, and Oerlikon-Buhrle shall direct SKA to take all steps necessary to hold, the Balzers-Pfeiffer Assets, as they are presently constituted, separate and apart on the following terms and conditions:

a. The Balzers-Pfeiffer Assets, as defined in paragraph I.L. of the Consent Agreement, shall be held separate and apart and shall be operated independently of Oerlikon-Buhrle (meaning here and hereinafter, Oerlikon-Buhrle excluding the Balzers-Pfeiffer Assets and excluding all personnel connected with Balzers-Pfeiffer as of the date this Agreement is signed) except to the extent that Oerlikon-Buhrle must exercise direction and control over the Balzers-Pfeiffer Assets to assure compliance with this Hold Separate or the Consent Agreement.

b. Oerlikon-Buhrle shall maintain, and shall direct SKA to maintain, the marketability, viability, and competitiveness of the Balzers-Pfeiffer Assets, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and is shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Balzers-Pfeiffer Assets.

c. Oerlikon-Buhrle shall appoint Wolfgang Dondorf, the Geschaeftsfuehrer ("President") of Balzers-Pfeiffer, provided he agrees, or a comparable, knowledgeable person among the top management of the Balzers-Pfeiffer Assets, as President to manage and maintain Balzers-Pfeiffer on a day to day basis during the Hold Separate. The President shall have exclusive management and control of Balzers-Pfeiffer, and shall manage Balzers-Pfeiffer independently of Oerlikon-Buhrle's other businesses.

d. The President shall report exclusively to the Balzers-Pfeiffer Aufsichtsrat ("Board"), which shall be appointed by Oerlikon-Buhrle. The Board shall consist of Wolfgang Dondorf, who is the President of Balzers-Pfeiffer as of the date of this Hold Separate; Wilfried Glaum, who is the Controller of Balzers-Pfeiffer (or a comparable, knowledgeable person among the top management of Balzers-Pfeiffer); and Dr. Beat Baumgartner, who is an Oerlikon-Buhrle financial officer (or a comparable, knowledgeable person from Oerlikon-Buhrle's financial office who has no direct involvement with Oerlikon-Buhrle's turbomolecular pump business). The President shall be the Chairman of the Board. Except for the Oerlikon-Buhrle employee serving on the Board, Oerlikon-Buhrle shall not permit any officer, employee, or agent of Oerlikon-Buhrle also to be an officer, employee or agent of Balzers-Pfeiffer. Each Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Board shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Board during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

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

f. Oerlikon-Buhrle shall not exercise, and Oerlikon-Buhrle shall direct SKA not to exercise, direction or control over, or influence directly or indirectly, the Balzers-Pfeiffer Assets, the Board, or the President, or any of their operations, assets, or businesses; provided, however, that Oerlikon-Buhrle may exercise only such direction and control over the Balzers-Pfeiffer Assets as is necessary to assure compliance with this Hold Separate, the order and with all applicable laws and except as otherwise provided in this Hold Separate.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the Consent Order or negotiating agreements to divest assets, Oerlikon-Buhrle shall not receive or have access to, or the use of, any material confidential information of the Balzers-Pfeiffer Assets or the activities of the President or Board not in the public domain, nor shall Balzers-Pfeiffer, the President or the Board receive or have access to, or the use of, any material confidential information about Oerlikon-Buhrle. Oerlikon-Buhrle may receive on a regular basis from Balzers-Pfeiffer aggregate financial information necessary and essential to allow Oerlikon-Buhrle to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Oerlikon-Buhrle from sources other than Balzers-Pfeiffer or the Board, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

h. Except as is permitted by this Hold Separate, the Board member appointed by Oerlikon-Buhrle who is also an officer, agent, or employee of Oerlikon-Buhrle ("Oerlikon-Buhrle Board Member") shall not receive any Balzers-Pfeiffer material confidential information and shall not disclose any such information obtained through his or her involvement with Balzers-Pfeiffer to Oerlikon-Buhrle or use it to obtain any advantage for Oerlikon-Buhrle. The Oerlikon-Buhrle Board Member shall participate in matters that come

before the Board only for the limited purpose of considering any capital investment of over $250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.e, and carrying out Oerlikon-Buhrle's responsibilities under the Hold Separate and the order. Except as permitted by the Hold Separate, the Oerlikon-Buhrle Board Member shall not participate in any matter, or attempt to influence the decisions of the Balzers-Pfeiffer management with respect to matters that would involve a conflict of interest between Oerlikon-Buhrle and Balzers-Pfeiffer. Meetings of the Board during the term of the Hold Separate shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate.

i. Oerlikon-Buhrle shall not change, and Oerlikon-Buhrle shall direct SKA not to change, the composition of the Board unless the Chairman of the Board consents. The Chairman of the Board shall have the power to remove members of the Board for cause and to require Oerlikon-Buhrle to appoint replacement members to the Board in the same manner as provided in paragraph 3.d. of this Hold Separate. Oerlikon-Buhrle shall not change the composition of the management of Balzers-Pfeiffer, except that the Board shall have the power to remove management employees for unsatisfactory performance or for cause.

j. If the President or member of the Board ceases to act or fails to act diligently, a substitute President or member of the Board shall be appointed in the same manner as provided in paragraphs 3.c. and 3.d.

k. Oerlikon-Buhrle sales and distribution personnel connected with the Balzers-Pfeiffer Assets or providing support services to Balzers-Pfeiffer as of the date this Hold Separate is signed shall continue, as employees of Oerlikon-Buhrle, to provide such services as they are providing to Balzers-Pfeiffer as of the date of this Hold Separate. Such Oerlikon-Buhrle personnel must retain and maintain all material confidential information relating to Balzers-Pfeiffer on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Oerlikon-Buhrle business, including without limitation the turbomolecular pumps business. Such Oerlikon-Buhrle personnel

shall also execute a confidentiality agreement prohibiting the disclosure of any confidential Balzers-Pfeiffer information.

l. Balzers-Pfeiffer shall be staffed with sufficient employees to maintain the viability and competitiveness of the Balzers-Pfeiffer Assets, which employees shall be Balzers-Pfeiffer employees and may also be hired from sources other than Balzers-Pfeiffer. Each management employee of Balzers-Pfeiffer shall execute a confidentiality agreement prohibiting the disclosure of any Balzers-Pfeiffer confidential information.

m. Oerlikon-Buhrle shall circulate to the management employees of Balzers-Pfeiffer and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

n. Oerlikon-Buhrle shall cause, and Oerlikon-Buhrle shall direct SKA to cause, Balzers-Pfeiffer to continue to expend funds for research and development, quality control, manufacturing and marketing of Balzers-Pfeiffer products at a level not lower than that expended in fiscal 1994 or budgeted in fiscal 1995, and shall increase such spending as deemed reasonably necessary by the Board in light of competitive conditions. If necessary, Oerlikon-Buhrle shall provide Balzers-Pfeiffer with any funds necessary to accomplish the foregoing. Oerlikon-Buhrle shall continue to provide to Balzers-Pfeiffer such support services as it provided prior to the Acquisition.

o. All earnings and profits of Balzers-Pfeiffer shall be retained separately by Balzers-Pfeiffer. If necessary, Oerlikon-Buhrle shall provide Balzers-Pfeiffer with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of the Hold Separate. Balzers-Pfeiffer may pay dividends in the same manner as it paid dividends prior to the Acquisition if its 1994 earnings enable it to do so; provided, however that any such dividends shall not exceed the amount of dividends Balzers-Pfeiffer paid in 1993.

p. Oerlikon-Buhrle shall indemnify the Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Board members.

q. Notwithstanding the provisions of paragraph 3.h., companies who undertake a due diligence process in the course of negotiations to purchase the Balzers-Pfeiffer Assets shall be accompanied and

assisted by the Oerlikon-Buhrle Board Member, in addition to appropriate Balzers-Pfeiffer employees selected by the Board. The Oerlikon-Buhrle Board Member may delegate tasks relating to such due diligence to attorneys, accountants and/ or other financial employees of Oerlikon-Buhrle who are not directly engaged in the Oerlikon-Buhrle turbomolecular pump business; provided, however, that such Oerlikon-Buhrle employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Balzers-Pfeiffer confidential information.

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

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

a. Access during the office hours of Oerlikon-Buhrle 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 Oerlikon-Buhrle relating to compliance with this Hold Separate;

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

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

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Oerlikon-Buhrle Holding AG ("Oerlikon-Buhrle") has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Balzers-Pfeiffer Assets, which include Balzers-Pfeiffer GmbH ("Balzers-Pfeiffer"). Until after the Commission's order becomes final and the Balzers-Pfeiffer Assets are divested, Balzers-Pfeiffer must be managed and maintained as a separate, ongoing business, independent of all other Oerlikon-Buhrle businesses. All competitive information relating to the Balzers-Pfeiffer Assets, including, without limitation, its turbomolecular pump business, must be retained and maintained by the persons involved in the Balzers-Pfeiffer Assets, including employees and agents of Oerlikon-Buhrle and Balzers-Pfeiffer, on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment or agency involves any other Oerlikon-Buhrle business. Similarly, all such persons involved in any other Oerlikon-Buhrle business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Balzers-Pfeiffer Assets.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Oerlikon-Buhrle to civil penalties and other relief as provided by law.

APPENDIX II

LEYBOLD SYSTEMS BUSINESS AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Oerlikon-Buhrle Holding AG ("Oerlikon-Buhrle"), a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business at Hofwiesenstrasse 135, CH-8021 Zurich, Switzerland 4002; 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, on January 21, 1994, Oerlikon-Buhrle entered into an Agreement with Degussa Aktiengesellschaft ("Degussa") to acquire all the voting stock of Leybold AG ("Leybold") (hereinafter "Acquisition"), and

Whereas, Leybold AG, a wholly-owned subsidiary of Degussa, with its principal office and place of business located at Wilhelm-Rohn-Strasse 25, D-6450 Hanau 1, Federal Republic of Germany, through its Thin Film Coating Systems Business, manufactures and markets, among other things, compact disc metallizers; and

Whereas, Oerlikon-Buhrle, with its principal office and place of business located at Hofwiesenstrasse 135, CH-8021 Zurich, Switzerland, through its subsidiary Balzers AG, manufactures and markets, among other things, compact disc metallizers; and

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

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

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Leybold Compact Disc Metallizer Business or the Leybold Systems Business and the

Commission's right to have the Leybold Systems Business continue as a viable competitor; and

Whereas, the purpose of the Hold Separate is:

A. To preserve the Leybold Systems Business and the Leybold Compact Disc Metallizer Business as a viable, competitive, and independent business pending divestiture of the Leybold Compact Disc Metallizer Business or the Leybold Systems Business,

B. To remedy any anticompetitive effects of the Acquisition, and

C. To preserve the Leybold Systems Business as viable, ongoing assets engaged in the manufacture and sale of vacuum systems and equipment for the deposition of thin films until divestiture is achieved; and

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

Whereas, Oerlikon-Buhrle understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

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

1. Oerlikon-Buhrle agrees to execute and be bound by the Consent Agreement.

2. Oerlikon-Buhrle agrees that from the date this Hold Separate is accepted until the earliest of the times listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph three of this Hold Separate:

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

b. The time that divestiture of the Leybold Compact Disc Metallizer Business or the Leybold Systems Business required by paragraph II and/or paragraph IV of the Consent Agreement is completed.

3. Oerlikon-Buhrle shall hold the Leybold Systems Business, separate and apart on the following terms and conditions:

a. Leybold Systems Business, as defined in paragraph I.K. of the Consent Agreement, shall be held separate and apart and shall be operated independently of Oerlikon-Buhrle (meaning here and hereinafter, Oerlikon-Buhrle excluding Leybold Systems Business and excluding all personnel connected with the Leybold Systems Business as of the date this Agreement is signed, but including all other portions of Leybold), except to the extent that Oerlikon-Buhrle must exercise direction and control over the Leybold Systems Business to assure compliance with this Hold Separate or the Consent Agreement.

b. Oerlikon-Buhrle shall maintain the marketability, viability, and competitiveness of the Leybold Systems Business, including the Leybold Compact Disc Metallizer Business, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and it shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Leybold Systems Business including the Leybold Compact Disc Metallizer Business.

c. Oerlikon-Buhrle shall appoint Roland Lacher, the general manager of the Leybold Systems Business, provided he agrees, or a comparable, knowledgeable person among the top management of the Leybold Systems Business, as Manager to manage and maintain the

Leybold Systems Business on a day to day basis during the Hold Separate. The Manager shall have exclusive management and control of the Leybold Systems Business, and shall manage the Leybold Systems Business independently of Oerlikon-Buhrle's other businesses.

d. The Manager shall report exclusively to the Leybold Systems Business Management Committee ("Management Committee"), which shall be appointed by Oerlikon-Buhrle. The Committee shall consist of Roland Lacher, who is the manager of the Leybold Compact Disc Metallizer business as of the date of this Hold Separate (or a comparable, knowledgeable person from among the top management of the Leybold Compact Disc Metallizer business); Dr. Joachim Manke, who is a manager of the Leybold Systems Business (or a comparable, knowledgeable person from among the top management of the Leybold Systems business); and Dr. Beat Baumgartner, who is an Oerlikon-Buhrle financial officer (or a comparable, knowledgeable person from Oerlikon-Buhrle's financial office who has no direct involvement with Oerlikon-Buhrle's vacuum systems business). The Manager shall be the Chairman of the Management Committee. Except for the Oerlikon-Buhrle employee serving on the Management Committee, Oerlikon-Buhrle shall not permit any officer, employee, or agent of Oerlikon-Buhrle also to be an officer, employee or agent of the Leybold Systems Business. Each Management Committee member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Management Committee shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Management Committee during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

e. All material transactions, out of the ordinary course of business and not precluded by paragraph three hereof, shall be subject to a majority vote of the Management Committee.

f. Oerlikon-Buhrle shall not exercise direction or control over, or influence directly or indirectly, the Leybold Systems Business, including the Leybold Compact Disc Metallizer Business, the Management Committee, or the Manager of the Leybold Systems Business, any of their operations, assets, or businesses; provided, however, that Oerlikon-Buhrle may exercise only such direction and

control over the Leybold Systems business as is necessary to assure compliance with this Hold Separate, the order and with all applicable laws and except as otherwise provided in this Hold Separate.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the consent order of negotiating agreements to divest assets, Oerlikon-Buhrle shall not receive or have access to, or the use of, any material confidential information of the Leybold Systems Business or the activities of the Manager or Management Committee not in the public domain, nor shall the Leybold Systems Business, Manager, or the Management Committee receive or have access to, or the use of, any material confidential information about Oerlikon-Buhrle. Oerlikon-Buhrle may receive on a regular basis from the Leybold Systems Business aggregate financial information necessary and essential to allow Oerlikon-Buhrle to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Oerlikon-Buhrle from source other than the Leybold Systems Business or the Management Committee, and includes, but is not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

h. Except as is permitted by this Hold Separate, the Management Committee member appointed by Oerlikon-Buhrle who is also an officer, agent, or employee of Oerlikon-Buhrle ("Oerlikon-Buhrle Management Committee Member") shall not receive any Leybold Systems Business material confidential information and shall not disclose any such information obtained through his or her involvement with the Leybold Systems Business to Oerlikon-Buhrle or use it to obtain any advantage for Oerlikon-Buhrle. The Oerlikon-Buhrle Management Committee member shall participate in matters that come before the Management Committee only for the limited purpose of considering any capital investment of over $250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph

3.e, and carrying out Oerlikon-Buhrle's responsibilities under the Hold Separate and the order. Except as permitted by the Hold Separate, the Oerlikon-Buhrle Management Committee Member shall not participate in any matter, or attempt to influence the votes of the other directors on the Management Committee with respect to matters that would involve a conflict of interest between Oerlikon-Buhrle and the Leybold Systems Business.

i. Oerlikon-Buhrle shall not change the composition of the Management Committee unless the Management Committee consents. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to require Oerlikon-Buhrle to appoint replacement members to the Management Committee in the same manner as provided in paragraph 3.d. of this Hold Separate. Oerlikon-Buhrle shall not change the composition of the management of the Leybold System Business, except that the Management Committee shall have the power to remove management employees unsatisfactory performance or for cause.

j. If the Chairman of the Management Committee ceases to act of fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraphs 3.c. and 3.d.

k. Oerlikon-Buhrle personnel connected with the Leybold Systems Business or providing support services to the Leybold Systems Business as of the date this Hold Separate is singed may continue, as employees of Oerlikon-Buhrle, to provide such services as they are currently providing to the Leybold Systems Business. Such Oerlikon-Buhrle personnel must retain and maintain all material confidential information relating to the Leybold Systems Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Oerlikon-Buhrle business.

l. The Leybold Systems Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Leybold Systems Business, which employees shall be the Leybold Systems Business' employees and may also be hired from source other than Oerlikon-Buhrle. Each management employee of the Leybold Systems Business shall execute a confidentiality agreement

prohibiting the disclosure of any Leybold Systems Business confidential information.

m. Oerlikon-Buhrle shall circulate to the management employee of the Leybold Thin Film Coating Systems Business and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

n. The Leybold Systems Business shall continue to expend funds for research and development, quality control, and marketing of Leybold Systems Business products at a level not lower than that budgeted for either the 1993 or 1994 fiscal year, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. Within thirty (30) days of the date of this Hold Separate, the Chairman of the Management Committee shall develop a budget and operating plan for the 1995 fiscal year that complies with the provisions of this paragraph and present it to the Management Committee for approval. If necessary, Oerlikon-Buhrle shall provide the Leybold Systems Business with any funds to accomplish the foregoing. Oerlikon-Buhrle shall provide the Leybold Systems Business such support services as provided by Leybold prior to the Acquisition.

o. Oerlikon-Buhrle shall provide the Leybold Systems Business with sufficient working capital to operate at a level not less than the rate of operation in effect during the twelve (12) months preceding the date of the Hold Separate.

p. The Management Committee shall serve at the cost and expense of Oerlikon-Buhrle. Oerlikon-Buhrle shall indemnify the Management Committee against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Management Committee members.

q. The Management Committee shall have access to and be informed about all companies who inquire about, seek or propose to buy the Leybold Systems Business.

r. Notwithstanding the provisions of paragraph 3.h., companies who undertake a due diligence process in the course of negotiations to purchase the Leybold Compact Disc Metallizer Assets may be accompanied and assisted by the Oerlikon-Buhrle Management Committee Member, in addition to appropriate Leybold Systems Business employees selected by the Management Committee. The

Oerlikon-Buhrle Management Committee Member may delegate tasks relating to such due diligence to attorneys, accountants and/or other financial employees of Oerlikon-Buhrle who are not directly engaged in the Oerlikon-Buhrle compact disc metallizer business; provided, however, that such Oerlikon-Buhrle employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Leybold Systems Business confidential information.

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

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

a. Access during the office hours of Oerlikon-Buhrle 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 Oerlikon-Buhrle or relating to compliance with this Hold Separate;

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

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

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Oerlikon-Buhrle Holding Ag ("Oerlikon-Buhrle") and Lyebold have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Leybold Compact Disc Metallizer Business and Leybold Thin Film Coating Systems Business. Until after the Commission's order becomes final and the Compact Disc Metallizer Business Asses are divested, the Leybold Thin Film Coating Systems Business must be managed and maintained as a separate, ongoing business, independent of all other Oerlikon-Buhrle businesses. All competitive information relating to the Leybold Thin Film Coating Systems Business must be retained and maintained by the persons involved in the Leybold Thin Film Coating Systems Business on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment or agency involves any other Oerlikon-Buhrle business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Leybold Thin Film Coating Systems Business.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Oerlikon-Buhrle to civil penalties and other relief as provided by law.

IN THE MATTER OF

OLSEN LABORATORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3556. Complaint, Feb. 6, 1995--Decision, Feb. 6, 1995

This consent order prohibits, among other things, two Kansas-based firms and an official from making false claims for Eez-Away, an arthritis pain treatment, or similar products. The consent order requires the respondents to possess competent and reliable scientific evidence before making any health or medical benefit claim for any personal or household product or service they market in the future; requires them to clearly identify any future infomercial that they disseminate as paid advertising; and prohibits them from misusing endorsements.

Appearances

For the Commission: *Lesley Anne Fair* and *Beth M. Grossman.*

For the respondents: *Tish Pahl, Olsson, Frank & Weeda*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, and Peter F. Olsen, individually and as an officer and director of said corporations ("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 Olsen Laboratories, Inc. is a Delaware corporation, with its principal office and place of business at 11088 Alhambra Street, Leawood, Kansas.

Respondent Richfield Distributors, Inc. is a New York corporation, with its principal office and place of business at 11088 Alhambra Street, Leawood, Kansas.

Respondent Peter F. Olsen is an officer and director of Olsen Laboratories, Inc. and Richfield Distributors, Inc. Individually or in

concert with others, he formulates, directs and controls the acts and practices of Olsen Laboratories, Inc. and Richfield Distributors, Inc., including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondents.

PAR. 2. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed external analgesics, including Eez-Away Relief, to consumers. These products are "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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 Eez-Away Relief, including but not necessarily limited to the attached Exhibits A and B, transcriptions of the program-length television commercials (or "infomercials") entitled, respectively, "30 Minutes" and "Eez-Away the Pain." The aforesaid advertisements contain the following statements and depictions:

A. JULIA GABOR (Consumer endorser): "It is a miracle drug and I'm, I, uh, I know it is." (Exhibit A, p. 1)

B. SHELLY DUVALL (Anchor): "And we'll tell you about a recent breakthrough in the treatment of arthritis that has brought new hope to many chronic arthritis sufferers. Much new work is being done, and the good news is there's hope. Later on we'll tell you about a new arthritis remedy that could provide the much sought-after relief from pain. So if you or someone you love has arthritis, muscle or joint pain, please, stay tuned. The pain may soon be over." (Exhibit A, p. 3)

C. MARIE GIORDANO (Consumer endorser): "Well, I had my back, lower back pain for about three years, and it was just really so bad I couldn't walk. I had to take time off from work, and I was laid up for really two weeks at home on my back flat. I tried many things, and nothing really worked." (Exhibit A, pp. 4-5; Exhibit B, p. 3)

* * *

"When I first applied it, I had very little hope that anything was going to help me. I have arthritis, and I figured that was it. But it really made me comfortable after the pain was gone. I felt 'aahhh.'" (Exhibit A, p. 7; Exhibit B, p. 5)

D. DAVID FLYNN (Anchor): "We recently learned that some exciting new research is being done on a new type of pain reliever. We wanted to find out more."

SHELLY DUVALL: "We spoke with chiropractor Dr. John Panicali. We learned that he took part in a research study of a new arthritis treatment that's been getting a lot of attention." (Exhibit A, p. 5)

E. SHELLY DUVALL: "The new product tested by Dr. Panicali is called 'Eez-Away Relief.' When we spoke with him, he had been dispensing it for several months. And what were his findings?" (Exhibit A, p. 5)

DR. JOHN PANICALI (Chiropractor): "Patients that we've been working with for many months now have reached a certain point of relief, but at that point, we've reached a stone wall. So we tried this product on those patients. And patients are coming back and telling me, 'Doc, I don't know what that stuff was, but I'm getting further motion, I'm doing things now I never did before, for the first time I'm climbing stairs without pain, I can actually look over my shoulder when I back out of my driveway.'" (Exhibit A, p. 6; Exhibit B, p. 4)

F. DR. PANICALI: "The unique thing about Eez-Away Relief is that it absorbs through the skin surface at a faster rate than other products. But what's also unique is that once it's at the joint surface, it binds to tissues, ligaments and fats and stays within the joint for a much longer period of time, affording relief for a longer period, and pain-free motion." (Exhibit A, p. 6)

G. JOHN BOISE (Consumer endorser): "I tried it, every couple of hours for about three or four days, and the pain just disappeared completely. And so now I've been using it like once a week, and the pain just stays away; and I can start moving my hands a lot better than I ever used to be able to move them." (Exhibit A, p. 7; Exhibit B, p. 5)

* * *

"I've been trying a lot of different medications over the past two or three years trying to eliminate arthritis in my joints, and since I used Eez-Away, it just worked and it's like a miracle." (Exhibit A, p. 22; Exhibit B, p. 20)

H. DAVID FLYNN: "Shelly, these results are very impressive, but is it safe? Has it been properly tested?"

SHELLY DUVALL: "Absolutely, David. It's met all the FDA requirements, and it contains only ingredients that are recognized by the FDA itself to be both safe and effective for pain relief."

FLYNN: "But what's the big secret? Can we now buy it in stores?"

DUVALL: "Til now the only way to get some was to see one of the testing physicians like Dr. Panicali. Unfortunately, it's still not available in stores." (Exhibit A, pp. 7-8)

I. VOICE-OVER: "This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores." (Exhibit A, pp. 9, 19 & 25; Exhibit B, pp. 6, 16 & 23)

J. VOICE-OVER: "At last, you won't have to live with that nagging pain in your hands, back, arms, elbows, knees and other joints. With Eez-Away, you'll regain the vitality you once had to enjoy life again with mobility and freedom. Simple pleasures like biking, fishing, tennis, and fun with your family will all return once the pain is gone." (Exhibit A, pp. 9, 20 & 26; Exhibit B, pp. 7, 17 & 23-24)

K. VOICE-OVER: "So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain." (Exhibit A, pp. 11, 22 & 28; Exhibit B, pp. 9, 19 & 26)

L. UNIDENTIFIED CONSUMER ENDORSER: "I use it for about ten minutes, all over, and it has no odor. And I got dressed, and about ten minutes later I -- there was no pain. It was like I -- it was hard to believe that there was actually no pain." (Exhibit A, p. 12)

M. *Depiction: Close-up of assorted over-the-counter medications, including Bufferin, Mineral Ice, Excedrin, Ben Gay, Heet, Icy Hot, Tylenol, and Advil.*

DAVID FLYNN: "This is just a sampling of some of the pain remedies that we found in our local drugstore. There are literally aisles full of pills and ointments that claim to relieve pain. Shelly, what makes Eez-Away so different?"

SHELLY DUVALL: "Well, the people that we spoke to, David, said simply that these remedies just don't work the way that Eez-Away does. They've been searching for relief, they finally found it with this product." (Exhibit A, p. 13)

N. DAVID FLYNN: "Next we have a woman who was crippled by arthritis pain until she found Eez-Away."

SHELLY DUVALL: "This is the true story of Dee Sanchez." (Exhibit A, p. 13)

SHELLY DUVALL: ". . . a few short months ago she was suffering from severe chronic arthritis." (Exhibit A, p. 13)

SHELLY DUVALL: "Dee was in excruciating pain . . . ." (Exhibit A, p. 14)

DEE SANCHEZ (Consumer endorser): "I had tried just about every type of rub, every type of cream that came on the market. I'd go buy it and give it a try. I'd tried a few, uh, I had an aunt that even made up some home remedies that were supposed to be from the old country that would help my arthritis and so forth. And nothing was doing any good."

SHELLY DUVALL (Exhibit A)/EILEEN FULTON (Exhibit B): "Then one day Dee's luck changed. Dee [She] was introduced to new Eez-Away Relief. The results were immediate and dramatic." (Exhibit A, pp. 14-15; Exhibit B, pp. 12-13)

O. SHELLY DUVALL: "[W]e have seen this same story again and again with other people. People who had lost mobility, stopped being active because of the pain. They were able to get up and enjoy life with the help of Eez-Away." (Exhibit A, p. 16)

P. SHELLY DUVALL: "Another physician taking part in the Eez-Away test program was Dr. Thomas Jackson of Vero Beach, Florida. He's a cardiologist with a special concern for the effects of arthritis on a person's general health." (Exhibit A, p. 16)

DR. THOMAS JACKSON (Cardiologist): "Minnie Benjamin has juvenile rheumatoid arthritis. Now juvenile rheumatoid arthritis begins in the teenage years. It can begin in childhood. She's had it for a long time. When I saw Minnie, she had a problem with her ankle and with her wrist and was unable to walk properly, limping, and had a splint on her hand. I gave her Eez-Away because I had used it in a few other instances. I mentioned to her to use it according to the directions. She came back the next morning, the splint was off and she wasn't limping.
So I was really impressed with that overnight response. You know, it's rather fabulous, rather amazing to say the least."

MINNIE BENJAMIN: "You see I'm not wearing my brace. And I hope I don't have to put it on anymore because the Eez-Away has helped me get rid of it." (Exhibit A, p. 17; Exhibit B, pp. 14-15)

Q. PHIL SABATO (Consumer endorser): "With this product, Eez-Away, I'm back to normal. I can walk again, I could bend down without being in pain, I could

climb up the ladder. I don't have the pain that I did in the past." (Exhibit A, p. 18; Exhibit B, p. 15)

R. SANDY DUVALL (Consumer endorser): "After using Eez-Away, I don't have any problems. I have no pain, and I don't think about it any more. It's really, uh, it's like a new lease on life." (Exhibit A, p. 18; Exhibit B, p. 15)

* * *

"I used it three or four times the first day. And by the third time I put it on, I had absolutely no pain in my hand at all." (Exhibit A, p. 24; Exhibit B, p. 22)

S. DAVID FLYNN: "Needless to say, we are impressed with this new product, so we spoke with the person who developed this revolutionary new pain remedy." (Exhibit A, p. 23) [EILEEN FULTON: "Now let's meet the man who developed this revolutionary pain remedy, Mr. Peter Olsen." (Exhibit B, p. 21)]

PETER OLSEN: "When we first developed Eez-Away, we knew it would relieve a lot of pain, and it has. Even doctors are amazed. As a matter of fact, we're so confident that we actually have a guarantee. Use the product for 30 days. If you're not satisfied, we'll return your money." (Exhibit A, p. 23; Exhibit B, p. 21)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that Eez-Away Relief is a new and unique product that is a major breakthrough in the treatment of arthritis pain.

PAR. 6. In truth and in fact, Eez-Away Relief is not a new and unique product that is a major breakthrough in the treatment of arthritis pain. 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 advertisement attached as Exhibit A, respondents have represented, directly or by implication, that scientific research proves that Eez-Away Relief is effective for the rapid elimination of severe pain and physical disabilities caused by arthritis.

PAR. 8. In truth and in fact, scientific research does not prove that Eez-Away Relief is effective for the rapid elimination of severe pain and physical disabilities caused by arthritis. 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 advertisements attached

as Exhibits A and B, respondents have represented, directly or by implication, that:

A. Eez-Away Relief rapidly eliminates severe pain and physical disabilities caused by arthritis.

B. Eez-Away Relief provides long-term pain relief.

C. Eez-Away Relief significantly increases the range of motion in the affected joints of people with arthritis, including those with rheumatoid arthritis.

D. Eez-Away Relief is more effective than other over-the-counter medications in relieving arthritis pain.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph nine, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 11. In truth and in fact, at the time they made the representations set forth in paragraph nine, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. 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 A, respondents have represented, directly or by implication, that Eez-Away Relief relieves arthritis pain by penetrating through the skin to the affected joint.

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 A, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph twelve, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 14. In truth and in fact, at the time they made the representation set forth in paragraph twelve, respondents did not possess and rely upon a reasonable basis that substantiated such

representation. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements and depictions contained in the advertisements set forth in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that the testimonials or endorsements from consumers appearing in advertisements for Eez-Away Relief reflect the typical or ordinary experience of members of the public who use Eez-Away Relief.

PAR. 16. Through the use of the statements and depictions contained in the advertisements set forth in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that, at the time they made the representation set forth in paragraph fifteen, they possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 17. In truth and in fact, at the time they made the representation set forth in paragraph fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph sixteen, was, and is, false and misleading.

PAR. 18. By and through the "30 Minutes" infomercial, a transcription of which is attached hereto as Exhibit A, respondents have represented, directly or by implication, that "30 Minutes" is an independent television program and is not paid commercial advertising.

PAR. 19. In truth and in fact, "30 Minutes" is not an independent television program and is paid commercial advertising. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

PAR. 20. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

EXHIBIT A

30 MINUTES

	Graphic: This program is a paid for advertisement by Olsen Labs Inc. Graphic: The program you are about to see is true. The names of the people have not been changed and their statements have not been altered. We make this claim for your protection and in the interest of truth.
VOICE -OVER:	The program you are about to see is true. The names of the people have not been changed and their statements have not been altered. We make this claim for your protection and in the interest of truth.
MARIE GIORDANO:	It's a good feeling about yourself. You're able to smile again, be happy again.
UNIDENTIFIED WOMAN #1:	I'm very excited, yes, I'm very excited.
JULIA GABOR:	It is a miracle drug and I'm, I, uh, I know it is.
UNIDENTIFIED WOMAN # 2:	They want to borrow it, but no one's getting it.
SCOTT WALTER:	When I tried Eez-Away, I couldn't believe it.
SANDY DUVALL:	A product that says it will work that does work.
TOM BURKE:	And it works everytime.
DEE SANCHEZ:	Wow! That's all I can -- that's all I can do. Wow.
	Depiction: People playing tennis.
VOICE-OVER:	The good life. For most people it means free time, friendship, happiness and health.
	Depiction: Men fishing.
	And, thanks to modern medicine, Americans are now living longer
	Depiction: Woman diving into pool.
	with the opportunity of many more years of this good life.
	Depiction: People playing shuffleboard.
	But tragically, there is one common disease that deprives millions of Americans of their chance at the good life -- Arthritis.
	Depiction:

Man pitching horseshoes.
Since the dawn of civilization, man has searched for a cure for this crippling disease,
Depiction:
People riding bicycles.
and today we continue that search on "30 Minutes".
Depiction:
Man and woman sitting at anchor news desk with a camera and cameraman off to the side.
Moves in to close-up of the two anchors
Large superimposed text: 30 Minutes

DAVID FLYNN: Hello, I'm David Flynn.

SHELLY DUVALL: And I'm Shelly Duvall, and welcome to another edition of "30 Minutes."

DAVID FLYNN: Chances are that you or someone you know has arthritis. This painful disease affects nearly 40 million Americans. That's 1 in 7 people in this country.

SHELLY DUVALL: Many of us associate arthritis with older people, but the fact is it strikes all ages, even children.

DAVID FLYNN: There is still no cure for arthritis, and so many people who suffer from it are in a constant search for treatment that will bring them some relief. Today on "30 Minutes" we will take a look at how people are coping with this terrible disease.

SHELLY DUVALL: And we'll tell you about a recent breakthrough in the treatment of arthritis that has brought new hope to many chronic arthritis sufferers. Much new work is being done, and the good news is there's hope. Later on we'll tell you about a new arthritis remedy that could provide the much sought-after relief from pain. So if you or someone you love has arthritis, muscle or joint pain, please, stay tuned. The pain may soon be over.

DAVID FLYNN: Let's start at the beginning. What is arthritis and what do we know about it?

DAVID FLYNN (Voiceover): The word arthritis is derived from Greek and literally means "inflamed joint."
Graphic:
ARTHRITIS
Inflamed Joint

DAVID FLYNN (V/0): There are many types of arthritis, but the most common form is osteoarthritis

DAVID FLYNN (V/0):	Most often characterized by redness, swelling, stiffness, and pain. Graphic: Osteoarthritis Redness Swelling Stiffness Pain According to the Arthritis Foundation, every person over 60 probably has Osteoarthritis to some degree. Graphic: Every person over 60 probably has Osteoarthritis.
SHELLY DUVALL:	But the worst thing about arthritis is how it can ruin lives. People who were once strong and active are often reduced to helplessness and depression because of the constant pain.
JULIA GABOR: Arthritis sufferer	I had arthritis so bad, I was in bed for 6 months, no exercise. I had to get up -- I was in a wheelchair.
SAMUEL GREEN: Arthritis sufferer	I had arthritis in these hands so bad, it felt, it felt like somebody had a knife -- and then he rammed it in there [indicating his hand] and pulled it.
JANNIE BUHR: Arthritis sufferer	It's very hard on me now with visiting the grandchildren. I do not stay very long with them, and I've always loved them, and planned to stay with them before, but I can't -- I just can't do it anymore.
MARIE GIORDANO: Arthritis sufferer	Well, I had my back, lower back pain for about three years, and it was just really so bad I couldn't walk. I had to take time off from work, and I was laid up for really two weeks at home on my back flat. I tried many things, and nothing really worked.
DAVID FLYNN:	What can these people do? We recently learned that some exciting new research is being done on a new type of pain reliever. We wanted to find out more.
SHELLY DUVALL:	We spoke with chiropractor Dr. John Panicali. We learned that he took part in a research study of a new arthritis treatment that's been getting a lot of attention. Depiction: Dr. Panicali in examining room with patient.

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SHELLY DUVALL (V/O): He sees many arthritis sufferers. We asked him why arthritis is such a difficult disease to treat.

DR. JOHN PANICALI:
Doctor of Chiropractic
I find that the worst thing about arthritis is that about half the people give up. They feel that once they have it, there is nothing that can be done. And that's not necessarily true. We find that they give up on life; they become depressed. Their exercise and their activity is limited. A lot of older patients start to gain weight because they're less active. So it's a -- it's a disease that affects the body, but I find that in more cases it affects the mind.

Depiction:
Dr. Panicali applying, and explaining to patient in examining room how to apply, Eez-Away.

SHELLY DUVALL (V/0): The new product tested by Dr. Panicali is called "Eez-Away Relief." When we spoke with him, he had been dispensing it for several months. And what were his findings?

DR. PANICALI: Patients that we've been working with for many months now have reached a certain point of relief, but at that point, we've reached a stone wall. So we tried this product on those patients. And patients are coming back and telling me, "Doc, I don't know what that stuff was, but I'm getting further motion, I'm doing things now I never did before, for the first time I'm climbing stairs without pain, I can actually look over my shoulder when I back out of my driveway." The product is natural. There's no side effects. There's no way at all this product can harm you.

Depiction:
Dr. Panicali, in front of a panel of x-rays, examining x-rays and pointing things out to patient.

DR. PANICALI (V/O): The unique thing about Eez-Away Relief is that it absorbs through the skin surface at a faster rate than other products. But what's also unique is that once it's at the joint surface, it binds to tissues, ligaments and fats and stays within the joint for a much longer period of time, affording relief for a longer period, and pain-free motion.

DR. PANICALI: Doctor of Chiropractic	The best thing I find with Eez-Away Relief is that patients can return to their normal lifestyle. Patients have found that they can go on. They can do activities around the house; they can go back to their normal lifestyle, perform activities that they thought were long gone. Depiction: Dr. Panicali applying Eez-Away to a patient's shoulder and explaining how to use the product.
SHELLY DUVALL (V/0):	Dr. Panicali introduced many of his patients to Eez-Away Relief. We asked a few of them for their reviews.
PAT MURANO: Businessman	I'm the type of guy, just like you are. I don't believe everything somebody tells me, unless I try it, for myself. I've tried the product, Eez-Away Relief. I know it works.
JOHN BOISE: Plant Manager	I tried it, every couple of hours for about three or four days, and the pain just disappeared completely. And so now I've been using it like once a week, and the pain just stays away; and I can start moving my hands a lot better than I ever used to be able to move them.
PATRICIA ROBINSON: Travel Agent	I couldn't put up my hair. I couldn't lift up my arms. I couldn't do anything with my right arm. And I started using Eez-Away and I can now lift it.
MARIE GIORDANO: Teacher's Aide	When I first applied it, I had very little hope that anything was going to help me. I have arthritis, and I figured that was it. But it really made me comfortable after the pain was gone. I felt "aahhh."
SHELLY DUVALL:	I want you to know that these folks have not been paid to endorse this product. They're real people who've had real results. We found that Eez-Away is giving people a lot of hope, even people who've tried it all.
DAVID FLYNN:	Shelly, these results are very impressive, but is it safe? Has it been properly tested?
SHELLY DUVALL:	Absolutely, David. It's met all the FDA requirements, and it contains only ingredients that are recognized by the FDA itself to be both safe and effective for pain relief.
DAVID FLYNN:	But what's the big secret? Can we now buy it in stores?

SHELLY DUVALL:	Til now the only way to get some was to see one of the testing physicians like Dr. Panicali. Unfortunately, it's still not available in stores.
DAVID FLYNN:	We've got to take a break, but when we come back, we'll talk with the person who developed this revolutionary new pain remedy.
SHELLY DUVALL (V/0):	And we'll spend a day in the life of an arthritis sufferer, when "30 Minutes" continues.
	Depiction:
	Child runs and jumps into Dee Sanchez's arms.
DEE SANCHEZ (V/0):	This just works. I put it on, and I don't hurt.
DEE SANCHEZ:	It's everything I could ever have asked for, and it's given me back my life.
	Superimposed text:
	EEZ-AWAY Gets Results
COMMERCIAL INSERT	Graphic:
	ATTENTION!
	ARTHRITIS SUFFERERS
VOICE-OVER:	Attention arthritis sufferers, the program you are now watching features a powerful Arthritis Treatment called Eez-Away Relief.
	Graphic:
	(Scrolling down the screen) The program that you are now watching features a powerful Arthritis Treatment called EEZ-AWAY RELIEF.
	This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores.
	However, if you or someone you love suffer from chronic aches, pains or stiffness, we have wonderful news.
	Depiction:
	Dr. Panicali rubbing Eez-Away on a woman's hand in an examining room
	Superimposed text on close up of woman's hand:
	Aches
	Pains
	Stiffness
	For a limited time only the makers of Eez-Away are offering this amazing new pain remedy directly to you through this introductory TV offer.
	Graphic:

Arm bent at 90 degree angle, with the elbow enhanced in red. A bottle of Eez-Away comes from the right of the screen and then tips toward the reddened elbow, the top flips up, the red disappears, the top closes and the bottle comes to stand at the right hand side of the screen.

At last, you won't have to live with that nagging pain in your hands, back, arms, elbows, knees and other joints. With Eez-Away, you'll regain the vitality you once had to enjoy life again with mobility and freedom. Simple pleasures like biking, fishing, tennis, and fun with your family will all return once the pain is gone.

Depictions:

Screen, divided into four quadrants, with pictures of people bicycling, fishing, playing tennis, and swimming

Superimposed text:

Biking

Fishing

Tennis

Just apply Eez-Away to the painful area and soon you'll feel the power, the relief. Eez-Away is patented, and has no messy residue or strong medicine smell, and it's not taken internally so it won't upset your stomach like some pain relievers.

Depiction:

Man in locker room applying Eez-Away to his knee

Superimposed text:

Easy To Use

And doctors recommend it as safe, even on sensitive skin.

Depiction:

Dr. Panicali applying Eez-Away to patient's shoulder in examining room.

Superimposed text:

No Mess

No Strong Smell

With your order, you get an 8 oz. bottle of EEZ-AWAY Relief. That's a full 30 day supply.

We'll also include this beautiful, "Natural Care Workbook." It's 60 pages of valuable

information to give you strength and to keep you limber once the pain is gone.
Depiction:
Close up of the front cover of booklet. On the cover is a stop sign with the words "THE PAIN STOPS HERE." Some of the contents of the book are shown, including drawings of exercises, someone receiving a massage, and three progressively smaller profiles of the human body.
This $11.95 value is yours absolutely free.
Plus, if you call now, we'll also include another 8-oz. bottle of Eez-Away. Perfect for your purse or briefcase. It's a $24.95 value free, just for trying Eez-Away.
The entire Eez-Away package, including 2 8-oz. bottles plus the natural care workbook, would cost over $60.00 if sold separately. But now, through this special TV offer, you pay only $39.95.
We're so confident that Eez-Away Relief will work for you, that we're offering a complete money back guarantee.
Superimposed text:
30 DAY GUARANTEE
1-800-938-2828
If you're not convinced that Eez-Away is the most effective pain remedy that you've ever tried, return it for a full refund.
So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain. Call now.
Graphic:

Call
1 - 800 -938 -2828
$39.95 + $5.95 Shipping & Handling
EEZ - AWAY
P.O. Box A
Lincoln, KS 67455
ALLOW 4 TO 6 WEEKS FOR DELIVERY
OLSEN LABS, INC., 115 WEST ELM ST, LINCOLN, KS 67455

Have your credit card or checkbook ready and call 1-800-938-2828. A $57.00 value for just $39.95, plus $5.95 shipping and handling. Call 1-800-938-2828 or send your check or money order to EEZ-AWAY, P.O. Box A, Lincoln, KS 67455, or call
1-800-938-2828.

END COMMERCIAL INSERT

JANNIE BUHR: Now, I can move the knee without any pain to it. I'm always surprised that I can use them and there's no pain. I mean, you know, I sit down, I lay down, I don't have the pain that I always had.

UNIDENTIFIED WOMAN #3: I use it for about ten minutes, all over, and it has no odor. And I got dressed, and about ten minutes later I -- there was no pain. It was like I -- it was hard to believe that there was actually no pain.

SAMUEL GREEN: But now that I use this Eez-Away, see, you can see for yourself [opening and closing his hands].

JULIA GABOR: But I just used it on my shoulder and I think that I knew that would help my shoulder within, within a week. I was, oh, I thought it was a miracle drug.

UNIDENTIFIED WOMAN #1: Since I've been using Eez-Away, I have a better grip, and I can do my laundry better, I can do my housework much better, and I can also comb my hair much better, because I couldn't raise my hand or hold a grip on the comb to comb my hair.

UNIDENTIFIED WOMAN #2: [Shuffling a deck of cards] And at one time I was not able to shuffle a deck of cards as I'm doing now. Since I've used Eez-Away, I'm able to shuffle the cards on my own with have -- without having someone do it for me. And it's the greatest thing to know that you can do it on your own.

Depiction:

The two anchors sitting behind a news desk. To the left is a camera and cameraman.

Large superimposed text: 30 Minutes

Depiction:

Close-up of assorted over-the-counter medications, including Bufferin, Mineral Ice, Excedrin, Ben Gay, Heet, Icy Hot, Tylenol, and Advil.

DAVID FLYNN: This is just a sampling of some of the pain remedies that we found in our local drugstore. There are literally aisles full of pills and ointments that claim to relieve pain. Shelly, what makes Eez-Away so different?

SHELLY DUVALL: Well, the people that we spoke to, David, said simply that these remedies just don't work the way that Eez-Away does. They've been

searching for relief, they finally found it with this product.

DAVID FLYNN: Next we have a woman who was crippled by arthritis pain until she found Eez-Away.

SHELLY DUVALL: This is the true story of Dee Sanchez.

Depiction:
Dee Sanchez outside at a picnic.

SHELLY DUVALL (V/0): Dee Sanchez lives in Lynnford, New Jersey. She's married and the mother of two girls. From these pictures you wouldn't know that a few short months ago she was suffering from severe chronic arthritis.

DEE SANCHEZ: I just plain hurt. Sometimes I just wanted to sit down and cry because it was so frustrating because I couldn't -- I couldn't do all the things that were me. The simple things. To a lot of people it wouldn't matter. Cleaning my house, taking curtains down and washing them, hanging them back up. I couldn't do that.

SHELLY DUVALL (V/0): Dee was in excruciating pain, and it wasn't only she that was suffering. The deterioration of Dee's physical and mental state was taking its toll on her family as well.

Depiction:
Sanchez's husband and daughters outside at a picnic table.

FRANK SANCHEZ: We have a family that's close, and yet all want to do things together, and no fault to Dee on this thing, if I were in pain constantly, your nerves were on edge, and things that would not irritate someone normally, I mean the slighest little thing can, can set off an argument when none need have come. You tend to overreact when you're hurting.

VANESSA SANCHEZ: She'd be, like, complaining, start dropping stuff, and, like, we'd ask to help, and she'd say, 'No! I can get it!" She'd tell us to go away.

FRANK SANCHEZ: You react two ways. One with anger at yourself because you can't do anything about and probably frustration. Uh, with her -- but combined with her irritability it only made matters worse.

SHELLY DUVALL (V/0): Dee was desperate, her life was falling apart. She tried everything.

DEE SANCHEZ: I had tried just about every type of rub, every type of cream that came on the market. I'd go

buy it and give it a try. I'd tried a few, uh, I had an aunt that even made up some home remedies that were supposed to be from the old country that would help my arthritis and so forth. And nothing was doing any good.

SHELLY DUVALL (V/O): Then one day Dee's luck changed. Dee was introduced to new Eez-Away Relief.
Depiction:
Sanchez pouring Eez-Away on to cotton ball and rubbing onto her shoulder.
The results were immediate and dramatic.

DEE SANCHEZ: I think the first thing I noticed was just when I woke up in the morning just to [stretching] you know, you automatically stretch and I could stretch. I'm cooking again, my house is spotless again. I can clean.

DEE SANCHEZ (V/0): I can fix my little one's hair every morning before she goes to school,
Depiction:
Sanchez braiding her daughter's hair.
and sew,
Depiction:
Sanchez sewing on a button.
and scrub my floor the old fashioned way even though the kids laugh at me for doing it.
Depiction:
Sanchez mopping her floor.
I mean I can, I can hug my husband, and he can grab me all he wants. It doesn't hurt anymore.
Depiction:
Sanchez brushing her hair in front of the mirror and her husband comes and hugs her from behind

DEE SANCHEZ: Everything that I've ever done,
it's -- it's back again.
Depiction:
Sanchez and family taking a walk.

SHELLY DUVALL (V/0) Yes, Dee Sanchez is a happy woman today, enjoying life again. She's regained her health and her spirits, and her relationship with her family is better than ever.
Depiction:
Daughter jumping into Sanchez's arms and Sanchez catching her.
What does she think of Eez-Away Relief?

DEE SANCHEZ: Wow! Here I am and I work, and I'm, I'm me again. I'm Dee. And that's the best thing I can say, I'm me again.

DAVID FLYNN: This stuff must be very powerful.

SHELLY DUVALL: Well, David, it certainly worked for Dee Sanchez. Her story is so inspiring, but we have seen this same story again and again with other people. People who had lost mobility, stopped being active because of the pain. They were able to get up and enjoy life with the help of Eez-Away.

Depiction:

Dr. Jackson examining Minnie Benjamin's wrist.

SHELLY DUVALL (V/0): Another physician taking part in the Eez-Away test program was Dr. Thomas Jackson of Vero Beach, Florida. He's a cardiologist witha special concern for the effects of arthritis on a person's general health.

DR. THOMAS JACKSON: Cardiologist The arthritis is dangerous when -- when people tend to become sedentary. When they sit down and they tend to not move, and they tend not to walk, and not to exercise, they are limiting the-- their longevity, really. They don't do quite as well as people that are out there, active, and they're doing things. People who are older, many times feel, uh, young as long as they can do the things that, uh, younger people do.

I've had an opportunity to -- to give some samples, to see some people get responses, and to notice smiles on their faces and flexible joints. That's been good. That's been very good.

Depiction:

Dr. Jackson, in examining room, removing splint from Minnie Benjamin's wrist.

DR. JACKSON (V/0): Minnie Benjamin has juvenile rheumatoid arthritis. Now juvenile rheumatoid arthritis begins in the teenage years. It can begin in childhood. She's had it for a long time. When I saw Minnie, she had a problem with her ankle and with her wrist and was unable to walk properly, limping, and had a splint on her hand. I gave her Eez-Away because I had used it in a few other instances. I mentioned to her to use it according to the directions.

	She came back the next morning, the splint was off and she wasn't limping.
DR. JACKSON:	So I was really impressed with that overnight response. You know, it's rather fabulous, rather amazing to say the least.
MINNIE BENJAMIN: Medical technician	You see I'm not wearing my brace And I hope I don't have to put it on anymore because the Eez-Away has helped me get rid of it.
DAVID FLYNN:	Do you have arthritis? We'll tell you how to find out when 30 Minutes continues.
	Depiction: Two anchors sitting at desk, camera and cameraman off to the left
DR. THOMAS JACKSON: Cardiologist	I'm not going to put my reputation on the line for -- for something that's -- that I am not convinced will be of a benefit of my patients. I'm certainly not going to recommend something that's going to harm them. It works!
PHIL SABATO: Science Teacher	With this product, Eez-Away, I'm back to normal. I can walk again, I could bend down without being in pain, I could climb up the ladder. I don't have the pain that I did in the past.
SCOTT WALTER: Business owner	I really used Eez-Away quite a bit -- for two hours straight, and in that two hours time, I was able to bring my finger down and touch my hand. So I was, I was impressed by that. And I stayed with the product and now I've got the mobility where I can close my hand, I'm able to use my hand, close my fist, I'm able to write, and I'm free to work with my hands again.
SANDY DUVALL: Communications Specialist	After using Eez-Away, I don't have any problems. I have no pain, and I don't think about it any more. It's really, uh, it's like a new lease on life.
TOM BURKE: Business Executive	Before the product, I could only open and close very slowly. Ever since I've been using it now I have full use of the hand [opening and closing hand]. I was out playing football with the kids yesterday, because now I can catch and throw the football. And as long as I use it, I got no fear.
COMMERCIAL INSERT	Graphic: ATTENTION! ARTHRITIS SUFFERERS

161 Complaint

VOICE-OVER: Attention arthritis sufferers, the program you are now watching features a powerful Arthritis Treatment called Eez-Away Relief.
Graphic:
(Scrolling down the screen) The program that you are now watching features a powerful Arthritis Treatment called EEZ-AWAY RELIEF.
This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores.
However, if you or someone you love suffer from chronic aches, pains or stiffness, we have wonderful news.
Depiction:
Dr. Panicali rubbing Eez-Away on a woman's hand in an examining room
Superimposed text on close up of woman's hand:
Aches
Pains
Stiffness
For a limited time only the makers of Eez-Away are offering this amazing new pain remedy directly to you through this introductory TV offer.
Graphic:
Arm bent at 90 degree angle, with the elbow enhanced in red. A bottle of Eez-Away comes from the right of the screen and then tips toward the reddened elbow, the top flips up, the red disappears, the top closes and the bottle comes to stand at the right hand side of the screen.
At last, you won't have to live with that nagging pain in your hands, back, arms, elbows, knees and other joints. With Eez-Away, you'll regain the vitality you once had to enjoy life again with mobility and freedom. Simple pleasures like biking, fishing, tennis, and fun with your family will all return once the pain is gone.
Depictions:
Screen, divided into four quadrants, with pictures of people bicycling, fishing, playing tennis, and swimming
Superimposed text:
Biking,

Fishing
Tennis
Just apply Eez-Away to the painful area and soon you'll feel the power, the relief. Eez-Away is patented, and has no messy residue or strong medicine smell, and it's not taken internally so it won't upset your stomach like some pain relievers.
Depiction:
Man in locker room applying Eez-Away to his knee
Superimposed text:
Easy To Use
And doctors recommend it as safe, even on sensitive skin.
Depiction:
Dr. Panicali applying Eez-Away to patient's shoulder in examining room.
Superimposed text:
No Mess
No Strong Smell
With your order, you get an 8 oz. bottle of EEZ-AWAY Relief. That's a full 30 day supply.
We'll also include this beautiful, "Natural Care Workbook."
It's 60 pages of valuable information to give you strength and to keep you limber once the pain is gone.
Depiction:
Close up of the front cover of booklet. On the cover is a stop sign with the words "THE PAIN STOPS HERE." Some of the contents of the book are shown, including drawings of exercises, someone receiving a massage, and three progressively smaller profiles of the human body.
This $11.95 value is yours absolutely free.
Plus, if you call now, we'll also include another 8-oz. bottle of Eez-Away. Perfect for your purse or briefcase. It's a $24.95 value free, just for trying Eez-Away.
The entire Eez-Away package, including 2 8-oz. bottles plus the natural care workbook, would cost over $60.00 if sold separately. But now, through this special TV offer, you pay only $39.95.

We're so confident that Eez-Away Relief will work for you, that we're offering a complete money back guarantee.
Superimposed text:
30 DAY GUARANTEE
1-800-938-2828
If you're not convinced that Eez-Away is the most effective pain remedy that you've ever tried, return it for a full refund.
So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain. Call now.
Graphic:
Call
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$39.95 + $5.95 Shipping & Handling
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Lincoln, KS 67455
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END COMMERCIAL INSERT

UNIDENTIFIED WOMAN #2: It changed my life in the sense where I'm independent again. Where I can do for myself. I can tie my shoe. I can put my own stockings on, I don't need help to do that anymore. I can button my own clothes and comb my own hair, and it's making me feel like a woman again.

JOHN BOISE: I've been trying a lot of different medications over the past two or three years trying to eliminate arthritis in my joints, and since I used Eez-Away, it just worked and it's like a miracle.

MARIE GIORDANO: I wish everybody could feel the same relief that I felt three weeks ago when I first applied it. It's a wonderful feeling knowing that there is something out there that can work and it does work, it's positive thinking. And I would recommend it to everyone.
Depiction:

	Two anchors sitting at news desk with camera and cameraman to left of screen. Superimposed text: 30 Minutes
DAVID FLYNN:	Needless to say, we are impressed with this new product, so we spoke with the person who developed this revolutionary new pain remedy.
PETER OLSEN: Developer of Eez-Away	When we first developed Eez-Away, we knew it would relieve a lot of pain, and it has. Even doctors are amazed. As a matter of fact, we're so confident that we actually have a guarantee. Use the product for 30 days. If you're not satisfied, we'll return your money.
SHELLY DUVALL:	Do you have arthritis? Here are the warning signs.
SHELLY DUVALL (V/0):	Swelling in one or more joints. Early morning stiffness. Recurring pain or tenderness in any one joint. Inability to move a joint normally. Obvious redness and warmth in a joint. Unexpected weight loss, fever or weakness combined with joint pain. Graphic: Arthritis Warning-Signs Swelling Stiffness Pain or Tenderness Inability to Move Normally Redness and Warmth Weight Loss or Fever Weakness with Pain
DAVID FLYNN:	If you have symptoms, you should begin to treat them immediately. Arthritis can be controlled, but the sooner you start, the better.
DR. THOMAS JACKSON: Cardiologist	This medication is safe, topical, and will be able to get around many of the problems that we have not been able to get around before. Uh, it's going to make an impact, I believe, in the way we treat arthritis in the future.
JOHN BOISE:	Sometimes my hands got so bad that literally I would have to take some time off from work because I couldn't stand the pain in my knuckles. Uh, now it's no problem. I have no pain whatsoever, my hands are fine, and I, I can go back to work and enjoy it and make a living.

161 Complaint

SANDY DUVALL:	I followed the directions. It was real easy to put on, the smell didn't knock me out. And I used it three or four times the first day. And by the third time I put it on, I had absolutely no pain in my hand at all.
DR. PANICALI: Doctor of Chiropractic	Eez-Away Relief is a perfect example that you should never give up. Patients that suffer from daily pain, there's something out there that can help you. I thank God that this is something that can bring these patients relief.
DEE SANCHEZ:	Who knows what my life would have been like? I could still be walking around in such pain that's totally unnecessary. So, anybody that is watching this, try it. It's worth it.
COMMERCIAL INSERT	Graphic: ATTENTION! ARTHRITIS SUFFERERS
VOICE-OVER:	Attention arthritis sufferers, the program you are now watching features a powerful Arthritis Treatment called Eez-Away Relief. Graphic: (Scrolling down the screen) The program that you are now watching features a powerful Arthritis Treatment called EEZ-AWAY RELIEF. This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores. However, if you or someone you love suffer from chronic aches, pains or stiffness, we have wonderful news. Depiction: Dr. Panicali rubbing Eez-Away on a woman's hand in an examining room Superimposed text on close up of woman's hand: Aches Pains Stiffness For a limited time only the makers of Eez-Away are offering this amazing new pain remedy directly to you through this introductory TV offer. Graphic: Arm bent at 90 degree angle, with the elbow enhanced in red. A bottle of Eez-Away comes from the right of the screen and then tips toward the reddened elbow, the top flips up,

the red disappears, the top closes and the bottle comes to stand at the right hand side of the screen.

At last, you won't have to live with that nagging pain in your hands, back, arms, elbows, knees and other joints. With Eez-Away, you'll regain the vitality you once had to enjoy life again with mobility and freedom. Simple pleasures like biking, fishing, tennis, and fun with your family will all return once the pain is gone.

Depictions:

Screen, divided into four quadrants, with pictures of people bicycling, fishing, playing tennis, and swimming

Superimposed text:

Biking

Fishing

Tennis

Just apply Eez-Away to the painful area and soon you'll feel the power, the relief. Eez-Away is patented, and has no messy residue or strong medicine smell, and it's not taken internally so it won't upset your stomach like some pain relievers.

Depiction:

Man in locker room applying Eez-Away to his knee

Superimposed text:

Easy To Use

And doctors recommend it as safe, even on sensitive skin.

Depiction:

Dr. Panicali applying Eez-Away to patient's shoulder in examining room.

Superimposed text:

No Mess

No Strong Smell

With your order, you get an 8 oz. bottle of EEZ-AWAY Relief. That's a full 30 day supply.

We'll also include this beautiful, "Natural Care Workbook." It's 60 pages of valuable information to give you strength and to keep you limber once the pain is gone.

Depiction:

Close up of the front cover of booklet. On the cover is a stop sign with the words "THE

PAIN STOPS HERE." Some of the contents of the book are shown, including drawings of exercises, someone receiving a massage, and three progressively smaller profiles of the human body.
This $11.95 value is yours absolutely free.
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We're so confident that Eez-Away Relief will work for you, that we're offering a complete money back guarantee.
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If you're not convinced that Eez-Away is the most effective pain remedy that you've ever tried, return it for a full refund.
So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain. Call now.
Graphic:

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1-800-938-2828.

END COMMERCIAL INSERT

DAVID FLYNN: I hope you've enjoyed this 30 Minutes. And I hope we've shown you that you don't need to sit still for arthritis pain any longer.

	Superimposed text at bottom of screen: 1-800-938-2828
SHELLY DUVALL:	Yes. Now you can fight back. It's your life, don't feel old before your time. If you have chronic pain, find a remedy that works for you and begin treatment right away. You'll be glad you did.
DAVID FLYNN:	Good luck, and we'll see you next time on "30 Minutes."
SHELLY DUVALL:	Good bye.
	Depiction: The two anchors sitting at the desk with a camera and cameraman in the left part of the screen.
	Superimposed text: Network Marketing International, Inc. (c) 1991.
	Graphic: This program has been a paid for advertisement by Olsen Labs Inc.
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EXHIBIT B

EEZ-AWAY THE PAIN

VOICE-OVER:	This program is a paid for advertisement by Olsen Labs, Incorporated. Graphic: This program is a paid for advertisement by Olsen Labs, Inc.
EILEEN FULTON:	Hi there, I'm Eileen Fulton. Oh, yes, I play that character on a daytime soap opera. Now if you or someone you know is suffering from arthritis, joint or muscle pain, I've got the best news for you, it's called Eez-Away Relief, and believe me, it works and it works fast, and I know because I use it and I just love it. Now please stay tuned because we're gonna tell you more.
MARIE GIORDANO:	It's a good feeling about yourself. You're able to smile again, be happy again.
UNIDENTIFIED WOMAN #1:	I'm very excited, yes, I'm very excited.
UNIDENTIFIED WOMAN #2:	They wanna borrow it, but no one's getting it.
SCOTT WALTER:	When I tried Eez-Away, I couldn't believe it.
SANDY DUVALL:	A product that says it'll work that does work.
TOM BURKE:	And it works every time.
DEE SANCHEZ:	Wow! That's all, that's all I can do. Wow.
VOICE-OVER:	This is the good life. For most people it means free time, friendship, happiness and good health. We all want to stay active no matter what our age, but tragically there is one common ailment that deprives many of us of this good life -- Arthritis. Depictions: People playing tennis, shuffleboard, horseshoes, fishing, swimming, and biking.
VOICE-OVER:	Stay tuned, for in the next few moments, you'll learn about a fabulous new arthritis pain remedy called Eez-Away Relief. Graphic: EEZ-AWAY THE PAIN We welcome you now to "EEZ-AWAY THE PAIN," with your host, one of daytime TV's most popular stars, Eileen Fulton.
EILEEN FULTON:	Oh, for over 30 years I've been playing this real fun character on a daytime soap opera. I've seen a lot of changes since then. Television's come a long way, well so have I. Look, I'm not a teenager anymore, thank

goodness for that. But I have to admit, I have noticed some little aches and pains. My doctor said it's arthritis.

I'm sorry to say that there's no cure for arthritis just yet, but we can control the symptoms now, can't we. Many of us would just do anything to get rid of some of these aches and pains. Of course there's some of us who have serious arthritis, and that can be crippling.

I want you to listen to some of these stories.

JULIA GABOR:
Arthritis Sufferer

I had arthritis so bad. I was in bed for 6 months, no exercise. I had to get up, I was in a wheelchair.

SAMUEL GREEN:
Arthritis Sufferer

I had arthritis in these hands so bad it felt, it felt like somebody had a knife and then he'd rammed it in there [indicating his hand], then pulled it.

JANNIE BUHR:
Arthritis Suffer

It's very hard on me now with visiting the grandchildren. I do not stay very long with them and I've always loved them and planned to stay with them before. But I can't, I just can't do it anymore.

MARIE GIORDANO:
Arthritis Sufferer

Well, I had my back, lower back pain for about three years, and it was just really so bad I couldn't walk. I had to take time off from work, and I was laid up for really two weeks at home on my back flat. I tried many things, and nothing really worked.

EILEEN FULTON:

Well, I certainly wasn't about to let that happen to me. I'm having too much fun to let a little arthritis slow me down. I have spent years searching for something that could relieve the pain so I could continue doing all the things I love to do. Finally, I found the answer, and it's called Eez-Away Relief. And it is amazing because it really does work, and it works fast. That's why I'm so excited to be telling you about this wonderful product. So stay tuned, because later, we'll tell you how you can get some of this amazing pain reliever for your very own self.

But first, let's hear from chiropractor Dr. John Panicali. He's been dispensing Eez-Away Relief to his patients for several years. We asked him why arthritis is so difficult to treat.

Depiction:

Dr. Panicali with patient in examining room.

161 Complaint

DR. JOHN PANICALI: Doctor of Chiropractic	I find that the worst thing about arthritis is that half the people give up. They feel that once they have it there's nothing that can be done, and that's not necessarily true. We find that they give up on life. They become depressed, their exercise and their activity is limited. A lot of older patients start to gain weight because they are less active. So, it's a disease that affects the body, but I find that in more cases it affects the mind. Depiction: Dr. Panicali applying Eez-Away to a patient's shoulder and instructing patient on how to use the product.
EILEEN FULTON:	Dr. Panicali has had great results with Eez-Away Relief, but let him tell you himself.
DR. PANICALI:	Patients that we've been working with for many months now have reached a certain point of relief, but at that point, we've reached a stone wall. So we tried this product on those patients. And patients are coming back and telling me, "Doc, I don't know what that stuff was, but I'm getting further motion, I'm doing things now I never did before, for the first time I'm climbing stairs without pain, I can actually look over my shoulder when I back out of my driveway." The product is natural. There's no side effects. There's no way at all this product can harm you. The best thing I find with Eez-Away Relief is that patients can return to their normal lifestyle. Patients have found that they can go on, they can do activities around the house, they can go back to their normal lifestyle, perform activities that they thought were long gone. Depiction: Dr. Panicali applying Eez-Away to a patient's shoulder and instructing patient on how to use product.
EILEEN FULTON:	Dr. Panicali introduced many of his patients to Eez-Away Relief. We asked a few of them for their reviews:
PAT MURANO: Businessman	I'm the type of guy, just like you are, I don't believe everything somebody tells me unless I try it for myself. I've tried the product, Eez-Away Relief, I know it works.

JOHN BOISE: Plant Manager	I tried it, every couple of hours for about three or four days, and the pain just disappeared completely. And so now I've been using it like once a week, and the pain just stays away; and I can start moving my hands a lot better than I ever used to be able to move them.
PATRICIA ROBINSON: Travel Agent	I couldn't put up my hair. I couldn't lift my arms, I couldn't do anything with my right arm. And I started using the Eez-Away and I can now lift it.
MARIE GIORDANO: Teacher's Aide	When I first applied it, I had very little hope that anything was going to help me. I have arthritis, and I figured that was it. But it really made me comfortable after the pain was gone. I felt "aahhh."
EILEEN FULTON:	I want you to know these folks have not been paid to endorse this product. They're real people who've had real results. Eez-Away is giving a lot of people hope. Even people who've tried it all. Before I tried Eez-Away, I wanted to know if it was completely safe. I can assure you that Eez-Away meets with all FDA requirements and it contains only ingredients that are recognized by the FDA as both safe and effective for pain relief. Now, right now we're going to take a moment to tell you once more how you can order Eez-Away for your very own, so you stay tuned.
DEE SANCHEZ:	This just worked. I put it on and I don't hurt - it's everything I could have ever have asked for, it's given me back my life.
	Superimposed text: EEZ-AWAY gets results.
COMMERCIAL INSERT	Graphic: Attention! Arthritis Sufferers. The program that you are now watching features a powerful arthritis treatment called EEZ-AWAY RELIEF.
VOICE-OVER:	Attention arthritis sufferers, the program you are now watching features a powerful arthritis remedy called Eez-Away Relief. This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores. However, if you or someone you love suffers from chronic aches, pain or stiffness we have wonderful news.
	Depiction:

Dr. Panicali rubbing Eez-Away on a woman's hand in the examining room.
Superimposed text on close up of woman's hand:
Aches
Pains
Stiffness
For a limited time only, the makers of Eez-Away are offering this new pain remedy directly to you through this special introductory TV offer.
At last, you won't have to live with that nagging pain in your hands, back, arms, elbows, knees and other joints.
Graphic:
Arm bent at 90 degree angle, with the elbow enhanced in red. A bottle of Eez-Away comes from the right of the screen and tips toward the reddened elbow, the top flips up, the red disappears, the top closes and the bottle comes to stand at the right hand side of the screen.
Superimposed text:
Hands
Back
Elbows
Knees
Other Joints
With Eez-Away, you'll regain the vitality you once had to enjoy life again with mobility and freedom. Simple pleasures like biking, fishing, tennis, and fun with your family will all return once the pain is gone.
Depiction:
Screen, divided into four quadrants, with pictures of people bicycling, fishing, playing tennis, and swimming
Superimposed text:
Biking
Fishing
Tennis
Just apply Eez-Away to the painful area and soon you'll feel the power, the relief.
Depiction:
Man in locker room applying Eez-Away.
Superimposed text:
Easy to use.

Eez-Away is patented. It has no messy residue or strong medicine smell, and it's not taken internally so it won't upset your stomach like some pain relievers.
Depiction:
Dr. Panicali applying Eez-Away to woman's shoulder in examining room.
Superimposed text:
No mess
No strong smell
And doctors recommend it as safe even for sensitive skin.
Depiction:
Dr. Panicali giving bottle of Eez-Away to patient.
With your order you get two 8 oz. bottles of Eez-Away Relief. That's a full 60 day supply.
Plus, when you call we'll also send you this valuable guide to natural arthritis treatment: "The Pain Stops Here." It shows you how exercise, diet, posture and more can fight the affects of arthritis and put you in control again. It's an $11.95 value, but it can be yours free just for trying Eez-Away.
And once you try Eez-Away, we know you'll want to spread the word. So with your order we'll also send you this additional 8 oz. bottle of Eez-Away to share with a friend or loved one. This "pass-along" bottle makes a great gift and it's yours absolutely free if you call now.
When you order you'll get two 8 oz. bottles of Eez-Away plus the free "pass-along" bottle for a total of three bottles of Eez-Away Relief. That's a 90 day supply. Plus, you also get the arthritis careworkbook, "The Pain Stops Here," absolutely free.
The entire package including all this would cost over 80 dollars if sold separately, but now through this special TV offer, it can be yours for $29.95. That's a savings of over 50 dollars.
Now save money while you stop the pain just pennies a day for Eez-Away Relief.
We're so confident that Eez-Away will work for you that we offer a complete money back guarantee.
Superimposed text:

30 Day Guarantee.
If you're not convinced that Eez-Away is the most effective pain remedy you've ever tried, return it for a full refund and keep the arthritis workbook as our gift to you.
Superimposed text (appears above Guarantee, in smaller type): Individual Results May Vary
So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain. Call now.
Superimposed text:
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Graphic:
EEZ-AWAY RELIEF $29.95 *plus $5.95 shipping,*
10847 Sherman Way *CA resident add sales tax*
Sun Valley, CA 91352
1-800-674-5700
allow 1-3 weeks delivery
30 day money back guarantee
Stop the pain. Enjoy life again with Eez-Away. With this special offer, you get two bottles of Eez-Away and a natural care workbook packed with information and exercises to keep you limber and build strength. Call now and get a third bottle free to share. The entire 80 dollar Eez-Away package can be yours for just $29.95 plus shipping. There's no risk. You have nothing to lose but the pain. Use your credit card and call 1-800-647-5700. Or mail check or money order to EEZ-AWAY.

END COMMERCIAL INSERT

Superimposed text:
(displayed during all of the following testimonials)
1-800-674-5700

JANNIE BUHR: Now, I can move the knee without any pain to it. I'm always surprised that I can use them and there's no pain, I, you know, I sit down, I lay down. I don't have the pain that I always had.

SCOTT WALTER: I stayed with the product and now I've got the mobility where I can close my hand, I'm able to use my hand, close my fist, able to write and free to work with my hands again.

SAMUEL GREEN: But now that I use this Eez-Away, see, you can see for yourself [moving hands].

JULIA GABOR: Well I just used it on my shoulder and I think I knew that that was helping my shoulder within, within a week.

UNIDENTIFIED WOMAN 1: Since I've been using Eez-Away, I have a better grip and I can do my laundry better. I can do my housework much better and I can also comb my hair much better because I couldn't raise my hand or hold a grip on the comb to comb my hair.

UNIDENTIFIED WOMAN #2: [Shuffling cards] And at one time I wasn't able to shuffle a deck of cards, as I'm doing now, since I've used Eez-Away I'm able to shuffle the cards on my own without having someone do it for me, and it's the greatest thing to know that you can do it on your own.

VOICE-OVER: We welcome you back to "EEZ-AWAY THE PAIN," with you host, one of daytime TV's most popular stars, Eileen Fulton.

Graphic:

Eez-Away the Pain

With

Eileen Fulton

EILEEN FULTON: When you're in pain, sometimes the slightest little movement can be so difficult. And if you're like I am, you'll search everywhere trying to find the right medication. And there's so many things on the market today, so what makes Eez-Away so different? Well, for me it works and from the testimony of all these other people, you see I'm not by myself. Now I want you to meet a woman who has really suffered terribly from arthritis pain until she found Eez-Away. This is the true story of Dee Sanchez.

Depiction:

Sanchez family having a picnic.

Dee Sanchez lives in Lindhurst, New Jersey, she's married and the mother of two girls. From these pictures, you wouldn't know that just a few short months ago she was suffering from severe chronic arthritis.

DEE SANCHEZ: I just plain hurt. Sometimes I just wanted to sit down and cry because it was so frustrating, because I couldn't, I couldn't do all the things that were me. They're simple things, to a lot of people, it wouldn't matter. Cleaning my house, taking the curtains down, washing

161 Complaint

them, hanging them back up. I couldn't do that.

EILEEN FULTON: Dee was in excruciating pain. And it wasn't only she who was suffering. The deterioration of Dee's physical and mental state was taking it's toll on her family as well.

FRANK SANCHEZ: We have a, a family that's close and yet we all want to do things together and, no fault to Dee on this thing, if I were in pain constantly, uh, your nerves are on edge and things that would not irritate someone normally the slightest little thing can, can set off an argument when none need to have come -- you tend to overreact when you're hurting.

VANESSA SANCHEZ: She'd be like complaining, she kept dropping stuff, and like we'd ask to help, and she'd say "No I can get it!" And she'd just tell us to go away.

FRANK SANCHEZ: You react in two ways, one with anger at yourself because you can't do anything about it, and probably frustration with her, combined with her irritability, it only made matters worse.

EILEEN FULTON: Dee was desperate, her life was falling apart. She tried everything.

Superimposed text:

The program you are watching is a paid advertisement for Eez-Away Relief.

DEE SANCHEZ: I had tried just about every type of rub, every type of cream that came on the market. I'd go buy it and give it a try. I'd tried a few, uh, I had an aunt who even made up some home remedies that were supposed to be from the old country that would help my arthritis and so forth. And nothing was doing any good.

Depiction:

Dee pouring Eez-Away onto a cotton ball and applying to her shoulders.

EILEEN FULTON: Then one day Dee's luck changed. She was introduced to new Eez-Away Relief. The results were immediate and dramatic.

DEE SANCHEZ: I think the first thing I noticed was just that I woke up in the morning just to, you know you automatically stretch, and I could stretch. I'm cooking again, my house is spotless again, I can clean, I can fix my little one's hair every morning before she goes to school, sew, and scrub my floors the old fashioned way even

though the kids laugh at me for doing it, I can I mean I can hug my husband and he can grab me all he wants - it doesn't hurt anymore, everything that I've ever done, it's back again.

Depictions:

Dee sewing, mopping, doing her hair and her daughter's and hugging her husband.

EILEEN FULTON: Yes, Dee Sanchez is a happy woman today. Enjoying life again. She's regained her health, and her spirit and her relationship with her family is better than ever. What does she think of Eez-Away Relief?

DEE SANCHEZ: Wow! Here I am and I work and I'm, I'm me again, I'm Dee and that's the best thing I can say, I'm me again.

EILEEN FULTON: [Playing piano] Do you know, when my arthritis flares up I can't even play this simplest little piece, and it breaks my heart because I really love the piano. But now that I have my Eez-Away, there's no stopping me, no sir. If you have pain that limits your activity, don't you wait another minute--Eez-Away really does work. But don't just take it from me, here's another doctor who's become an Eez-Away believer.

Depiction:

Dr. Jackson, in an examining room, examining Minnie Benjamin's wrist.

This is Doctor Thomas Jackson of Vero Beach, Florida. He's a cardiologist with special concern for the effects of arthritis on a person's general health.

DR. JACKSON: Cardiologist Arthritis is dangerous when, when people tend to become sedentary, when they sit down and they tend to not move, they tend not to walk, not to exercise. They are limiting the, their longevity, really, they don't do quite as well as people that are out there, active, and they're doing things. People who are older, many times, feel, uh, young as long as they can do the things that, uh, younger people do. I've had an opportunity to, to give some samples, to see some people get responses and to notice smiles on their faces and flexible joints. That's been good, that's been very good.

Depiction:

Doctor Jackson, in examining room, removing wrist splint from Minnie Benjamin.
Minnie Benjamin has juvenile rheumatoid arthritis. Now juvenile rheumatoid arthritis begins in the teenage years. It can begin in childhood. She's had it for a long time. When I saw Minnie, she had a problem with her ankle and with her wrist and was unable to walk properly, limping, and had a splint on her hand. I gave her Eez-Away because I had used it in a few other instances. I mentioned to her to use it according to the directions. She came back the next morning, the splint was off and she wasn't limping.
So I was really impressed with that overnight response. You know, it's rather fabulous, rather amazing to say the least.

MINNIE BENJAMIN:
Medical Technician
You see I'm not wearing my brace. And I hope I don't have to put it on anymore because the Eez-Away has helped me get rid of it.

PHIL SABATO:
Science Teacher
With this product, Eez-Away, I'm back to normal. I can walk again, I could bend down without being in pain, I could climb up the ladder. I don't have the pain that I did in the past.

SCOTT WALTER:
Business Owner
I really used Eez-Away quite a bit for two hours straight, and in that two hours time I was able to bring my finger down and touch my hand. So I was, I was impressed by that.

JULIA GABOR:
Arthritis Sufferer
I'm very satisfied with it and I intend to use it until even, until I forget that I even have that grab pain every now and then.

SANDY DUVALL:
Communications Specialist
After using Eez-Away, I don't have any problems. I have no pain, and I don't think about it anymore. It's really, uh, it's like a new lease on life.

TOM BURKE:
Business Executive
Before the product I could only open and close very slowly. But since I've been using it, I have full use of the hands. [Opens and closes his hands]. I was out playing football with the kids yesterday, because now I can catch and throw the football and as long as I use it I got my freedom.

DR. JACKSON:
I'm not going to put my reputation on the line or for something that I am not convinced will be of a benefit to my patients. And I'm certainly not going to recommend something that's gonna harm them. It works. It's simple.

It is effective. The proof is in the pudding. All I say is try the pudding, you know, taste it for yourself, try it.

EILEEN FULTON: Eez-Away is so easy to use, I'll show you how in just a minute. But first, here's another chance to order Eez-Away through our introductory TV offer.

COMMERCIAL INSERT Graphic:
Attention! Arthritis Sufferers.
The program that you are now watching features a powerful arthritis treatment called EEZ-AWAY RELIEF.

VOICE-OVER: Attention arthritis sufferers, the program you are now watching features a powerful arthritis remedy called Eez-Away Relief.
This breakthrough pain reliever is so new, so revolutionary, that it's not yet available in stores.
However, if you or someone you love suffers from chronic aches, pain or stiffness we have wonderful news.
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Dr. Panicali rubbing Eez-Away on a woman's hand in the examining room.
Superimposed text on close up of woman's hand:
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Pains
Stiffness
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Arm bent at 90 degree angle, with the elbow enhanced in red. A bottle of Eez-Away comes from the right of the screen and tips toward the reddened elbow, the top flips up, the red disappears, the top closes and the bottle comes to stand at the right hand side of the screen.
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Man in locker room applying Eez-Away.
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And doctors recommend it as safe even for sensitive skin.
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Dr. Panicali giving bottle of Eez-Away to patient.
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The entire package including all this would cost over 80 dollars if sold separately, but now through this special TV offer, it can be yours for $29.95. That's a savings of over 50 dollars. Now save money while you stop the pain just pennies a day for Eez-Away Relief.

We're so confident that Eez-Away will work for you that we offer a complete money back guarantee.

Superimposed text: 30 Day Guarantee.

If you're not convinced that Eez-Away is the most effective pain remedy you've ever tried, return it for a full refund and keep the arthritis workbook as our gift to you.

Superimposed text (appears above Guarantee, in smaller type): Individual Results May Vary

So if you have arthritis that won't go away, order Eez-Away now. It's guaranteed, so you have nothing to lose but the pain. Call now.

Superimposed text:

The program you are watching is a paid advertisement for EEZ-AWAY RELIEF.

Graphic:

EEZ-AWAY RELIEF $29.95 *plus $5.95 shipping*
10847 Sherman Way *CA residents add sales tax*
Sun Valley, CA 91352
1-800-674-5700
allow 1-3 weeks delivery
30 day money back guarantee

Stop the pain. Enjoy life again with Eez-Away. With this special offer, you get two bottles of Eez-Away and a natural care workbook packed with information and exercises to keep you limber and build strength. Call now and get a third bottle free to share. The entire 80 dollar Eez-Away package can be yours for just $29.95 plus shipping. There's no risk. You have nothing to lose but the pain. Use your credit card and

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END COMMERCIAL INSERT

Superimposed text:
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UNIDENTIFIED WOMAN #2: It's changed my life in the sense where I'm independent again, where I can do for myself, I can tie my shoe, I can put my own stockings on, I don't need help to do that anymore. I can button my own clothes and comb my own hair and it's making me feel like a woman again.

JOHN BOISE: I've been trying a lot of different medications over the past two or three years trying to eliminate arthritis in my joints, and since I used Eez-Away, it just worked and it's like a miracle.

JULIA GABOR: I'm very grateful that somebody told me about it. It's nothing to keep secret.

SCOTT WALTER: Listen, I gotta tell you right now, you'd better line up and you'd better start signing up, because this stuff works.

MARIE GIORDANO: I wish everybody could feel the same relief that I felt 3 weeks ago when I first applied it. It's a wonderful feeling knowing that there is something out there that can work and it does work. It's positive thinking, and I would recommend it to everyone.

VOICE-OVER: We welcome you back to "EEZ-AWAY THE PAIN," with your host, one of daytime TV's most popular stars, Eileen Fulton.

Graphic:
Eez-Away the Pain
With
Eileen Fulton

EILEEN FULTON: I'm getting ready to go out, and I'm going to dance all night long with the help of Eez-Away. Not so long ago, I couldn't do that, but now I'm just going to apply Eez-Away. It works so fast and it lasts so long, now I'm going to have a wonderful time. Now let's meet the man who developed this revolutionary pain remedy, Mr. Peter Olsen.

PETER OLSEN:
Developer of Eez-Away
When we first developed Eez-Away, we knew it would relieve a lot of pain, and it has. Even doctors are amazed. As a matter of fact,

we're so confident that we actually have a guarantee. Use the product for 30 days. If you're not satisfied, we'll return your money.

DR. JACKSON:
Cardiologist
This medication is safe, topical, and will be able to get around many of the problems that we have not been able to get around before. It's going to make an impact, I believe, in the way we treat arthritis in the future.

JOHN BOISE:
Sometimes my hands got so bad that literally I would have to take some time off from work because I couldn't stand the pain in my knuckles. Now there's no problem, I have no pain whatsoever, my hands are fine, and I can go back to work and enjoy it and make a living.

SANDY DUVALL:
I followed the directions. It was really easy to put on, the smell didn't knock me out. And I used it three or four times the first day. And by the third time I put it on, I had absolutely no pain in my hand at all.

DR. PANICALI:
Doctor of Chiropractic
Eez-Away Relief is a perfect example that you should never give up. Patients that suffer from daily pain, there's something out there that can help you. I thank God that this is something that can bring these patients relief.

DEE SANCHEZ:
Who knows what my life would have been like I could still be walking around in such pain that's totally unnecessary. So anybody that is watching this, try it, it's worth it.

EILEEN FULTON:
With this money back guarantee, what are you waiting for? If you have arthritis you simply must try Eez-Away. By not treating your arthritis, you actually may be making it worse. Here again is the information on how to order yours.

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VOICE-OVER:
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END COMMERCIAL INSERT

EILEEN FULTON: Well, I certainly hope you've enjoyed our show today. I have had a good time doing it for you. And I hope we've helped you realize you don't have to sit still for arthritis pain anymore, not now that we have Eez-Away. So yes, yes, you can fight back, so do. It's your life.
Superimposed text (from here until end):
1-800-647-5700
Don't feel old before your time. If you have pain, try Eez-Away right now. Boy you'll be so glad you did. Well, I have to go, so good luck to you and bye.
Depiction:

Eileen Fulton getting into limousine and driving away from mansion.
Superimposed text:
Presented by Olsen Labs, Inc.
Produced by New Look Production.
Copyright 1993. Olsen Tabs, Inc.
Graphic:
This program is a paid for advertisement by Olsen Labs, Inc.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint 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 violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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, 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 Olsen Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 11088 Alhambra Street, Leawood, Kansas.

Respondent Richfield Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 11088 Alhambra Street, Leawood, Kansas.

Respondent Peter F. Olsen is an officer and director of Olsen Laboratories, Inc. and Richfield Distributors, Inc. He formulates, directs and controls the acts and practices of Olsen Laboratories,Inc.

and Richfield Distributors, Inc., and his address is the same as that of said corporations.

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 respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' 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 Eez-Away Relief or any substantially similar 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 the product is a new or unique method of treatment for arthritis pain or is a breakthrough in the treatment of arthritis pain.

For purposes of this provision, "substantially similar product" shall mean any external analgesic that contains menthol as the active ingredient.

II.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' 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 drug in or affecting commerce, as "drug" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. The product rapidly eliminates severe pain and physical disabilities suffered by those persons with arthritis or other similar conditions; or

B. The product provides long-term pain relief; or

C. The product increases the range of motion in the affected joints of those persons with arthritis or other similar conditions; or

D. The product is more effective than other products in relieving pain or in treating the symptoms of those persons with arthritis or other similar conditions; or

E. The product relieves the pain of those persons with arthritis or other similar conditions by penetrating through the skin to the affected joint;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Provided that, with respect to any representation covered by subparts A, B and D of this Part and any representation covered by subpart C of this Part other than a representation that the product may temporarily increase the range of motion in the affected joints of people with arthritis by temporarily relieving minor pain in those joints, "competent and reliable scientific evidence" shall mean adequate and well-controlled, double-blind clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing.

III.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any corporation,

subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the health or medical benefits of any such product or service unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service for personal or household use, 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, that such product or service is a new or unique method of treatment for any disease or condition, or is a breakthrough in the treatment of any disease or condition.

V.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' agents,

representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test or study.

VI.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service for personal or household use, 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 any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of such product or service represents the typical or ordinary experience of members of the public who use such product or service, unless respondents, at the time of making such representation, possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Provided, however, that respondents may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondents disclose clearly and prominently and in close proximity to the endorsement what the generally expected performance would be in the depicted

circumstances or the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

VII.

It is further ordered, That respondents, Olsen Laboratories, Inc. and Richfield Distributors, Inc., corporations, their successors and assigns, and their officers; and Peter F. Olsen, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling, or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any commercial or video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed to be a presentation of ordering instructions so as to require the display of the disclosure provided herein.

VIII.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IX.

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

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

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

X.

It is further ordered, That respondents Olsen Laboratories, Inc. and Richfield Distributors, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in their 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, or any other corporate change that may affect compliance obligations arising out of this order.

XI.

It is further ordered, That respondents Olsen Laboratories, Inc. and Richfield Distributors, Inc. shall:

A. Within thirty (30) days of service of this order, provide a copy of this order to each of their 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 their 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 who are associated with it or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

XII.

It is further ordered, That respondent Peter F. Olsen shall, for a period of seven (7) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. 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.

XIII.

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.

Commissioner Azcuenaga recused.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

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

Docket C-3557. Complaint, Feb. 14, 1995--Decision, Feb. 14, 1995

This consent order requires, among other things, the New Jersey-based corporation to divest its tetanus and diphtheria vaccine business to a Commission-approved buyer; to license Cyanamid's rotavirus vaccine research to a Commission-approved licensee; and to change a previously established licensing agreement to ensure that it does not obtain certain competitively sensitive information. The consent order also prohibits, for ten years, the respondent from acquiring any interest in any entity engaged in the clinical development, manufacture, or sale of tetanus, diphtheria, or rotavirus vaccines in the United States without prior Commission approval.

Appearances

For the Commission: *Claudia Higgins, Ann Malester* and *Mary Lou Steptoe.*

For the respondent: *Michael Sohn, Arnold & Porter*, Washington, D.C. *Kenneth Logan, Simpson, Thacher & Bartlett*, New York, N.Y. *Kenneth Prince, Sherman & Sterling*, New York, N.Y.

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, American Home Products Corporation ("AHP"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting stock of American Cyanamid Company ("Cyanamid"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent American Home Products Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

II. THE ACQUIRED COMPANY

2. American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maine, with its principal executive offices located at One Cyanamid Plaza, Wayne, New Jersey.

III. JURISDICTION

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

IV. THE ACQUISITION

4. On or about August 17, 1994, AHP and Cyanamid signed an Agreement and Plan of Merger whereby AHP would acquire 100 percent of the voting securities of Cyanamid for approximately $9.7 billion ("Acquisition").

V. THE RELEVANT MARKETS

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

(1) The manufacture and sale of combined tetanus and diphtheria vaccine approved by the United States Food and Drug Administration

("FDA") for sale in the United States for adults and children seven years old and older, known as "adult Td";

(2) The manufacture and sale of combined diphtheria and tetanus vaccine approved by the FDA for sale in the United States for children between the ages of two months and seven years, known as "pediatric DT";

(3) The manufacture and sale of tetanus vaccine approved by the FDA for sale in the United States, known as "tetanus toxoid";

(4) The research and development of a vaccine against Rotavirus infection in humans; and

(5) The research, development, production and sale of cytokines for white blood cell and platelet restoration.

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

VI. STRUCTURES OF THE MARKETS

7. The market for the manufacture and sale of combined tetanus and diphtheria vaccine approved by the FDA for use for adults and children seven years old or older, known as "adult Td," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

8. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of adult Td in the United States.

9. The market for the manufacture and sale of combined diphtheria and tetanus vaccine for children between the ages of two months and seven years, known as "pediatric DT," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

10. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of pediatric DT in the United States.

11. The market for the manufacture and sale of tetanus vaccine, known as "tetanus toxoid," is highly concentrated as measured by the Herfindahl-Hirschmann Index.

12. AHP and Cyanamid are actual competitors in the relevant market for the manufacture and sale of tetanus toxoid in the United States.

13. The research and development market for a Rotavirus vaccine is highly concentrated as measured by the Herfindahl-Hirschmann

Index. As of the date of this complaint, there are only three producers of vaccines with research projects either in clinical development or near clinical development aimed at developing a vaccine against Rotavirus infection in humans.

14. AHP and Cyanamid are actual competitors in the relevant market for the research and development of a Rotavirus vaccine for sale in the United States.

15. The market for research, development, production and marketing of cytokines for white blood cell and platelet restoration is highly concentrated as measured by the Herfindahl-Hirschmann Index. As of the date of this complaint, the only cytokines for the restoration of white blood cells and platelets approved by the FDA for sale in the U.S. are: Granulocyte-Macrophage colony stimulating factor ("GM-CSF") manufactured and sold by Cyanamid and Granulocyte colony stimulating factor ("G-CSF") manufactured and sold by Amgen. Three cytokines for the restoration of white blood cells and platelets are pending FDA approval for sale in the U.S. These are: GM-CSF manufactured by Sandoz, under license from AHP; Interleukin-3 manufactured by Sandoz, under license from AHP; and Pixy321, also identified as rhIL-3/rhGM-CSF S. cerevisiae fusion protein, manufactured by Cyanamid.

16. AHP is a potential competitor of Cyanamid in the market for cytokines for white blood cell and platelet restoration.

VII. BARRIERS TO ENTRY

17. Entry into the adult Td, pediatric DT, and tetanus toxoid vaccine markets is difficult and time consuming. Entry into the manufacture and sale of tetanus and diphtheria vaccines is governed by the requirements of the FDA. The minimum time that it would take for a firm to complete FDA requirements to enter into the tetanus and diphtheria vaccine markets would be several years.

18. Entry into the relevant Rotavirus vaccine research and development market is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial vaccine will result.

19. Entry into the cytokines for white blood cell and platelet restoration market is difficult and time consuming. FDA regulations create long lead times for the introduction of new drugs; patents create large and often insurmountable barriers to entry.

VIII. EFFECTS OF THE ACQUISITION

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

a. Eliminating actual, direct and substantial competition between AHP and Cyanamid in the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

b. Increasing the likelihood that AHP will unilaterally exercise market power in the relevant cytokines for white blood cell and platelet restoration market and the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

c. Creating a dominant firm in the relevant adult Td, pediatric DT, and tetanus toxoid vaccine markets;

d. Eliminating actual, direct competition for research and development between AHP and Cyanamid in the Rotavirus vaccine research and development market and in the cytokines for white blood cell and platelet restoration market;

e. Enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in each of the relevant markets; and

f. Eliminating potential competition in the relevant Rotavirus vaccine research and development market and cytokines for white blood cell and platelet restoration market.

IX. VIOLATIONS CHARGED

21. 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.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain stock of American Cyanamid Company ("Cyanamid") and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 American Home Products Corporation ("AHP") is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

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. DEFINITIONS

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

A. "*AHP*" means American Home Products Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by AHP, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Cyanamid*" means American Cyanamid Company.

C. "*Acquirer*" means the entity to whom AHP shall divest AHP's Tetanus and Diphtheria Vaccine Assets pursuant to paragraph II of this order.

D. "*New Acquirer*" means the entity to whom the trustee shall divest AHP's Tetanus and Diphtheria Vaccine Assets pursuant to paragraph IV of this order.

E. "*Rotavirus Licensee*" means the entity to whom AHP shall license Cyanamid's Rotavirus Vaccine Research pursuant to paragraph V of this order.

F. "*Respondent*" means AHP.

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

H. "*Acquisition*" means the acquisition by AHP of the common stock of Cyanamid pursuant to a tender offer commenced on August 10, 1994.

I. "*AHP's Tetanus and Diphtheria Vaccine Assets*" means AHP's assets relating to the manufacture and sale of AHP's Tetanus and Diphtheria Vaccines that are not part of AHP's physical facilities or other tangible assets. "AHP's Tetanus and Diphtheria Vaccine 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 or the New Acquirer, as applicable, to use such information, software used solely in connection with AHP's Tetanus and Diphtheria Vaccines and all data, materials and information relating to United States Food and Drug Administration

("FDA") approvals for Tetanus and Diphtheria Vaccines. "AHP's Tetanus and Diphtheria Vaccine Assets" do not include any manufacturing assets of AHP or any assets acquired by AHP from American Cyanamid as a result of the Acquisition or AHP's Vaccine Filling and Packaging Assets.

J. "*AHP's Vaccine Filling and Packaging Assets*" means a non-exclusive license to all patents, trade secrets, technology and know-how relating to filling vials, syringes or other forms of filling or packaging used by AHP for Tetanus and Diphtheria Vaccines at any time up to and including the date of the Acquisition, including but not limited to the Tubex® filling system. "AHP's Vaccine Filling and Packaging Assets" do not include any manufacturing assets of AHP or any assets acquired by AHP from American Cyanamid as a result of the Acquisition.

K. "*Tetanus and Diphtheria Vaccines*" means vaccines used to create and maintain antitoxin levels in human beings to prevent tetanus and/or diphtheria, including tetanus toxoid vaccine, tetanus-diphtheria toxoids vaccine (adult) and diphtheria-tetanus toxoids vaccine (pediatric), approved by the FDA for sale in the United States.

L. "*Contract Manufacture*" means the manufacture of Tetanus and Diphtheria Vaccines by AHP for sale to the Acquirer or the New Acquirer, as applicable, in Finished Packaged Form, in annual volumes not to exceed: Tetanus Toxoid (fluid) 1,000,000 doses; Tetanus Toxoid (adsorbed) 3,000,000 doses; diphtheria-tetanus toxoids vaccine (pediatric) 1,000,000 doses; and tetanus-diphtheria toxoids vaccine (adult) 13,000,000 doses.

M. "*Finished Packaged Form*" means packaged in a form acceptable for commercial sale in the United States, in each form of packaging, or substantially similar thereto (including Tubex® & prefilled syringes) as that used by AHP (any time up to and including the date of the Acquisition) in the distribution and sale of AHP's Tetanus and Diphtheria Vaccines, with information including but not limited to the name and identification codes of the Acquirer or the New Acquirer, as applicable, inscribed on the packaging of the Tetanus and Diphtheria Vaccines, and packaged in units specified by the Acquirer or the New Acquirer, as applicable, as permitted by AHP's existing FDA approvals.

N. "*Cost*" means AHP's actual per unit cost of manufacturing AHP's Tetanus and Diphtheria Vaccines, which may be adjusted once

annually to reflect any increases in AHP's actual cost, provided, however, that for any year, the total rate of such adjustment with respect to all components of cost other than material and labor shall not exceed the rate of increase in the Consumer Price Index for such year.

O. "*Formulation*" means any and all information, including both patent and trade secret information, technical assistance and advice, relating to the manufacture of Tetanus and Diphtheria Vaccines that meet United States Food and Drug Administration approved specifications therefor.

P. "*Cyanamid's Rotavirus Vaccine Research*" means:

(1) All of the patents and patent applications that Cyanamid holds, has an option to hold or is licensed to practice under and that are directed to the development of a vaccine to protect humans against rotavirus disease;

(2) All of the know-how that Cyanamid received from licensors or developed itself that is directed to the development of a vaccine to protect humans against rotavirus disease;

(3) All of the biochemical materials, including, but not limited to, reagents, cell lines, monoclonal antibodies, bacculovirus stocks and rotavirus stocks that are directed to the development of a vaccine to protect humans against rotavirus disease; and

(4) All documentation, written materials, and other relevant data that are directed to the development of a vaccine to protect humans against rotavirus disease;

As of the date of the licensing pursuant to paragraph V or VI of this order, which can be licensed to the Rotavirus Licensee including, but not limited to, those items enumerated in the Confidential Appendix A.

II. TETANUS AND DIPHTHERIA VACCINES DIVESTITURE PROVISIONS

It is further ordered, That:

A. Within four (4) months of the date this order becomes final, AHP shall divest, absolutely and in good faith, AHP's Tetanus and Diphtheria Vaccine Assets and consummate an agreement that

includes the provisions required by paragraph II.C of this order, with an Acquirer or a New Acquirer, as applicable, (hereinafter "Divestiture Agreement").

B. Respondent shall divest AHP's Tetanus and Diphtheria Vaccine Assets only to and consummate a Divestiture Agreement only with an Acquirer or New Acquirer, as applicable, 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 AHP's Tetanus and Diphtheria Vaccine Assets and the Divestiture Agreement is to ensure the continuation of AHP's Tetanus and Diphtheria Vaccine Assets as an ongoing, independent operation, engaged in the same business in which AHP's Tetanus and Diphtheria Vaccine Assets are presently engaged, and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

C. The Divestiture Agreement shall include the following and AHP shall commit to satisfy the following:

1. AHP shall Contract Manufacture and deliver to the Acquirer or the New Acquirer, as applicable, in a timely manner the requirements of the Acquirer or the New Acquirer, as applicable, for Tetanus and Diphtheria Vaccines at AHP's Cost for a period not to exceed five (5) years from the date the Divestiture Agreement (or the New Acquirer's Divestiture Agreement, as applicable) is approved, or six (6) months after the date the Acquirer or the New Acquirer, as applicable, obtains all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, whichever is earlier; provided, however, that the five (5) year period shall be extended for a period not to exceed twenty-four (24) months if the trustee submits to the Commission the certification provided for in subparagraph II.C.10 of this order.

2. AHP shall commence delivery of Tetanus and Diphtheria Vaccines to the Acquirer or the New Acquirer, as applicable, within two (2) months from the date the Commission approves the Acquirer and the Divestiture Agreement (or the New Acquirer and its Divestiture Agreement).

3. After AHP commences delivery of Tetanus and Diphtheria Vaccine to the Acquirer or the New Acquirer, as applicable, pursuant to subparagraph II.C.2 of this order, all inventory of Tetanus and Diphtheria Vaccines produced by AHP at its facility located at

Marietta, Pennsylvania, regardless of the date of its production, may be sold by AHP only to the Acquirer or the New Acquirer, as applicable.

4. AHP shall make representations and warranties to the Acquirer or the New Acquirer, as applicable, that the Tetanus and Diphtheria Vaccines contract manufactured by AHP for the Acquirer or the New Acquirer, as applicable, meet the United States Food and Drug Administration approved specifications therefor and are not adulterated or misbranded within the meaning of the Food, Drug and Cosmetic Act, 21 U.S.C. 321, *et seq.* AHP shall agree to indemnify, defend and hold the Acquirer or the New Acquirer, as applicable, harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Tetanus and Diphtheria Vaccines contract manufactured by AHP to meet FDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer, as applicable, giving AHP prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting AHP to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require AHP to be liable for any negligent act or omission of the Acquirer or the New Acquirer, as applicable, or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer, as applicable, that exceed the representations and warranties made by AHP to the Acquirer or the New Acquirer, as applicable.

5. During the term of contract manufacturing, upon reasonable request by the Acquirer or the New Acquirer, as applicable, AHP shall make available to the Acquirer or the New Acquirer, as applicable, all records kept in the normal course of business that relate to the cost of manufacturing Tetanus and Diphtheria Vaccines at its Marietta, Pennsylvania facility.

6. Upon reasonable notice and request from the Acquirer or the New Acquirer, as applicable, AHP shall provide information, technical assistance and advice sufficient to assist the Acquirer or the New Acquirer, as applicable, in obtaining all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. Upon reasonable notice and request from the Acquirer or the New Acquirer, as applicable, AHP shall also provide consultation with knowledgeable employees of AHP and training at the Acquirer's facility or the New Acquirer's facility, as applicable,

for a period of time, not to exceed one (1) year, sufficient to satisfy the Acquirer's management or the New Acquirer's management, as applicable, that its personnel are adequately trained in the manufacture of Tetanus and Diphtheria Vaccines for sale in the United States. Respondent may require reimbursement from the Acquirer or the New Acquirer, as applicable, for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph II.C.6.

7. AHP shall offer an option for a non-exclusive license of AHP's Vaccine Filling and Packaging Assets to the Acquirer or the New Acquirer, as applicable, which option shall be exercisable within one (1) year from the date the Commission approves the Divestiture Agreement and the Acquirer or New Acquirer, as applicable. The license granted pursuant to this subparagraph: (a) may prohibit any sublicensing by the Acquirer or New Acquirer, as applicable, except as part of a sale of all of the Tetanus and Diphtheria Vaccines assets of the Acquirer or New Acquirer, as applicable, if such sale occurs after the Acquirer or the New Acquirer, as applicable, has obtained all necessary FDA approvals to manufacture tetanus and diphtheria vaccines for sale in the United States; (b) shall terminate if the Acquirer or New Acquirer, as applicable, ceases to produce or sell Tetanus and Diphtheria Vaccines in the United States, unless the license is transferred to a new entity pursuant to paragraph II.C.7 (a); and (c) may prohibit the Acquirer or the New Acquirer, as applicable, from using AHP's Vaccine Filling and Packaging Assets for any purpose other than for filling and packaging products manufactured or sold by the Acquirer or the New Acquirer, as applicable.

8. The Divestiture Agreement shall require the Acquirer or the New Acquirer, as applicable, to submit to the Commission within sixty (60) days of the approval by the Commission of the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable, a certification attesting to the good faith intention of the Acquirer or the New Acquirer, as applicable, and including an actual plan by the Acquirer or the New Acquirer, as applicable, to obtain in an expeditious manner all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

9. The Divestiture Agreement shall require the Acquirer or the New Acquirer, as applicable, to submit to the trustee appointed pursuant to paragraph III of this order, periodic verified written reports setting forth in detail the efforts of the Acquirer or the New

Acquirer, as applicable, to sell contract manufactured Tetanus and Diphtheria Vaccines in the United States and to obtain all FDA approvals necessary to manufacture its own Tetanus and Diphtheria Vaccines for sale in the United States. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary FDA approvals are obtained by the Acquirer or the New Acquirer, as applicable, to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer, as applicable, to report to the Commission and the trustee at least thirty (30) days prior to its ceasing the sale of contract manufactured Tetanus and Diphtheria Vaccines in the United States for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary FDA approvals to manufacture its own Tetanus and Diphtheria Vaccines for sale in the United States.

10. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer, as applicable: (1) voluntarily ceases for sixty (60) days or more the sale of Tetanus and Diphtheria Vaccines in the United States prior to obtaining all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States; (2) abandons its efforts to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States; or (3) fails to obtain all necessary FDA approvals of its own to manufacture Tetanus and Diphtheria Vaccines for sale in the United States within five (5) years from the date the Commission approves the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable; provided, however, that the five (5) year period may be extended for a period not to exceed twenty-four (24) months if the trustee certifies to the Commission that the Acquirer or the New Acquirer, as applicable, made good faith efforts to obtain all necessary FDA approvals for manufacturing Tetanus and Diphtheria Vaccines for sale in the United States and that such FDA approvals appear likely to be obtained within such extended time period.

11. The Divestiture Agreement shall provide that, if the Divestiture Agreement is terminated, the AHP Tetanus and Diphtheria Vaccine Assets shall be divested by the trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

D. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary FDA approvals to manufacture AHP's Tetanus and Diphtheria Vaccines for sale in the United States; (2) to maintain the viability and marketability of AHP's Tetanus and Diphtheria Vaccine Assets as well as all tangible assets, including manufacturing facilities, needed to contract manufacture and sell Tetanus and Diphtheria Vaccines; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of any of AHP's Tetanus and Diphtheria Vaccine Assets or tangible assets including manufacturing facilities needed to contract manufacture and sell Tetanus and Diphtheria Vaccines except for ordinary wear and tear.

III. TETANUS AND DIPHTHERIA VACCINES
TRUSTEE AUDITOR PROVISIONS

It is further ordered, That:

A. Within thirty (30) days of the date this order becomes final, the Commission shall appoint a trustee to ensure that AHP and the Acquirer or the New Acquirer, as applicable, expeditiously perform their respective responsibilities as required by the Divestiture Agreement approved by the Commission and by paragraph II of this order. AHP 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 AHP, which consent shall not be unreasonably withheld. If AHP 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 AHP of the identity of any proposed trustee, AHP shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the power and authority to assure respondent's compliance with the terms of paragraph II of this order and with the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

3. Within ten (10) days after appointment of the trustee, AHP 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 respondent's compliance with the terms of paragraph II of this order and with the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

4. The trustee shall serve until such time as the Acquirer or the New Acquirer, as applicable, has received all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, or for fifteen years, whichever is shorter.

5. The trustee shall have full and complete access to the personnel, books, records, facilities and technical information related to the manufacture of AHP's Tetanus and Diphtheria Vaccines, 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 cost of manufacturing Tetanus and Diphtheria Vaccines. Respondent shall cooperate with any reasonable request of the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to assure respondent's compliance with paragraph II of this order and the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

6. The trustee shall serve, without bond or other security, at the cost and expense of AHP, 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 AHP, 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.

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 the 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 of this order.

9. 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 assure compliance with the requirements of paragraph II of this order and the Divestiture Agreement with the Acquirer or the New Acquirer, as applicable.

10. The trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer, as applicable, with respect to the efforts of the Acquirer or the New Acquirer, as applicable, to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States and shall report in writing to the Commission every six months concerning compliance by the respondent and the Acquirer or the New Acquirer, as applicable, with the provisions of paragraph II of this order and the efforts of the Acquirer or the New Acquirer, as applicable, to receive all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

B. Respondent shall comply with all reasonable directives of the trustee regarding:

1. Respondent's obligations to contract manufacture and deliver the Acquirer's requirements or the New Acquirer's requirements, as applicable, for Tetanus and Diphtheria Vaccines, pursuant to paragraphs II.C.1 and II.C.2 of this order;

2. Respondent's obligations to provide representations and warranties regarding Tetanus and Diphtheria Vaccines, pursuant to paragraph II.C.4 of this order; and

3. Respondent's obligations to provide information, technical assistance and advice, pursuant to paragraph II.C.6 of this order.

C. If the Commission terminates the Divestiture Agreement pursuant to paragraph II.C.10, the Commission may direct the trustee to seek a New Acquirer, as provided for in paragraph IV of this order.

IV. TETANUS AND DIPHTHERIA VACCINES
TRUSTEE DIVESTITURE PROVISIONS

It is further ordered, That:

A. (1) If AHP fails to divest absolutely and in good faith AHP's Tetanus and Diphtheria Vaccine Assets and to consummate a Divestiture Agreement with an Acquirer within four (4) months from the date this order becomes final, then any executed Divestiture Agreement with the Acquirer shall be terminated and the Commission may direct the trustee appointed pursuant to paragraph II of this order (a) to divest AHP's Tetanus and Diphtheria Vaccine Assets and (b) to enter into a Divestiture Agreement that satisfies the requirements of paragraph II of this order with a New Acquirer. The trustee shall have the same authority and responsibilities pursuant to paragraph III of this order with respect to the New Acquirer.

(2) If the Commission terminates the Divestiture Agreement pursuant to paragraph II.C.10, the Commission may direct the trustee appointed under paragraph III of this order (a) to divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer and (b) to enter into a new Divestiture Agreement with such New Acquirer. In any case under this subparagraph IV.A(2), the trustee shall have the same authority and responsibilities with respect to the New Acquirer as those described in paragraph III of this order.

Neither the decision of the Commission to direct the trustee nor the decision of the Commission not to direct the trustee to divest AHP's Tetanus and Diphtheria Vaccine Assets under subparagraph IV.A(1) of 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 the trustee is directed under subparagraph A of this paragraph to divest the AHP Tetanus and Diphtheria Vaccine Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer, 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 AHP's Tetanus and Diphtheria Vaccine Assets and directing AHP to enter into a Divestiture Agreement with the New Acquirer, 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 extension of the authority and responsibilities of the trustee selected under paragraph III of this order within ten (10) days after notice by the staff of the Commission to respondent that the trustee's authority and responsibilities are to be extended pursuant to this paragraph, respondent shall be deemed to have consented to the extension of the trustee's authority and responsibilities.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer pursuant to the terms of paragraph II of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of paragraph II of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission. The trustee will have the authorities and responsibilities as described in paragraph III with respect to the New Acquirer.

3. Within ten (10) days after extension of the trustee's authority and responsibilities, respondent shall amend the existing 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 divest AHP's Tetanus and Diphtheria Vaccine Assets to a New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

4. The trustee shall have six (6) months from the date the Commission extends his or her authority and responsibilities under paragraph IV A.(1) of this order to divest AHP's Tetanus and Diphtheria Vaccines Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order.

5. The trustee shall have full and complete access to the personnel, books, records and facilities of AHP related to the manufacture, distribution, or sale of Tetanus and Diphtheria Vaccines or to any other relevant information, as the trustee may request. respondent shall develop such financial or other information as such

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.

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; to assure that AHP enters into a Divestiture Agreement that complies with the provisions of paragraph II.A; to assure that AHP complies with the remaining provisions of paragraph II of this order; and to assure that the New Acquirer obtains all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States. The divestiture and the Divestiture Agreement shall be made to the New Acquirer in the manner set forth in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's locating a New Acquirer and assuring compliance with 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 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 comply with the terms of this order.

11. The trustee shall have no obligation or authority to operate or maintain AHP's Tetanus and Diphtheria Vaccine Assets.

12. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning his or her efforts to divest AHP's Tetanus and Diphtheria Vaccine Assets, AHP's compliance with the terms of this order, and the New Acquirer's efforts to obtain all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States.

13. If, within five (5) years from the date on which the Commission approves the New Acquirer, the New Acquirer has not obtained all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, then the Divestiture Agreement between AHP and the New Acquirer shall terminate.

V. ROTAVIRUS VACCINE RESEARCH LICENSING PROVISIONS

It is further ordered, That:

A. Within twelve (12) months after the date this order becomes final, respondent shall: (1) grant a non-exclusive license, in perpetuity, and in good faith, of any technical information and patent rights included in Cyanamid's Rotavirus Vaccine Research (see paragraphs A & C of Confidential Appendix A); and (2) provide samples for research, adequate to satisfy the needs of the Rotavirus Licensee, of any physical assets included in Cyanamid's Rotavirus Vaccine Research (*see* paragraph B of Confidential Appendix A) that are owned by AHP; provided, however, that such license shall be limited: (i) to use solely in developing, producing and selling a vaccine to protect humans against rotavirus disease; and (ii) to

preclude its use to develop a vector for a vaccine intended to protect against a disease other than rotavirus.

B. Respondent shall license Cyanamid's Rotavirus Vaccine Research only to a Rotavirus Licensee 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 licensing of Cyanamid's Rotavirus Vaccine Research is to ensure the continuation of Cyanamid's Rotavirus Vaccine Research as an ongoing research project for a rotavirus vaccine to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Upon reasonable notice and request from the Rotavirus Licensee, respondent shall provide reasonable assistance to the Rotavirus Licensee regarding the Cyanamid Rotavirus Vaccine Research. Such assistance shall include reasonable consultation with knowledgeable employees of AHP and training at the Rotavirus Licensee's facilities or at such other place as is mutually satisfactory to respondent and the Rotavirus Licensee for a period of time sufficient to satisfy the Rotavirus Licensee's management that its personnel are appropriately trained to proceed with the Cyanamid Rotavirus Vaccine Research. However, AHP shall not be required to continue providing such assistance for more than six (6) months from the date the licensing is finally approved by the Commission. AHP may require reimbursement from the Rotavirus Licensee for all its direct out-of-pocket expenses incurred in providing the assistance to the Rotavirus Licensee.

D. Pending licensing of Cyanamid's Rotavirus Vaccine Research, respondent shall take such actions as are necessary to maintain the viability and marketability of Cyanamid's Rotavirus Vaccine Research and to prevent the destruction, removal, wasting, deterioration, or impairment of Cyanamid's Rotavirus Vaccine Research except for ordinary wear and tear.

VI. ROTAVIRUS VACCINE RESEARCH TRUSTEE EXCLUSIVE LICENSING PROVISIONS

It is further ordered, That:

A. If AHP has not, within twelve (12) months of the date this order becomes final, complied with the requirements of paragraph V of this order, the Commission may appoint a trustee to (1) grant an exclusive license, in perpetuity, and in good faith, of any technical information and patent rights included in Cyanamid's Rotavirus Vaccine Research (*see* paragraphs A & C of Confidential Appendix A); and (2) provide samples for research, adequate to satisfy the needs of the Rotavirus Licensee, of any physical assets included in Cyanamid's Rotavirus Vaccine Research (*see* paragraph B of Confidential Appendix A) that are owned by AHP; provided, however, that: (i) such exclusive license shall be limited to use solely in developing, producing and selling a vaccine to protect humans against rotavirus disease; (ii) such license shall be limited to preclude its use to develop a vector for a vaccine intended to protect against a disease other than rotavirus; and (iii) AHP shall have the right to retain and use all of the Cyanamid Rotavirus Vaccine Research assets, including samples of the assets in paragraph B of Confidential Appendix A, for the purpose of using them to develop a vector for a vaccine intended to protect against a disease other than rotavirus and for any other purpose other than developing and producing a vaccine to protect humans against rotavirus disease. In the event the Commission or the Attorney General brings an action against respondent 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, AHP 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 FTC Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph VI.A of this order, AHP 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 AHP, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in licensing technology. If AHP 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 AHP of the identity of any proposed trustee, AHP 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 grant an exclusive license of Cyanamid's Rotavirus Vaccine Research as described in paragraph VI.A. ("the Rotavirus Exclusive License").

3. Within ten (10) days after appointment of the trustee, AHP 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 enter into the Rotavirus Exclusive License as required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph VI.C.3 to accomplish the Rotavirus Exclusive License required by paragraph VI of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of licensing or believes that exclusive licensing can be achieved within a reasonable time, the twelve (12) month 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 the twelve (12) month period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, data, facilities, and technical information related to the Rotavirus Vaccine Research, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's ability to accomplish the exclusive licensing of Cyanamid's Rotavirus Vaccine

Research required by this order. Any delays in exclusively licensing Cyanamid's Rotavirus Vaccine Research required by this order caused by respondent shall extend the time under paragraph VI.C.4 for accomplishing the exclusive licensing of Cyanamid's Rotavirus Vaccine Research required by this order in an amount equal to the delay, as determined by the Commission or, for the 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 AHP's absolute and unconditional obligation to grant an exclusive license to Cyanamid's Rotavirus Vaccine Research as required by this order at no minimum price. The exclusive license shall be made in the manner and to the Rotavirus Licensee as set out in this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall grant an exclusive license to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of AHP, 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. 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 AHP 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 ability to grant an exclusive license of Cyanamid's Rotavirus Vaccine Research.

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 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

the 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 VI.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 enter into the Rotavirus Exclusive License required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Cyanamid Rotavirus Vaccine Research.

12. The trustee shall report in writing to AHP and to the Commission every sixty (60) days concerning the trustee's efforts to grant an exclusive license of Cyanamid's Rotavirus Vaccine Research as required by this order.

VII. GM-CSF AND IL-3 ROYALTIES

It is further ordered, That:

A. Within thirty (30) days of the date on which the FDA approves any product that includes in whole or in part GM-CSF, as identified in the October 9, 1987 Technology Transfer and GM-CSF Supply Agreement between AHP and Sandoz, Ltd. ("GM-CSF Agreement"), AHP shall take such action as may be necessary to ensure that the royalty payments made pursuant to Section 10.2(b) of the GM-CSF Agreement and any reports of such payments are made on a worldwide aggregated basis.

B. Within thirty (30) days of the date on which the FDA has approved both (1) any product that includes in whole or in part IL-3, as identified in the August 17, 1987 License Agreement for IL-3 between AHP and Sandoz, Ltd. ("IL-3 Agreement"); and (2) any product that includes in whole or in part Pixy321, also identified as rhIL-3/rhGM-CSF S. cerevisiae fusion protein, AHP shall take such action as may be necessary to ensure that the royalty payments made pursuant to Section 3.2 of the IL-3 Agreement and any reports of such payments are made on a worldwide aggregated basis.

VIII. PRIOR APPROVAL

It is further ordered, That, for a period of ten (10) years from the date this order becomes final or until respondent satisfies the requirements of paragraphs II, III or IV, whichever is later, 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, presently engaged in, or within the two years preceding such acquisition engaged in, the (1) clinical development or (2) manufacture and sale of tetanus or diphtheria vaccines in the United States;

B. Acquire any assets currently used for or previously used for (and still suitable for use for) the (1) clinical development or (2) manufacture and sale of tetanus or diphtheria vaccines in the United States;

C. Acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, presently engaged in, or within the two years preceding such acquisition engaged in, the (1) clinical development or (2) manufacture and sale in the United States of a vaccine to protect humans against rotavirus disease; or

D. Acquire any assets currently used for or previously used for (and still suitable for use for) the (1) clinical development or (2) manufacture and sale in the United States of a vaccine to protect humans against rotavirus disease.

IX. REPORTS

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every six (6) months after the date this order becomes final until AHP has fully complied with the provisions of paragraphs II, IV, V and VI of this order, AHP 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 these paragraphs of this order. AHP 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 these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestitures and entering into the Divestiture Agreement required by this order, including the identity of all parties contacted. AHP shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreement required by paragraph II of this order.

B. One (1) year from the date this order becomes final and annually for the next nine (9) years on the anniversary of the date this order becomes final or until the Acquirer or New Acquirer, as applicable, has obtained all necessary FDA approvals to manufacture Tetanus and Diphtheria Vaccines for sale in the United States, whichever is later, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

X. ACCESS

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, 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 consent order; and

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

XI. CORPORATE CHANGE

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in respondent such as

dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

XII. SUNSET

It is further ordered, That, notwithstanding any other provision of this order, this order shall terminate twenty years from the date this order becomes final.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement settling charges that American Home Products' proposed acquisition of American Cyanamid Company is likely substantially to lessen competition in the markets for three existing diphtheria and tetanus vaccines and substantially to lessen competition to develop a new rotavirus vaccine and to develop and produce cytokines. This appears to be a strong antitrust case, but I seriously question whether the remedy in the markets for the existing vaccines is sufficient.

Under the order, the divestiture of tetanus and diphtheria vaccine assets is limited to certain intellectual property, including formulations, patents, trade secrets, technology, and know-how. The divestiture is structured so that, as a practical matter, the only firms that could acquire these assets are firms that in my opinion already would qualify under the law as potential entrants. In short, the order will not restore the competition in the relevant tetanus and diphtheria markets lost as a result of the acquisition. Instead, the Commission should require the divestiture of a viable business unit, even if that business unit produces and sells products other than the vaccines in question.

IN THE MATTER OF

CHARTER MEDICAL CORPORATION

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

Docket C-3558. Complaint, Feb. 14, 1995--Decision, Feb. 14, 1995

This consent order requires, among other things, Charter Medical Corporation (Charter), a Georgia-based chain of psychiatric hospitals, to modify its agreement to purchase certain National Medical Enterprises (NME) facilities by rescinding Charter's acquisitions of NME psychiatric facilities in four specified localities. In addition, the consent order requires Charter, for ten years, to secure Commission approval before acquiring or divesting psychiatric facilities in those localities.

Appearances

For the Commission: *Robert W. Doyle, Jr., Ronald B. Rowe* and *John C. Weber.*

For the respondent: *Robert C. Jones, Jones, Day, Reavis & Pogue*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Charter Medical Corporation ("Charter"), a corporation subject to the jurisdiction of the Commission, proposes to acquire some of the assets of National Medical Enterprises, Inc. ("NME"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state, or county psychiatric hospital that primarily provides long-term, *i.e.,* thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

b. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of in-patient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.*, thirty days or more, treatment of chronic mental illness or short term court ordered detention or involuntary treatment, that provides 24-hour in-patient psychiatric services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

II. CHARTER

2. Respondent Charter is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 577 Mulberry Street, Macon, Georgia.

3. For purposes of this proceeding, Charter is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. NME

4. NME is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its offices and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

5. NME is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

6. On or about March 29, 1994, Charter and NME signed an Asset Sales Agreement; under the terms of that agreement, as subsequently amended, Charter would acquire 17 psychiatric hospitals, chemical dependency facilities and residential treatment centers from NME for approximately $53 million ("the Acquisition").

V. THE RELEVANT MARKETS

7. Relevant lines of commerce in which to analyze the effects of the Acquisition include the provision of all in-patient services by psychiatric hospitals and psychiatric units of general acute care hospitals, as well as narrower lines of commerce, such as in-patient psychiatric services for children and adolescents.

8. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the Acquisition are:

a. The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

b. The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth, and Douglas;

c. The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton, and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto, and;

d. The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

9. The relevant markets set forth in paragraphs seven through eight are concentrated, whether measured by Herfindahl-Hirschmann Indices or two-firm and four-firm concentration ratios.

10. Entry into the relevant markets is difficult due to certificate-of-need regulation of entry by the States of Florida, Georgia, Tennessee, and Virginia, substantial lead times required to establish a new hospital, and other factors.

11. Charter is an actual competitor of NME in the relevant markets. Charter is the largest chain of psychiatric hospitals in the United States.

VI. EFFECTS OF THE ACQUISITION

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

a. Eliminating actual competition between Charter and NME;

b. Increasing the likelihood that Charter will unilaterally exercise market power in the relevant markets;

c. Eliminating the NME hospitals as substantial independent competitive forces in the relevant markets;

d. Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant markets; and

e. Denying patients, physicians, third-party payors, and other consumers of hospital services in the relevant market the benefits of free and open competition based on price, quality, and service.

VII. VIOLATIONS CHARGED

13. The Asset Sales Agreement described in paragraph six constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph six, 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 certain assets and businesses of National Medical Enterprises, Inc. ("NME"), 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 Charter is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 577 Mulberry Street, Macon, Georgia.

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

ORDER

I.

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

A. "*Respondent*" or "*Charter*" means Charter Medical Corporation, its partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

B. "*NME*" means National Medical Enterprises, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business at 2700 Colorado Avenue, Santa Monica, California.

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

D. "*Hospital*" means a health care facility, licensed as a hospital, other than a federally-owned facility (such as a military or Veterans Administration hospital), having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

E. "*General acute care hospital*" means a health care facility licensed as a hospital, having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

F. "*Psychiatric hospital*" means a hospital licensed or certified as a psychiatric hospital (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric hospital that primarily provides long-term, *i.e.*, 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis,

treatment, and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

G. "*Psychiatric unit*" means a department, unit, or other organizational subdivision of a general acute care hospital licensed or certified as a provider of inpatient psychiatric care (except for a license or certificate that limits service to residential treatment facility services only), other than a federal, state or county psychiatric unit that primarily provides long-term, *i.e.,* 30 days or more, treatment of chronic mental illness or short term court ordered detentions and involuntary treatment, that provides 24-hour inpatient services for psychiatric diagnosis, treatment and care of persons suffering from acute mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

H. "*Psychiatric facility*" means either a psychiatric hospital, a general acute care hospital with a psychiatric unit, or a psychiatric unit.

I. "*Psychiatric service*" means the provision of inpatient services for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse at a psychiatric facility.

J. To "*operate*" a psychiatric facility means to own, lease, manage, or otherwise control or direct the operations of a psychiatric facility, directly or indirectly.

K. To "*acquire*" a psychiatric facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise:

(1) Acquire the whole or any part of assets used or previously used within the last two years (and still suitable for use) for operating a psychiatric facility from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(2) Acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating a psychiatric facility;

(3) Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of a psychiatric facility; or

(4) Enter into any other arrangement to obtain direct or indirect ownership, management or control of a psychiatric facility or any part

thereof, including but not limited to, a lease of or management contract for a psychiatric facility.

L. "*Residential treatment center*" means a treatment center that provides long-term (length of stay of 30 days or more) care in a non-psychiatric facility setting to patients that require long term care for psychiatric diagnosis and treatment for mental illness, emotional disturbance, or alcohol or drug abuse.

M. "*Outpatient facility*" means a facility that is not licensed as a psychiatric facility and has a primary function of providing outpatient treatment for psychiatric diagnosis, treatment and care of persons suffering from mental illness, emotional disturbance, or alcohol or drug abuse, for patients that do not require inpatient psychiatric services.

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

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

P. "*Relevant area(s)*" means:

(1) The "Orlando area," consisting of the Florida counties of Orange, Osceola and Seminole;

(2) The "Atlanta area," consisting of the Georgia counties of Fulton, Paulding, Fayette, Clayton, Henry, Rockdale, De Kalb, Gwinnett, Cobb, Cherokee, Forsyth and Douglas;

(3) The "Memphis area," consisting of the Tennessee counties of Shelby, Tipton and Fayette, the Arkansas county of Crittenden, and the Mississippi county of De Soto;

(4) The "Richmond area," consisting of the Virginia city of Richmond and the Virginia counties of Henrico, Hanover, Goochland, Powhatan, Chesterfield, Charles City, and New Kent.

Q. "*Relevant facilities*" means the following NME psychiatric hospitals, including, without limitation, all related assets and businesses, successors and assigns and all improvements, additions and enhancements made to such assets: MidSouth Hospital, Memphis, Tennessee; Psychiatric Institute of Richmond, Richmond, Virginia; Brawner North Medical Health System, Smyrna, Georgia;

Crescent Pines Hospital, Stockbridge, Georgia; Laurel Oaks Hospital and Residential Treatment Center, Orlando, Florida.

II.

It is further ordered, That respondent forthwith modify its Asset Sale Agreement with NME, dated March 29, 1994, to rescind respondent's agreement to acquire the relevant facilities.

III.

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:

A. Acquire any psychiatric facility in any of the relevant areas, including the relevant facilities;

B. Permit any psychiatric facility it operates in the relevant areas to be acquired by any person that operates, or will operate immediately following such acquisition, any other psychiatric facility in the relevant areas, including the relevant facilities.

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

1. The acquisition of a facility that is (a) solely licensed as a residential treatment center and not licensed as a psychiatric facility, or (b) solely operated as an outpatient facility and not licensed as a psychiatric facility;

2. Any acquisition that does not involve psychiatric services; or

3. Any acquisition otherwise subject to this paragraph III of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the psychiatric facility or part thereof to be acquired, including assumption by respondent of any liabilities, does not exceed five hundred thousand dollars ($500,000).

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not directly or

indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any other psychiatric facility in the relevant areas, for the joint establishment or operation of any new psychiatric facility, psychiatric service or part thereof, in the relevant areas, including the relevant facilities. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

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

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

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

1. The fair market value of the assets to be contributed to the joint venture or other arrangement by the psychiatric facility not operated by respondent does not exceed five hundred thousand dollars ($500,000);

2. The transaction does not involve psychiatric services; or

3. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph III of this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not permit all or any

substantial part of any psychiatric facility it operates in the relevant areas to be acquired by any other person unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondent shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and annually thereafter for a period of ten (10) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with the requirements of this order.

VII.

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

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda 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' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

VIII.

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

IN THE MATTER OF

THE H.D. LEE CO., INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket C-411. Consent Order, May 1, 1963 -- Set Aside Order, Feb. 14, 1995*

The Federal Trade Commission has set aside a 1965 consent order with The H.D. Lee Co., Inc., (62 FTC 1248), pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On October 26, 1994, The Lee Apparel Company, Inc., formerly The H.D. Lee Co., Inc. ("Lee") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. Lee requests that the Commission set aside the 1965 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Lee affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on December 15, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[1] The Commission's order in Docket No. C-411 became final on August 9, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to

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* The consent order was made effective on August 9, 1965.

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

overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-411.

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

It is furthered ordered, That the Commission's order in Docket No. C-411 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

SULZER LIMITED

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-3559. Complaint, Feb. 23, 1995--Decision, Feb. 23, 1995

This consent order requires, among other things, Sulzer, a Swiss firm to divest, within six months, a copy of all the information necessary to purchase ingredients for, to manufacture and to sell aluminum polyester powder -- equivalent to Sulzer's Amdry 2010 -- to a Commission-approved acquirer. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to divest copies of both the Amdry 2010 information and all product information relating to the acquired firms aluminum polyester powder. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring any assets in the aluminum polyester powder market.

Appearances

For the Commission: *Ann B. Malester, Claudia Higgins* and *Mary Lou Steptoe.*

For the respondent: *Joel Mitnick* and *Neal Stoll, Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y. *Sutton Keaney, Winthrop, Stimson, Puntham & Roberts*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Sulzer Limited, a corporation, subject to the jurisdiction of the Commission, has agreed to acquire all of the assets of the Metco Division of The Perkin-Elmer Corporation, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 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. DEFINITIONS

1. "*Aluminum Polyester Powder*" means a thermal spray material consisting of wholly aromatic polyester and aluminum silicon that is applied via thermal spray equipment to aircraft turbine engines.

2. "*Wholly Aromatic Polyester*" means wholly aromatic polyester that is used as an input in Aluminum Polyester Powder.

II. RESPONDENT

3. Respondent Sulzer is a corporation organized and existing under the laws of the Country of Switzerland, with its headquarters located at CH-8401, Winterthur, Switzerland.

4. Respondent is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

5. Metco is a division of The Perkin-Elmer Corporation, which is a corporation organized and existing under the laws of the State of New York, with its headquarters located at 761 Main Avenue, Norwalk, Connecticut.

6. Metco is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. ACQUISITION

7. On or about April 18, 1994, Sulzer and Metco entered into an agreement whereby Sulzer will acquire all of the assets of the Metco Division of The Perkin-Elmer Corporation ("Acquisition").

V. THE RELEVANT MARKET

8. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the manufacture and sale of Aluminum Polyester Powder.

9. For purposes of this complaint, the relevant section of the country is the United States.

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

11. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph thirteen of the complaint because of the difficulties in obtaining an adequate source of Wholly Aromatic Polyester and because the original turbine engine manufacturers must conduct tests to verify that the Aluminum Polyester Powder meets their standards before approving its use.

12. Sulzer and Metco are actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

13. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant marketing violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Sulzer and Metco;

b. By increasing the likelihood that Sulzer will unilaterally exercise market power; and

c. By increasing the likelihood that Aluminum Polyester Powder customers will be forced to pay higher prices.

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

VII. VIOLATIONS CHARGED

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

16. The acquisition described in paragraph seven, 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 certain assets and businesses of the Metco Division of The Perkin-Elmer Corporation, 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sulzer Limited ("Sulzer") is a corporation organized and existing under the laws of the Country of Switzerland with its offices and principal place of business at CH-8401, Winterthur, Switzerland.

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. "*Sulzer*" means Sulzer Limited, its directors, officers, employees, agents and representatives, its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

B. "*Metco*" means the Metco Division of The Perkin-Elmer Corporation.

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

D. "*Acquisition*" means the acquisition of certain assets of Metco by Sulzer.

E. "*Aluminum polyester powder*" means a thermal spray material consisting of wholly aromatic polyester and aluminum silicon that is applied via thermal spray equipment to aircraft turbine engines.

F. "*Amdry 2010*" means Sulzer's aluminum polyester powder marketed in the United States under the name "Amdry 2010."

G. "*Sumitomo Polyester*" means wholly aromatic polyester (polyoxybenzoyl homopolymer) that Sumitomo Chemical Company Limited produces for Sulzer according to Sulzer's specifications for use as an input in Amdry 2010.

H. "*Sulzer aluminum silicon*" means the particular grade, specification, and type of aluminum silicon used in Amdry 2010.

I. "*Amdry 2010 Ingredients*" means Sumitomo Polyester and Sulzer aluminum silicon.

J. "*Amdry 2010 Information*" means a copy of all information necessary to purchase Amdry 2010 Ingredients and all information necessary for the manufacture and sale of Amdry 2010, including but not limited to:

1. All product information related to Sumitomo Polyester and related know-how, including (without limitation) its morphology, the name(s) of the supplier(s) of Sumitomo Polyester, all particle specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Sumitomo Polyester for use in Amdry 2010;

2. All product information related to Sulzer aluminum silicon, including (without limitation) its morphology, the name(s) of the supplier(s) of Sulzer aluminum silicon, all product specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Sulzer aluminum silicon for use in Amdry 2010;

3. All information related to the manufacture of Amdry 2010, including (without limitation) all production manuals, training materials, lists of equipment used in the manufacturing process, formulas, process, all manufacturing standards and procedures, quality control specifications, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to manufacture commercially acceptable Amdry 2010; and

4. All information related to the sale of Amdry 2010, including (without limitation) product brochures, customer lists, training materials, and other tangible embodiments of know-how used in the sale of Amdry 2010.

K. *"Amdry 2010 Equivalent"* means an aluminum polyester powder that is chemically equivalent to Amdry 2010 and that is not produced by Sulzer or Metco.

L. "*Original equipment manufacturers*" means General Electric Aircraft Engines Division, Textron Lycoming, and the Garrett Division of Allied Signal, and their successors and assigns.

M. "*Metco 601*" means Metco's aluminum polyester powder marketed in the United States under the name "Metco 601."

N. "*Carborundum Ekonol Polyester*" means wholly aromatic polyester that The Carborundum Company produces for Metco according to Metco's specifications for use as an input in Metco 601.

O. "*Metco aluminum silicon*" means the particular grade, specification, and type of aluminum silicon used in Metco 601.

P. "*Metco 601 Ingredients*" means Carborundum Ekonol Polyester and Metco aluminum silicon.

Q. "*Metco 601 Information*" means a copy of all information necessary to purchase Metco 601 Ingredients and all information necessary for the manufacture and sale of Metco 601, including but not limited to:

1. All product information related to Carborundum Ekonol Polyester and related know-how, including (without limitation) its morphology, the name(s) of the supplier(s) of Carborundum Ekonol Polyester, all particle specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Carborundum Ekonol Polyester for use in Metco 601;

2. All product information related to Metco aluminum silicon, including (without limitation) its morphology, the name(s) of the supplier(s) of Metco aluminum silicon, all product specifications, formulas, processes, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to acquire commercially acceptable Metco aluminum silicon for use in Metco 601;

3. All information related to the manufacture of Metco 601, including (without limitation) production manuals, training materials, lists of equipment used in the manufacturing process, formulas, process, all manufacturing standards and procedures, quality control specifications, technology, trade secrets, manufacturing information, plans, drawings and data and other tangible embodiments of know-how used to manufacture commercially acceptable Metco 601; and

4. All information related to the sale of Metco 601, including (without limitation) product brochures, customer lists, training materials, and other tangible embodiments of know-how used in the sale of Metco 601.

R. *"Metco 601 Equivalent"* means an aluminum polyester powder that is chemically equivalent to Metco 601 and that is not produced by Metco or Sulzer.

II.

It is ordered, That:

A. Sulzer shall, absolutely and in good faith, divest the Amdry 2010 Information within six (6) months of the date this order becomes final to an acquirer that will develop, manufacture, sell, and seek original equipment manufacturers' approvals for an Amdry 2010 Equivalent. Sulzer shall divest 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.

B. Sulzer shall provide all additional assistance, information and know-how reasonably necessary to the acquirer of the Amdry 2010 Information to help such acquirer receive all product approvals from the original equipment manufacturers necessary for the purchase of an Amdry 2010 Equivalent by such original equipment manufacturers or by any other person pursuant to standards and qualifications established by such manufacturer. Such assistance shall include but not be limited to the following:

1. Paying all costs of testing by or for the original equipment manufacturers for product approvals of an Amdry 2010 Equivalent;

2. Providing any training relevant to the production of an Amdry 2010 Equivalent to the acquirer;

3. Offering any technical assistance necessary to assist the acquirer in its development of an Amdry 2010 Equivalent; and

4. Any additional information or know-how reasonably necessary to the acquirer.

C. Sulzer shall submit to the Commission, within nine (9) months of the date the Commission approves the divestiture of the Amdry 2010 Information, an affidavit from each of the original equipment manufacturers certifying that each such manufacturer has either (1) individually approved an Amdry 2010 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information for all uses for which Amdry 2010 is approved by such original

equipment manufacturer, or (2) individually approved any other person's aluminum polyester powder for all uses for which Amdry 2010 is approved by such original equipment manufacturer and that such manufacturer is not interested in approving an Amdry 2010 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information for all uses for which Amdry 2010 is approved by such original equipment manufacturer.

D. The purpose of the divestiture of the Amdry 2010 Information is to enable the acquirer to become a viable competitor in the aluminum polyester powder market and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If Sulzer has (1) not divested the Amdry 2010 Information within six (6) months of the date this order becomes final, or (2) not submitted affidavits as required by paragraph II.C. of this order, within nine (9) months of the date the Commission approves the divestiture of the Amdry 2010 Information, then the Commission may appoint a trustee to divest both the Amdry 2010 Information and the Metco 601 Information only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Amdry 2010 Information and the Metco 601 Information is to enable the acquirer to become a viable competitor in the aluminum polyester powder market, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. In the event 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, Sulzer shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or

any other statute enforced by the Commission, for any failure by respondent to comply with this order.

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

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

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest both the Amdry 2010 Information and the Metco 601 Information and to take all such steps as may be feasible and necessary to assist the acquirer of the Amdry 2010 Information and the Metco 601 Information to receive all product approvals from the original equipment manufacturers necessary for the purchase of an Amdry 2010 Equivalent or a Metco 601 Equivalent by such manufacturer or by any other person pursuant to standards and qualifications established by such manufacturer. Such assistance shall include but not be limited to the following:

a. Requiring respondent to pay all costs of testing by or for the original equipment manufacturers for product approvals of an Amdry 2010 Equivalent or a Metco 601 Equivalent;

b. Requiring respondent to provide any training relevant to the production of an Amdry 2010 Equivalent or a Metco 601 Equivalent to the acquirer;

c. Requiring respondent to offer any technical assistance necessary to assist the acquirer in its development of an Amdry 2010 Equivalent or a Metco 601 Equivalent; and

d. Requiring respondent to provide any additional information or know-how reasonably necessary to the acquirer.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of both the Amdry 2010 Information and the Metco 601 Information and to provide the additional assistance as required by paragraph III.B.2. of this order.

4. From the date of appointment, the trustee shall have twelve (12) months to divest both the Amdry 2010 Information and the Metco 601 Information, to provide all additional assistance reasonably necessary to the acquirer, and to submit affidavits to the Commission from each of the original equipment manufacturers certifying that each has individually approved the Amdry 2010 Equivalent or the Metco 601 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information and the Metco 601 Information for all uses for which Amdry 2010 or Metco 601 is approved by such original equipment manufacturer, and if such affidavits are not submitted, the trustee shall have an additional six (6) months thereafter to accomplish the divestiture of both the Amdry 2010 Information and the Metco 601 Information, to provide the additional assistance, and to submit the affidavits. If, however, at the end of the additional six (6) month period, the trustee believes that the original equipment manufacturers will approve the Amdry 2010 Equivalent or the Metco 601 Equivalent manufactured by the Commission-approved acquirer of the Amdry 2010 Information and the Metco 601 Information for all uses for which Amdry 2010 or Metco 601 is approved by such original equipment manufacturer, and will submit said affidavits to the Commission within a reasonable time, the time period for said approvals and submission of affidavits may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Amdry 2010 Information and the Metco 601 Information, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such 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 of the Amdry 2010 Information and the Metco 601 Information, the provision of additional assistance to the acquirer, and the approval of the Amdry 2010 Equivalent or the Metco 601 Equivalent by the original equipment manufacturers. Any delays caused by the respondent shall extend the time for the divestiture of the Amdry 2010 Information and the Metco 601 Information, the additional assistance to the acquirer, and the approvals by the original equipment manufacturers, 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. If the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or such 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Sulzer 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 divestiture of the Amdry 2010 Information and the Metco 601 Information and submission of the required affidavits from the original equipment manufacturers.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities 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 this paragraph 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 of the Amdry 2010 Information and the Metco 601 Information, the provision of all additional assistance reasonably necessary to the acquirer, and the submission of affidavits by each of the original equipment manufacturers as required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Amdry 2010 Information and the Metco 601 Information.

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

IV.

It is further ordered, That:

A. For a ten (10) year period commencing on the date this order becomes final, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with Sumitomo Chemical Company Limited or otherwise take any action whatsoever, directly or indirectly, that would prevent Sumitomo Chemical Company Limited from selling Sumitomo Polyester to any other person. Within thirty (30) days after the order becomes final, respondent shall provide a copy of the order to each person at Sumitomo Chemical Company Limited with whom respondent has contact in connection with the purchase of Sumitomo Polyester.

B. If a trustee is appointed and the Metco 601 Information is divested pursuant to paragraph III.A. of this order, then for a ten (10)

year period commencing on the date the Metco 601 Information is divested, Sulzer shall not enter into, obtain, make, carry out or enforce any exclusive agreements with The Carborundum Company or otherwise take any action whatsoever, directly or indirectly, that would prevent The Carborundum Company from selling Carborundum Ekonol Polyester to any other person. Within thirty (30) days after the trustee is appointed, respondent shall provide a copy of this order to each person at The Carborundum Company with whom respondent or Metco has contact in connection with the purchase of Carborundum Ekonol Polyester.

V.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, at the time of such acquisition engaged in, or within the six months preceding such acquisition engaged in, the manufacture, sale, or distribution of aluminum polyester powder in the United States; or

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, sale, or distribution of aluminum polyester powder in the United States.

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. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or 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 the divestiture.

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

VII.

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 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, subject to any legally recognized privilege, and upon written request with reasonable notice to Sulzer made to its General Counsel, 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 it, to interview officers, directors, or employees of respondent, who may have counsel present regarding such matters.

IN THE MATTER OF

RED APPLE COMPANIES, INC., ET AL.

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

Docket 9266. Complaint, May 27, 1994--Decision, Feb. 28, 1995

This consent order requires, among other things, three New York-based companies and their officer to divest six supermarkets, within 12 months, to a Commission-approved acquirer or acquirers. If the respondents fail to satisfy the divestiture requirements, the consent order permits the Commission to appoint a trustee to divest supermarkets to satisfy the terms of the order. The consent order also prohibits the respondents, for ten years, from acquiring, without prior Commission approval, any supermarket or any interest in an entity that owns or operates a supermarket in New York County south of 116th Street. In addition, the respondents, for ten years, are prohibited from entering into or enforcing any restrictions that would prevent any person acquiring any supermarket owned or operated by any respondent in New York County south of 116th Street from operating the stores as supermarkets.

Appearances

For the Commission: *Ronald Rowe, James Fishkin* and *Mary Lou Steptoe.*

For the respondents: *Jonathan Honig* and *Martin Bring, Lowenthal, Laudau, Fishcher & Bring*, New York, N.Y.

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 respondents Red Apple Companies, Inc., a corporation, John A. Catsimatidis, an individual, Supermarket Acquisition Corp., a corporation, and Designcraft Industries, Inc. (d/b/a Sloan's Supermarkets, Inc.), a corporation, all subject to the jurisdiction of the Commission, have acquired certain assets of Sloan's Supermarkets, Inc. (a/k/a CKMR Corporation), 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 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; other grocery products, including nonfood items such as soaps, detergents, paper goods; other household products; and health and beauty aids.

b. "*Red Apple*" means Red Apple Companies, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates (including Red Apple Supermarkets, Inc., Gristede's Supermarkets, Inc., and Supermarket Acquisition Corp.), and their directors, officers, employees, agents, partners, and representatives (including John A. Catsimatidis), and their respective successors or assigns.

c. "*Sloan's*" means Sloan's Supermarkets, Inc. (a/k/a CKMR Corporation), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

d. "*John A. Catsimatidis*" means John A. Catsimatidis, an individual and Chairman and Chief Executive Officer of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, and Treasurer of Designcraft Industries, Inc.

e. "*SAC*" means Supermarket Acquisition Corp., its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

f. "*Designcraft*" means Designcraft Industries, Inc. (d/b/a Sloan's Supermarkets, Inc.), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents,

partners, and representatives, and their respective successors or assigns.

RED APPLE COMPANIES, INC.

2. Respondent Red Apple is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

3. Respondent Red Apple is, and at all times relevant herein has been, engaged in the operation of supermarkets in New York County, New York.

4. Respondent Red Apple 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.

JOHN A. CATSIMATIDIS

5. Respondent John A. Catsimatidis is the Chairman, Chief Executive Officer, and sole shareholder of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, Treasurer, and principal shareholder of Designcraft Industries, Inc., with his office and principal place of business at 823 Eleventh Avenue, New York, New York.

6. Respondent John A. Catsimatidis controls, directs, or influences the operations of Red Apple Companies, Inc., Supermarket Acquisition Corp., and Designcraft Industries, Inc.

7. Respondent John A. Catsimatidis 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 an individual 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.

SUPERMARKET ACQUISITION CORP.

8. Respondent SAC is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

9. Respondent SAC is an entity owned by John A. Catsimatidis and used by him to acquire assets from Sloan's.

10. Respondent SAC 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.

DESIGNCRAFT INDUSTRIES, INC.

11. Respondent Designcraft (d/b/a Sloan's Supermarkets, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 823 Eleventh Avenue, New York, New York.

12. Respondent Designcraft 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.

ACQUISITIONS

13. On or about April 16, 1991, Red Apple entered into an agreement with Sloan's identifying for acquisition 20 Sloan's supermarkets located in New York County, New York. Subsequently, Red Apple acquired 18 of these supermarkets and three additional supermarkets from Sloan's in New York County, New York. Sloan's Supermarkets, Inc. subsequently changed its name to CKMR Corporation.

14. On or about December 24, 1992, Designcraft entered into an agreement with CKMR Corporation (formerly Sloan's Supermarkets, Inc.) for the acquisition of the 11 remaining Sloan's supermarkets.

On or about March 23, 1993, Designcraft acquired these supermarkets from CKMR Corporation. Designcraft subsequently changed its name to Sloan's Supermarkets, Inc.

TRADE AND COMMERCE

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

16. Relevant sections of the country in which to analyze the acquisitions described herein are residential neighborhoods in New York County, New York, located within the Upper East Side, the Upper West Side, Chelsea, and Greenwich Village.

MARKET STRUCTURE

17. 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

18. 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

19. Prior to the acquisitions described herein, Red Apple and Sloan's were actual competitors in the relevant lines of commerce and sections of the country.

EFFECTS

20. The effect of the acquisitions 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 Red Apple or John A. Catsimatidis and supermarkets owned or controlled by Sloan's;

b. By increasing the likelihood that Red Apple or John A. Catsimatidis will unilaterally exercise market power; or

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

21. The acquisitions by Red Apple and Designcraft of assets of Sloan's 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 Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of the Commission's Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Red Apple Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

2. Respondent John A. Catsimatidis is the Chairman, Chief Executive Officer, and sole shareholder of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, Treasurer, and the largest shareholder of Sloan's Supermarkets, Inc., with his office and principal place of business at 823 Eleventh Avenue, New York, New York.

3. Respondent Supermarket Acquisition Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at 823 Eleventh Avenue, New York, New York.

4. Respondent Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 823 Eleventh Avenue, New York, New York.

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

B. "*Red Apple*" means Red Apple Companies, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates (including Red Apple Supermarkets, Inc., Gristede's Supermarkets, Inc., and Supermarket Acquisition Corp.), and their directors, officers, employees, agents, partners, and representatives (including John A. Catsimatidis), and their respective successors or assigns.

C. "*John A. Catsimatidis*" means John A. Catsimatidis, an individual and Chairman and Chief Executive Officer of Red Apple Companies, Inc., and Chairman, Chief Executive Officer, and Treasurer of Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.).

D. "*SAC*" means Supermarket Acquisition Corp., its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

E. "*SSI*" means Sloan's Supermarkets, Inc. (a/k/a Designcraft Industries, Inc.), its parents, predecessors, subsidiaries, divisions, groups and affiliates, and their directors, officers, employees, agents, partners, and representatives, and their respective successors or assigns.

F. "*Respondents*" means Red Apple, John A. Catsimatidis, SAC, and SSI.

G. "*Assets to be divested*" means the assets described in paragraphs II. A. and II. B. of this order.

H. "*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.

II.

It is further ordered, That respondents shall divest six supermarkets in the following manner:

A. Respondents shall divest, absolutely and in good faith, within twelve months from the date this order becomes final, four of the following listed supermarkets, with one supermarket located in each of the four areas identified below within New York County, New York:

1. Upper East Side:

a. Sloan's located at 1407 Lexington Avenue (store no. 425);
b. Sloan's located at 1343-1347 Lexington Avenue (store no. 437); or
c. Gristede's located at 1356 Lexington Avenue (store no. 52).

2. Upper West Side:

a. Sloan's located at 530-34 Amsterdam Avenue (store no. 435); or
b. Gristede's located at 251 West 86th Street/2361 Broadway (store no. 56).

3. Chelsea:

a. Gristede's located at 188 Ninth Avenue (store no. 441, formerly under the Sloan's trade name) or the nearest alternate supermarket owned or operated by any respondent.

4. Greenwich Village:

a. Sloan's located at 585 Hudson Street (store no. 410) or the nearest alternate supermarket owned or operated by any respondent; or
b. Gristede's located at 25 University Place (store no. 82) or the nearest alternate supermarket west of Broadway owned or operated by any respondent.

The assets to be divested shall consist of the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations that are divested.

B. Respondents shall also divest, absolutely and in good faith, within twelve months from the date this order becomes final, two of the following listed supermarkets, with one supermarket from one area identified below within New York County, New York, and the other supermarket from a different area identified below within New York County, New York:

1. Upper East Side:

In addition to one of the three Upper East Side supermarkets listed in paragraph II. A. 1., either one other supermarket listed in paragraph II. A. 1., or one of the following:

a. Sloan's located at 1245 Park Avenue (store no. 38, formerly under the Red Apple trade name);
b. Gristede's located at 205 East 96th Street (store no. 98);
c. Gristede's located at 350 East 86th Street (store no. 50);
d. Sloan's located at 1668 Second Avenue (store no. 434);
e. Gristede's located at 1644 York Avenue (store no. 53); or
f. Sloan's located at 1637 York Avenue (store no. 507).

2. Upper West Side:

In addition to one of the two Upper West Side supermarkets listed in paragraph II.A.2., either one other supermarket listed in paragraph II.A.2., or the following:

a. A supermarket owned or operated by any respondent and located within four blocks of either of the two supermarkets listed in paragraph II. A. 2.

3. Greenwich Village:

In addition to one of the four Greenwich Village supermarkets listed in paragraph II.A.4., either one other supermarket listed in paragraph II.A.4., or one of the following:

a. Gristede's located at 77 Seventh Avenue (store no. 37) or the nearest alternate supermarket owned or operated by any respondent; or

b. Gristede's located at 311 Bleecker Street (store no. 83) or the nearest alternate supermarket owned or operated by any respondent.

The assets to be divested shall consist of the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations that are divested.

C. Respondents shall divest the assets to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the assets to be divested is to ensure the 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 acquisitions as alleged in the Commission's complaint.

D. Pending divestiture of such assets to be divested to comply with paragraphs II. and III. of this order, respondents shall take such actions as are necessary to maintain the viability and marketability of such 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 such assets to be divested to comply with paragraphs II. and III. of this order except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, such assets to be divested to comply with paragraph II. of this order within twelve months from the date this order becomes final, the Commission may appoint a trustee to divest any of the supermarkets listed in paragraph II. (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) that are owned or operated by any respondent at the time of the appointment of the trustee in order to satisfy the requirements of paragraphs II. A. and II. B. of this order. 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, respondents 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 respondents 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, respondents 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 respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have 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 respondents of the identity of any proposed trustee, respondents 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 any of the supermarkets listed in paragraph II (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) that are owned or operated by any respondent at the time of the appointment of the trustee in order to comply with paragraph II. of this order.

3. Within ten (10) days after appointment of the trustee, respondents 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 paragraph II. of this order. Such trust agreement may include a confidentiality agreement.

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 any of the supermarkets listed in paragraph II. (and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations) or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents 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 respondents' 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 any particular supermarket to be divested, from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such supermarket, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, 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 respondents, 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 respondents, 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. Respondents 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 respondents and the Commission every ninety (90) days concerning the trustee's efforts to accomplish divestiture.

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket located in New York County, New York, south of 116th Street, including any

facility that has operated as a supermarket in this area within six (6) months of the date of the proposed acquisition; or

B. Acquire any stock, share capital, equity, or other interest in: (1) any entity that owns any interest in or operates any supermarket located in New York County, New York, south of 116th Street, or (2) any entity that owned any interest in or operated any supermarket located in New York County, New York, south of 116th Street within six (6) months of the date of the proposed acquisition.

Provided, however, that an acquisition otherwise covered by the requirements of this paragraph shall be exempt from the requirements of this paragraph if it is an acquisition by John A. Catsimatidis or by a respondent corporation from a respondent corporation or from John A. Catsimatidis.

V.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final, respondents 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 any respondent, any leasehold interest in any supermarket, or any interest in any retail location that formerly operated as a supermarket in New York County, New York, south of 116th Street, to operate a supermarket or retail food store.

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 respondents have fully complied with the provisions of paragraphs II. or III. of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II. and III. of this order. Respondents shall include in their 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. Respondents shall include in their 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, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VII.

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

VIII.

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

A. Upon five days' written notice to respondents, 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 any respondent relating to any matters contained in this order; and

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

Commissioner Varney not participating.

IN THE MATTER OF

AMERICAN INSTITUTE OF SMOKING CESSATION, ET AL.

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

Docket C-3560. Complaint, March. 3, 1995--Decision, March. 3, 1995

This consent order prohibits, among other things, an Illinois-based company and its two officers from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation, and from representing, through any endorsement or testimonial, the achievements of participants who attend their smoking cessation or weight-loss seminars unless the representation reflects the typical or ordinary experience of participants of such programs. In addition, the consent order prohibits the respondents from misrepresenting the contents, results or validity of any study, test, survey or report.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *Robert E. Kehoe* and *Daniel S. Kaplan, Wildman, Harrold, Allen & Dixon*, Chicago, IL.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Institute of Smoking Cessation, Inc. ("AISC"), a corporation, Kenneth C. Grossman, individually and as an officer of said corporation, and Jane A. Grossman, individually and as an officer 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 AISC is an Illinois corporation, with its principal office and place of business at 318 South Garfield, Hinsdale, Illinois.

Respondents Kenneth C. Grossman and Jane A. Grossman are, respectively, the President/Treasurer and Vice-President/Secretary

and sole directors and shareholders of the corporate respondent. Together, 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 advertised, offered for sale, and sold seminars for smoking cessation and weight loss known as "The Grossman Method," and other stop-smoking and weight-loss seminars, to consumers. The Grossman Method seminar consists of a single group hypnosis session, three hours in length, provided to consumers by Kenneth Grossman at various sites throughout the United States.

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 for The Grossman Method seminar, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements:

A. "STOP SMOKING IN JUST 3 HOURS FLAT! WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN! . . . The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, up to 98% will throw away their cigarettes and stop smoking by seminar's end. I personally guarantee it. . . . This is the ORIGINAL STOP SMOKING IN THREE HOURS FLAT SEMINAR developed and presented by Dr. Kenneth Grossman. Over the years, many others have tried to imitate it, but they simply cannot duplicate it. Kenneth Grossman, Ph.D., developed this seminar during a career of over 15 years as a clinical hypnotherapist helping people to stop smoking and rid themselves of unwanted habits. . . . ELIMINATES YOUR DESIRE FOR CIGARETTES . . . See, hear and experience it for yourself--and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. . . . You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE . . . . The Grossman method is safe and effective and it has helped tens of thousands of heavily addicted smokers to become non-smokers in one relaxing and enjoyable 3 hour seminar. LOSE WEIGHT FREE. Now you can use the Grossman Method of Hypnosis to help you lose weight. . . . 'The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12!! It's been a great summer at the beach.' Gerri Cheek. . . . 'I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astonished.' John Cain" (Exhibit A)

B. "STOP SMOKING IN JUST THREE HOURS FLAT! WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN! . . . The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, over 98% will throw away their cigarettes and stop smoking by seminar's end. I personally guarantee it. . . . ELIMINATES YOUR DESIRE FOR CIGARETTES . . . I know you! You've tried to quit smoking many times before--but nothing worked. Not nicorette gum. Not the 'patch.' Not 'cold turkey.' Not willpower. And not even other forms of hypnosis. The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable three hour seminar. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE. You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers. . . .DOCTOR RECOMMENDED. . . . LOSE WEIGHT FREE . . . . Lose weight the quick, safe and healthy way. Eliminate food Cravings, anxiety and guilt . . . ." (Exhibit B)

C. "STOP SMOKING IN JUST 3 HOURS FLAT! . . . ELIMINATES YOUR DESIRE FOR CIGARETTES! . . . THE PAINLESS WAY TO QUIT SMOKING . . . HIGHLY RECOMMENDED BY MEDICAL DOCTORS! Dr. Grossman developed his revolutionary seminar after many years of clinical research with heavy tobacco users. This seminar is so effective that it is highly recommended by medical doctors and other health professionals. . . . LOSE WEIGHT FREE . . . Now you can use the Grossman Method of Hypnosis to help you lose weight... Lose weight the quick, safe and healthy way. . . . 'The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12!! It's been a great summer at the beach.' Gerri Cheek Hanover, MD. . . . 'I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astonished.' John Cain Springfield, IL" (Exhibit C)

D. "STOP SMOKING IN THREE (3) HOURS FLAT! . . . See, hear and experience it for yourself--and then throw away your cigarettes and stop smoking completely. . . . Your energy level will increase. You'll feel better about yourself. You will save hundreds of dollars each year. You will reduce your chances of getting heart disease, cancer, or lung disease. Don't miss this--it's the easiest way to quit! . . . Warning: Seminars are not all the same. Don't confuse Dr. Grossman's seminar with others that may sound like his but are quite different. This is the original program that has helped thousands of smokers quit for good without shots, pills, gum or expensive follow-up treatments. LOSE WEIGHT FREE!! If you are concerned about gaining weight when you stop smoking, or want to lose excess pounds, this program can help you lose your desire for fattening foods without dieting and without willpower. . . ." (Exhibit D)

E. "THE GUARANTEED GROSSMAN METHOD Has Helped Thousands to Become Non-Smokers!!

'After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done.' I highly recommend it to anyone who wants to quit smoking.' Gerald Vermeulen, MD Physician Joliet, IL.

'I attended your seminar three years ago and quit smoking after 38 years of killing myself . . .' Floyd Girvin Memphis, TN.
'This seminar was the beginning of a whole new life for me. I attended your program over a year ago and to this day I have not even touched a cigarette! . . .' Katy Taylor Dunedin, FL.
'I smoked 2 packs a day for 45 years and quit 9 years ago with this seminar. This was the best investment in time and money I've ever made. I've saved; thousands of dollars! I feel healthy and alive! I've sent dozens of people to this seminar and they are all non-smokers too.' Andy Post Worth, IL.
'I quit smoking at this seminar in 1989 after 34 years of 2-1/2 packs a day... Dortha Thaxton Blytheville, AR.
'Thanks to your program I have been smoke free for almost 4 years! I had smoked 3 packs a day for 15 years.' Hugh Hawkins Salisbury, NC." (Exhibit E)

F. "STOP SMOKING GUARANTEED In Just 3 Hours Flat! Without Anxiety, Irritability or Weight Gain! . . . Proven 97.22% Effective . . . Our method is so effective that at many of our seminars 100% of the participants stop smoking for good. At a seminar we conducted last year for Jefferson Memorial Hospital in Crystal City, Mo, 97.22% of the participants quit smoking! These amazing results were verified by 2 separate follow-up surveys conducted by both the American Institute of Smoking Cessation and Jefferson Memorial Hospital." (Exhibit F)

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

A. Participants who attend respondents' single-session group hypnosis seminar typically are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing irritability, anxiety or weight gain.

C. Over three hundred thousand consumers have permanently quit smoking as a result of attending respondents' single-session, group hypnosis seminar over the last fifteen years.

D. Up to or over 98% of consumers attending respondents' single-session group hypnosis seminar have quit smoking.

E. Respondents' single-session group hypnosis seminar is more efficacious for smoking cessation than other stop-smoking methods.

PAR. 6. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-E, 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 that 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. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that surveys prove that ninety-seven to one hundred percent of the participants who attend respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars.

PAR. 9. In truth and in fact, follow-up surveys do not prove that ninety-seven to one hundred percent of the participants who attend many of respondents' smoking cessation seminars permanently abstain from smoking after attending those seminars. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements in the advertisements referred to in paragraph four, including but not limited to the advertisement attached as Exhibits A and C, respondents have represented, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar typically achieve weight loss quickly.

PAR. 11. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 12. In truth and in fact, at the time that they made the representation set forth in paragraph ten, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. 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.

EXHIBIT A

Sun., Nov. 29, 1992 Rocky Mountain News

THE GUARANTEED GROSSMAN METHOD

STOP SMOKING IN JUST 3 HOURS FLAT!

Without Anxiety, Irritability or Weight Gain!

WRITTEN MONEY BACK GUARANTEE

$39.99 COMPLETE

NO SHOTS! NO PILLS! NO PATCHES! NO GUM!

AURORA	NORTHGLENN	LAKEWOOD
TUESDAY-DECEMBER 1	WEDNESDAY-DECEMBER 2	THURSDAY-DECEMBER 3
7:00PM	7:00PM	7:00PM
HOLIDAY INN-SOUTHEAST DENVER	HOLIDAY INN-NORTHGLENN	SHERATON DENVER WEST
3200 S. Parker Rd.	10 East 120th Ave.	360 Union Blvd.
(I-225, Exit Parker Rd.)	(I-25, Exit 223)	(6th Ave. Exit Simms/Union)

NOTICE: All programs are personally presented by Dr. Kenneth Grossman. Register at the door at 6:30 PM.Cash, Check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes. This seminar is fun! Bring your friends and stop smoking together!

FOR INFORMATION ON SPECIAL GROUP DISCOUNTS OR ON-SITE CORPORATE PROGRAMS, CALL 1-800-225-6588.

"The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who can us, up to 98% will throw away their cigarettes and stop smoking by seminar's end. I personally guarantee it" Kenneth Grossman, Ph.D.

"After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done. I highly recommend it to anyone who wants to quit smoking."
Dr. Gerald Vanseuten Physician Joliet, IL

"It helped me quit after 40 years of smoking 2 packs a day. This program is well explained and of great value."
Dr. Frank Wilcke Physician Elgin, IL

Excellent explanation of hypnosis and the hypnotic process. By the end of the session I was a non-smoker easily and effectively."
Dr. Steven Tailor Physician Morris, IL

"I tried to quit before and I almost killed my husband! This time, no problem! My husband came two months later and became a non-smoker too."
Jennifer Murray Aurora, CO

"Best thing to happen to me. I came to prove it wouldn't work, but it did."
Barbara Brazell Denver, CO

"Easy as taking off a log!"
JoAnn Blohm Golden, CO

"Being around my smoking friends does not bother me as I anticipated it would. I feel physically so much better and am quite proud of my accomplishment."
Diane Ryan Denver, CO

"I didn't think this session would work for me, I'd been to Smoke Enders twice, Lutheran Hospital Smoking Cessation & a hypnotist ($230.00). Only this class helped me to quit."
Bill Gericke Arvada, CO

"Quick and easy!! Highly recommend this program to others."
Jerry Osgood Morrison, CO

"I had tried nearly all the methods to stop smoking to no avail. I was truly amazed at the ease I had in becoming a non-smoker. I am truly thankful I came."
Gayln Wagner Lakewood, CO

"This is the best, simplest, most straight forward and convenient program I have ever come across. I highly recommend it!"
Dr. Ronald Conden Elgin, Illinois

ELIMINATES YOUR DESIRE FOR CIGARETTES

See, hear and experience it for yourself - -and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. You'll be able to finish a meal, have a cup of coffee, have a beer, go to the bathroom, talk on the phone, watch TV, drive an automobile, take a break - -or anything else. But you'll do it without smoking. You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.

YOU ARE ALWAYS IN CONTROL

You won't be unconscious. You'll be aware of everything. Yet you'll be in a pleasant state of hypnosis which will help to to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped tens of thousands of heavily addicted smokers to become non-smokers in one relaxing and enjoyable 3 hour seminar.

WRITTEN MONEY BACK GUARANTEE

We are so sure that you will stop smoking that WE PERSONALLY GUARANTEE YOUR RESULTS. If for any reason, BEFORE THE END OF THE SEMINAR, you are not satisfied, we will refund your money on the spot, no questions asked. If, for any reason, you ever go back to smoking, you may attend another Grossman Method Stop Smoking Seminar FREE OF CHARGE.

ABOUT YOUR SEMINAR LEADER

This is the ORIGINAL STOP SMOKING IN THREE HOURS FLAT SEMINAR developed and presented by Dr. Kenneth Grossman. Over the years many others have tried to imitate it, but they simply cannot duplicate it.

Kenneth Grossman, Ph.D., developed this seminar during a career of over 15 years as a clinical hypnotherapist helping people to stop smoking and rid themselves of unwanted habits. He taught many hypnosis related seminars at the college level including the widely acclaimed "Self-Hypnosis for Self-Improvement Seminar" which empowers the students to focus the power of their mind to accomplish any goal they can conceive.

He studied at Eastern Michigan University, the University of Nebraska, the University of Chicago and earned his doctorate in Clinical Hypnotherapy from the American Institute of Hypnotherapy. He is listed in *Who's Who in Professional Speaking* and *Who's Who in the Midwest*.

LOSE WEIGHT FREE

Now you can use the Grossman Method of Hypnosis to help you lose weight. If you are concerned about gaining weight when you stop smoking, or would like to lose those extra pounds, the WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both seminars the Weight Loss Program is FREE! If you are a non-smoker who wishes to lose weight with the Weight Loss Program, you MUST register at 6:30 and attend the program from 7:00PM to 10:30 PM. Your fee is only $39.99.

"The Weight Loss Program is terrific. In two months I've lost 47 pounds. I went from a size 18 to a size 12!! It's been a great summer at the beach!"
Gerri Cheek

"I lost 28 pounds in just six weeks. I lost the weight so fast and easy that my family and friends were astonished."
John Cain

Presented as a public service by AMERICAN STOP SMOKING SEMINARS INC Hyattsville Illinois

SMOKERS BRING THIS AD FOR AN EXTRA BONUS!

Exhibit A

EXHIBIT B

THE GUARANTEED GROSSMAN METHOD

STOP SMOKING

IN JUST 3 HOURS FLAT!

WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN!

$ 39 99

NO HIDDEN COSTS

Kenneth Grossman, Ph.D.
The Stop Smoking Specialist

"The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, over 95% will throw away their cigarettes and stop smoking by seminars end. I personally guarantee it."

OVERLAND, KS
WEDNESDAY - JUNE 23
7:00 PM
RAMADA INN - SOUTHWEST
8787 Reeder Rd.
(I-35, Exit 87th St. East)

KANSAS CITY, MO
THURSDAY - JUNE 24
7:00 PM
ADAM'S MARK HOTEL
9103 E. 39th St.
(I-70 and the Truman Sports Complex)

NOTICE: Register at the door at 6:30 PM. Cash, check, Visa, Mastercard and American Express are all welcome.
Bring all your cigarettes. This seminar is fun! Bring your friends and stop smoking together!
FOR INFORMATION ON CORPORATE DISCOUNTS, CALL 1-800-225-6580 OR FAX 1-708-325-5485.

ELIMINATES YOUR DESIRE FOR CIGARETTES

I know you! You've tried to quit smoking many times before- -but nothing worked. Not nicorette gum. Not the "patch". Not "cold turkey". Not willpower. And not even other forms of hypnosis.

The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable 3 hour seminar. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.

You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers.

WRITTEN MONEY BACK GUARANTEE

I am so sure that you will stop smoking that I PERSONALLY GUARANTEE YOUR RESULTS. If for any reason, BEFORE THE END OF THE SEMINAR, you are not satisfied, *I will refund your money* on the spot, no questions asked. Also, you will receive a written Guarantee Card. If you ever go back to smoking, it entitles you to attend another Grossman Method Stop Smoking Seminar FREE OF CHARGE.

DOCTOR RECOMMENDED

"Excellent explanation of hypnosis and the hypnotic process. By the end of the session I was a nonsmoker easily and effectively."
Steven Teller, MD Physician Morris,IL
"This is the best, simplest, most straight forward program I have ever come across. I recommend it."
Ronald Conden, DDS Dentist Elgin, IL
"I highly recommend it."
Gerald Vermeulen, MD Physician Joliet, IL
"This program is well explained and of great value."
Frank L. Wiltde, MD Physician Elgin, IL
"I strongly advise it to everyone who smokes."
Joel Needleman, DDS Dentist Ingleside, TX
"I refer my smoking patients to this program."
Kent R. Corral, MD Physician Tempe, FL
"This works! Before this program I tried patches and everything else without success."
Jessee P. O'Dwyer, DDS Dentist Nashville, TN

LOSE WEIGHT FREE

Now you can use the Grossman Method of Hypnosis to help you lose weight. The WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR. Lose weight the quick, safe and healthy way. Eliminate food cravings, anxiety and guilt. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both seminars the Weight Loss Program is FREE! If you are a NON-SMOKER who wishes to lose weight with the Weight Loss Program, you must register at 6:30 and attend the program from 7:00PM to 10:30PM. Your fee is only $39.99.

$5.00 COUPON

ATTENTION SMOKERS!

Bring in this flyer for $5.00 off the registration fee. Coupon good only for the Stop Smoking Seminar on the dates listed above. Not redeemable for cash. One coupon per person. Machine made copies are acceptable, so give a copy to a friend!

Exhibit B

EXHIBIT C

THE GUARANTEED GROSSMAN METHOD

STOP SMOKING

IN JUST 3 HOURS FLAT!

NO ANXIETY
NO IRRITABILITY
NO WEIGHT GAIN

$39.99 COMPLETE!

WRITTEN MONEY BACK GUARANTEE

Kenneth Grossman, Ph.D.
The Stop Smoking Specialist

"The Grossman Method of Hypnosis has helped over 300,000 smokers during the past 15 years. Of those motivated smokers who join us, up to 98% will throw away their cigarettes and stop smoking by seminars end. I personally guarantee it."

SMOKERS BRING THIS AD FOR AN EXTRA BONUS!!

TAMPA	ST. PETERSBURG BEACH
WEDNESDAY - DEC. 16	THURSDAY - DEC. 17
7:00 PM	7:00 PM
HOLIDAY INN-TAMPA AIRPORT 4500 W. Cypress Street (I-275, Exit Westshore Blvd.)	TRADEWINDS HOTEL 5500 Gulf Blvd. (I-275, Exit 4 Pinellas Bayway)

NOTICE: All programs will be personally presented by Dr. Kenneth Grossman. Register at the door at 6:30 PM. Cash, check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes. Great idea! Bring your friends and stop smoking together!

FOR INFORMATION ON SPECIAL GROUP DISCOUNTS OR ON-SITE CORPORATE PROGRAMS CALL 1-800-225-6580

ELIMINATES YOUR DESIRE FOR CIGARETTES!

See, hear and experience it for yourself - - and then stop smoking completely. You'll be able to do anything you've done before, but you'll do it without smoking. You'll be able to finish a meal, have a cup of coffee, have a beer, go to the bathroom, talk on the phone, watch TV, drive an automobile, take a break - - or anything else. But you'll do it without smoking. You'll be able to be around others who smoke, and their smoking won't bother or upset you. No matter how much you smoke, or how long you've been smoking, this seminar ELIMINATES THE CRAVING, URGE AND DESIRE TO SMOKE.

YOU ARE ALWAYS IN CONTROL

You won't be unconscious. You'll be aware of everything. Yet, you'll be in a pleasant state of hypnosis which will help you to overcome your desire for cigarettes once and for all. The Grossman Method of Hypnosis is safe and effective and it has helped thousands permanently become non-smokers.

WRITTEN MONEY BACK GUARANTEE

I am so sure that you will stop smoking that I PERSONALLY GUARANTEE YOUR RESULTS. If for any reason, BEFORE THE END OF THE SEMINAR, you are not satisfied, I will refund your money on the spot, no questions asked. If, for any reason, you ever go back to smoking, you may attend another Grossman Method Stop Smoking Seminar FREE OF CHARGE.

THE PAINLESS WAY TO QUIT SMOKING

I know you! You've tried to quit smoking many times before---but nothing worked. Not nicorette gum. Not "cold turkey". Not willpower. And not even other forms of hypnosis.
The Grossman Method of Hypnosis is unique. It is guaranteed to end your smoking habit in just one relaxing and enjoyable 3 hour seminar.

HIGHLY RECOMMENDED BY MEDICAL DOCTORS!

Dr. Grossman developed his revolutionary seminar after many years of clinical research with heavy tobacco users.

This seminar is so effective that it is highly recommended by medical doctors and other health professionals. (See Back Page)

LOSE WEIGHT FREE

Now you can use the Grossman Method of Hypnosis to help you lose weight. If you are concerned about gaining weight when you stop smoking, or would like to lose those extra pounds, the WEIGHT LOSS SEMINAR IS ABSOLUTELY FREE WHEN YOU ATTEND THE STOP SMOKING SEMINAR. Lose weight the quick, safe and healthy way. Eliminate food cravings, anxiety and guilt. The Weight Loss Hypnosis will take place immediately following the Stop Smoking Seminar. (Plan on an additional 35 minutes.) If you attend both, the Weight Loss Program is FREE! If you are a NON-SMOKER who wishes to lose weight with the Weight Loss Program, you must register at 6:30 and attend the program from 7:00 PM to 10:30 PM. Your fee is only $39.99.

"The Weight Loss program is terrific. In 2 months I've lost about 47 lbs. I went from a size 18 to size 12!! It's been a great summer at the beach!!"
Gerri Cheek Hanover, MD

"I lost 28 lbs. in just 6 weeks. I lost the weight so fast and easy that my family & friends were astonished."
John Cain Springfield, IL

AMERICAN STOP SMOKING CLINICS, INC. DR. KENNETH GROSSMAN, EXECUTIVE DIRECTOR

SMOKERS BRING THIS AD FOR AN EXTRA BONUS!!

EXHIBIT D

Amanda Lorenz.
Best man was John Kuykendall. Ushers were Ray and Brad Clayton.
The bride is a graduate of Glenwood High School and Illinois Wesleyan University. She is employed as a sales manger at Newark Electronics in Decatur. The groom is a graduate of Carmi Community High School and the University of Illinois. He is employed as a purchasing agent at PPG Industries.
The couple will reside in Mount Zion.

INTERNATIONAL STUDENTS NEED YOUR HELP!
Host families are urgently needed by...
Choose your student now!
Call your local Coordinator:
Leo Nickelson Jr.
217-525-2919
or 1-800-522-3230

EIGHT
GEMENT
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62769

next, in spite of all competition." a best friend. "I've always been to put your hands on."

THE ORIGINAL GROSSMAN METHOD HAS HELPED THOUSANDS!

STOP SMOKING
IN THREE (3) HOURS FLAT!
WITHOUT ANXIETY, IRRITABILITY OR WEIGHT GAIN

WED - JULY 24TH - 7:00 PM
Holiday Inn - East
3100 S. Dirksen Parkway
Springfield
(I-55, Exit 94)

REGISTER AT THE DOOR AT 6:30 PM. The fee is only $40 ($38 with the coupon). Cash, check, Visa, MasterCard and American Express are all welcome. Bring all your cigarettes - smoking is permitted.

ONLY $38
WITH THIS COUPON
SAVE $10
You must present this coupon at registration.

Dr. Kenneth Grossman Live and In Person!

Kenneth Grossman, PhD
The Stop Smoking Specialist

See, hear and experience it for yourself - - and then throw away your cigarettes and stop smoking completely. Without anxiety, irritability, or weight gain!
You'll be able to do anything you've done before - - drink coffee or tea, finish a meal, have a beer, go to the bathroom, drive, work, take a break, talk on the phone, or do anything else - - yet, you'll be able to do it without smoking.
Your energy level will increase. You'll feel better about yourself. You will save hundreds of dollars each year. You will reduce your chances of getting heart disease, cancer, or lung disease.
Don't miss this - - it's the easiest way to quit!

WARNING: SEMINARS ARE NOT ALL THE SAME. Don't confuse Dr. Grossman's seminar with others that may sound like his but are quite different. This is the original program that has helped thousands of smokers quit for good without shots, pills, gum or expensive follow-up treatments.

SATISFACTION GUARANTEED!
If, AT ANY TIME BEFORE THE END OF THE PROGRAM, you are not satisfied, your money will be refunded - - no questions asked.

Recommended by Physicians and Community Leaders:

"After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done. I highly recommend it to anyone who wants to quit smoking."
Darryl Thomasian, MD Physician
Joliet, IL

"I helped me quit after 40 years of smoking 2 packs a day. This program is well explained and at great value."
Frank L. Wilkie, MD Physician
Elgin, IL

"With your help, many of my patients have discovered smoking."
Kent Corral, MD Physician
Tampa, FL

"This helped me quit smoking. I have become a believer in the program and I strongly advise it to everyone who smokes."
Joel Nordstrom, DDS Dentist,
Ingleside, TX

"You changed my life! After 33 years I am now a non-smoker! I have nothing but praise and gratitude for the seminar."
Susan Rapoza, RN Nurse
Honolulu, HI

"I attended your seminar and walked away a non-smoker with no physical or psychological withdrawal. I believe in the work you are doing and I will post your information on our church bulletin board for the benefit of others."
Rev. Joseph Sanchez Catholic Priest,
Nashville, TN

"This program worked for me and I highly recommend it to others."
William P. Huntington Chief of Police
State Fair Park, Milwaukee, WI

"I attended your program over a year ago and to this day I have not even touched a cigarette. I have also lost 37 pounds! I like the new me!"
Katy Taylor Dunedin, Florida

"I smoked 2 packs a day for 45 years and quit 8 years ago with Dr. Grossman. This was the best investment in time and money I've ever made. I've saved thousands of dollars. I feel healthy and alive. I've sent dozens of people to the seminar and all of them are non-smokers too."
Andy Post, Wanda, IL

LOSE WEIGHT FREE!!

If you are concerned about gaining weight when you stop smoking, or want to lose excess pounds, this program can help you lose your desire for fattening foods without dieting and without willpower. When you register for the Stop Smoking seminar, you are invited to attend the Weight Loss program ABSOLUTELY FREE OF CHARGE. (Plan on an additional 35 minutes.) If you are a non-smoker and would like to attend the Weight Loss program, your fee is only $38 with the coupon in this ad. Register at 6:30 PM

For information on corporate discounts call: 1-800-225-6580

EXHIBIT E

THE GUARANTEED GROSSMAN METHOD

Has Helped Thousands to Become Non-Smokers!!

"Excellent explanation of hypnosis and the hypnotic process. By the end of the session I was a nonsmoker easey and effectivey."
Steven Taller, MD Physician
Morris, IL

"After attending this session 3 years ago, I never thought of smoking again. It was one of the easiest things I have ever done. I highly recommend it to anyone who wants to quit smoking."
Gerald Vermeulen, MD Physician
Joliet, IL

"It helped me quit after 40 years of smoking 2 packs a day. This program is well explained and of great value."
Frank L. White, MD Physician
Elgin, IL

"With your help, many of my patients have discontinued smoking."
Kent Correl, MD Physician
Tampa, FL

"This helped me quit smoking. I have become a believer in this program and I strongly advise it to everyone who smokes."
Joel Needleman, DDS Dentist
Ingleside, TX

"You changed my life! After 23 years I am now a non-smoker! I have nothing but praise and gratitude for the seminar."
Susan Rapoza, RN Nurse
Honolulu, HI

"Since I quit smoking at your seminar, I began to swim one mile per day and have lost the weight that I did not need! All this at 61 years old! Thanks for helping me enjoy life again!"
Ted Hooper Richmond, VA

"I attended your seminar three years ago and quit smoking after 38 years of killing myself. I have not experienced any weight gain. I feel so good about myself!"
Floyd Girvin Memphis, TN

"Thanks for my new life! I now participate in an aerobics class, go bicycling or walk on a daily basis. I even lost 10 pounds! I am becoming more fit than at any time in my life. I am proud to be a non-smoker!"
Sandra K. Miller Champaign, IL

"Even though I knew I should quit smoking, my conscience told me I loved it. I couldn't believe the results of the seminar! I NEVER picked up another cigarette after the program."
Ellen Coggin Jacksonville, FL

"The ease and lack of concern I feel about smoking has been great. Since your seminar I've had no hard days - - no craving - - no bad moods. I feel great!"
Lucky Clemons Stone Mountain, GA

"This program worked for me and I highly recommend it to others."
William P. Harrington Chief of Police
State Fair Park, Milwaukee, WI

"I attended your seminar and walked away a non-smoker with no physical or psychological withdrawal. I believe in the work you are doing and I will post your information on our church bulletin board for the benefit of others."
Rev. Joseph Sanches Catholic Priest
Nashville, TN

"This seminar was the beginning of a whole new life for me. I attended your program over a year ago and to this day I have not even touched a cigarette! I have also lost 27 pounds! I like the new me!"
Katy Taylor Dunedin, FL

"I smoked 2 packs a day for 45 years and quit 9 years ago with this seminar. This was the best investment in time and money I've ever made. I've saved thousands of dollars! I feel healthy and alive! I've sent dozens of people to this seminar and they are all non-smokers too."
Andy Post Worth, IL

"I was a real tough customer as I had been smoking for 30 years. I tried various methods and products on the market, but nothing had worked for me. After attending your program, I have completely stopped smoking and don't even have any desire for a cigarette!"
Allen A. Pollack Owings Mills, MD

"I have sent 12 family members to your program since I became a non-smoker a year ago and ALL of them have also become non-smokers. Two of them were attending for chewing tobacco and neither has had any desire to chew since your seminar."
Greg Williams Marietta, GA

"I smoked for 30 years. I attended your seminar and have not had a cigarette since. It was almost like a miracle! NO withdrawal symptoms!"
Vilma F. Marquez El Paso, TX

"Easy as pie! If I can do it, anyone can!"
Joyce Schnepf Charlotte, NC

"Great program. Easy as 1-2-3!"
Linda Revels Charlotte, NC

"My husband and 2 very good friends quit smoking at your seminar. My husband was a hard core smoker. Not only do they have more money but they feel better and I also benefited from your tapes. We could not be happier."
Darlene Harzke Milwaukee, WI

"Never thought I could feel this good again."
Madelyn Cheek Cumming, GA

"I have not had withdrawal symptoms. People smoking in front of me does not bother me. It has been terrific!"
Leilani Bush Waimanlo, HI

"The seminar is most helpful and I highly recommend it to all smokers."
Rev. John Atkinson Catholic Priest
Memphis, TN

"This is a wonderful program! I had quit several times before - - but this is totally different. This time I have had no withdrawal symptoms as I did before."
Flo Wheeler Raleigh, NC

"I never thought this would work for me. But it did! I feel that it was the best money I EVER spent."
Cathy Bankar Elgin, IL

"I quit smoking at this seminar in 1969 after 34 years of 2-1/2 packs a day. I also attended the weight loss program and have lost 20 pounds. This worked great for me!"
Dortha Thaxton Blythevile, AR

"This is the most sure-fire method of quitting smoking. Before this I had tried every method that I could find. This program has provided positive results for me!"
Don Warren Raleigh, NC

"I stayed for the Weight Loss and easely lost 36 pounds in 4 months!"
Glenn Martin Centre, AL

"I found it one of the easiest things I've ever done in my life! This is a powerful seminar which enabled me to step from a 42-year smoking habit into a non-smoking and far more pleasant existence in an instant of time!"
Will Kennedy Stevens Point, WI

"Thanks to your program I have been smoke free for almost 4 years! I had smoked 3 packs a day for 15 years."
Hugh Hawkins Salisbury, NC

"Before I went to this seminar, my life was consumed by cigarettes. Cigarettes were the first thing I thought about in the morning and the last thing every night. Dr. Grossman made quitting easy! My life is actually less stressful without smoking."
Jeffery Rush Indianapolis, IN

"I suggest it to everyone. Great stuff!"
Thomas Walbeck Woodstock, GA

"It's so wonderful to be free of the burden of smoking. After endless attempts, I successfully became a non-smoker with Dr. Grossman. I am so grateful and I highly recommend his program."
Rev. James Dammer Catholic Priest
Milwaukee, WI

Kenneth Grossman, Ph.D

ABOUT YOUR SEMINAR LEADER

Kenneth Grossman, Ph.D., developed this seminar after more than 12,000 hours of private practice in clinical hypnotherapy and after teaching many college level courses. Since then, he has presented hundreds of Stop Smoking Seminars to enthusiastic audiences throughout the United States. He studied at Eastern Michigan University, the University of Nebraska, the University of Chicago and earned his doctorate in Clinical Hypnotherapy from the American Institute of Hypnotherapy. He is listed in *Who's Who in Professional Speaking* and *Who's Who in the Midwest*.

AMERICAN STOP SMOKING CLINICS, INC. P.O. BOX 11, HINSDALE, ILLINOIS 60521-0011

EXHIBIT F

STOP SMOKING

GUARANTEED

In Just 3 Hours Flat! Without Anxiety, Irritability or Weight Gain!

Dr. Kenneth Grossman

Kenneth Grossman, Ph.D., is the Executive Director of the American Institute of Smoking Cessation, the President of the Society of Group Behavioral Hypnotherapists and the originator of this nationally acclaimed Smoking Cessation Seminar. He holds a doctorate in Clinical Hypnotherapy, and has authored numerous programs for personal growth and development. Dr. Grossman is a leading expert in smoking cessation, and [redacted] people stop smoking at

We Know You

We know you. You are tired of smoking. You have been trying to quit. You need help. You don't want cancer. You don't want heart disease. You don't want emphysema. You don't want to suffer the debilitating effects of a stroke. You are sick of the nagging of your family and friends. You are sick of spending hundreds of dollars each year on a filthy habit.

We Can Help You

You are ready to quit, but you don't know how. We can help you. We have developed the most effective method of smoking cessation available. Best of all, it takes only a few hours of your time and costs what you would pay for a few cartons of cigarettes.

[redacted] Effective!

Our method is so effective that at [redacted] 100% of those people who stop smoking [redacted] At a seminar we conducted last year for Jefferson Memorial Hospital in Crystal City, Mo. 97.22% of the participants quit smoking! These amazing results were verified by 2 separate follow-up surveys conducted by both the American Institute of Smoking Cessation and Jefferson Memorial Hospital.

Relieve Stress

Stress management is an important part of our seminar. You will learn how to feel calm, relaxed and in control. Once you learn our relaxation methods, you'll enjoy using them for the rest of your life.

ONLY $38

The Original and Still the Best

Over the years, our method of smoking cessation has spawned a number of imitators — some good, some not so good. Why take a chance on anyone but the best?

GUARANTEE:

You will stop smoking at our seminar or return to any of our future seminars throughout the world at no charge.

Weight Loss Included Free!

You don't have to worry about gaining weight when you stop smoking with our program. Special emphasis is placed on weight control and weight loss. At [redacted] participants who desired to [redacted] between 10 and 12 pounds. Some lost even more! So can you.

AT THIS LOCATION

Austin

7:00-10:00 P.M. Wednesday, May 2 Doubletree Hotel

6505 Interstate Hwy. 35 N. (Corner of I-35 & 290)

Exhibit F

"Register at door at 6:30 p.m. — Cash, Check, Visa, MasterCard and American Express are all welcome. Bring your cigarettes — they'll be the last ones you'll ever smoke!"

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 American Institute of Smoking Cessation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Illinois, with its offices and principal place of business at 318 South Garfield, Hinsdale, Illinois.

Respondents Kenneth C. Grossman and Jane A. Grossman are the sole officers and directors of the corporate respondent. Together, they formulate, direct, and control the acts and practices of the corporate respondent, and their principal office and place of business is the same as that of the corporate respondent.

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

DEFINITION

For the purposes of this order, "*competent and reliable scientific evidence*" shall mean those 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. Survey evidence may be appropriate depending on the representation made.

I.

It is ordered, That respondents American Institute of Smoking Cessation, Inc., a corporation, its successors and assigns, and its officers, Kenneth C. Grossman, individually and as an officer of said corporation, and Jane A. Grossman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing irritability, anxiety, weight gain, or other side effects unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

B. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking cessation program or weight loss program, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

C. Representing through any endorsement or testimonial that any participant(s) of respondents, smoking cessation program or weight loss program have achieved success in smoking abstinence or weight loss unless:

(1) At the time of making such representation, the success claimed is representative of the typical or ordinary experience of all participants of such program, and respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation, or

(2) Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

(a) What the generally expected results would be for participants in such program, or

(b) The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

D. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey or report.

E. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

III.

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

IV.

It is further ordered, That the individual respondents named herein shall promptly notify the Commission of the discontinuance of their present business or of their affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, each respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors, and employees.

VI.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GORAYEB SEMINARS, INC., ET AL.

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

Docket C-3561. Complaint, March. 3, 1995--Decision, March. 3, 1995

This consent order prohibits, among other things, two New Jersey-based companies and their officer from making any representation about the relative or absolute performance or efficacy of any smoking cessation or weight loss program, unless they possess and rely upon competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *Dan Schwartz, Bryan Cave*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gorayeb Seminars, Inc. ("GSI"), a corporation, and Gorayeb Learning Systems, Inc. ("GLS"), a corporation, and Ronald Gorayeb, individually and as an officer of said corporations ("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 Gorayeb Seminars, Inc., is a New Jersey corporation, with its principal office or place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Gorayeb Learning Systems, Inc., is a New Jersey corporation, with its principal office or place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Ronald B. Gorayeb is the President, Secretary, and sole Director and Shareholder of the corporate respondents. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondents, including

the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondents.

PAR. 2. Respondents have advertised, offered for sale, and sold seminars for smoking cessation and weight loss known as "The Gorayeb Method," and other stop-smoking and weight-loss seminars, to consumers. The Gorayeb Method seminar is a single-session, group hypnosis session, two hours in length, provided to consumers by respondent Ronald Gorayeb at various sites throughout the United States.

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 for The Gorayeb Method seminar for smoking cessation and weight loss, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements:

A. "THE GORAYEB SEMINARS - NO. 1 IN RESULTS. STOP SMOKING IN TWO HOURS... No cravings, No Irritability, No weight gain...WRITTEN GUARANTEE... That's right, regardless of your past experience with trying to stop, YOU WILL STOP SMOKING TONIGHT PERMANENTLY, Without Cravings and without withdrawal. You will experience two hypnotic sessions this evening, after which any desire or craving for cigarettes will simply be gone. With the Gorayeb Method of Clinical Hypnosis, you enter a deep, focused state of hypnosis where you are relaxed, alert and ALWAYS IN CONTROL. But will it work for me- Whether you are a chronic chain smoker or a casual smoker, you will leave this seminar as a NON-SMOKER. Thousands have before you, and with no withdrawal, no irritability, no weight gain. Our WRITTEN GUARANTEE. If for any reason you ever start smoking again, you'll be admitted to any Gorayeb Stop Smoking Seminar free of charge. Ronald B. Gorayeb, Certified Hypnotherapist. The Gorayeb Method of Hypnosis has worked for thousands. It will work for you too! Try it!" (Exhibit A)

B. "THE GORAYEB SEMINARS - NO. 1 IN RESULTS. LOSE WEIGHT WITH HYPNOSIS QUICKLY SAFELY WITHOUT HUNGER. WRITTEN GUARANTEE. That's right. You can LOSE THE WEIGHT YOU'VE BEEN WANTING TO-and keep it off permanently, without hunger, without dieting, without willpower. Using the power of hypnosis, you will lose unwanted cravings, eliminate the addiction to sweets and break the impulsive/compulsive eating habit-once and for all. With the Gorayeb Method of Clinical Hypnosis, there is NO SLEEP or LOSS OF CONTROL. You are awake and aware. Everyone who attends will be hypnotized. You'll leave refreshed-feeling good. But will it work for me- You can expect results ranging from 30-60 lbs. in 3 months to 120 lbs. in one year. No willpower, no hunger, no dieting - JUST SUCCESS. Thousands have

succeeded before you and you will too! Remember, diets don't work. You diet, lose weight and 6 months later it's all back. The only real answer for true behavior modification is the utilization of the subconscious mind. Our Written Guarantee: You will lose all the weight you've been wanting to. If you don't, or if you ever want a reinforcement, you'll be admitted to any Gorayeb Weight Loss Seminar free of charge. STOP HAVING WEIGHT AS AN ISSUE IN YOUR LIFE - Join us and become the winner you've always wanted to be. Ronald B. Gorayeb Certified Hypnotherapist. The Gorayeb Method of Hypnosis has worked for thousands. It will work for you too! Try it!" (Exhibit B)

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

A. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction and permanently abstain from smoking cigarettes.

B. Participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, anxiety or weight gain.

C. Thousands of consumers have permanently quit smoking as a result of attending respondents' single-session, group hypnosis seminar.

PAR. 6. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit A, 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 that 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. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that:

A. Participants who attend respondents' single-session group hypnosis seminar achieve and maintain weight loss.

B. Thousands of consumers have achieved and maintained weight loss as a result of attending respondents' single-session group hypnosis seminar.

C. Respondents' single-session group hypnosis seminar is more efficacious for weight loss and weight-loss maintenance than other weight-loss methods.

PAR. 9. Through the use of the statements in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph eight, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 10. In truth and in fact, at the time that they made the representations set forth in paragraph eight, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. 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.

EXHIBIT A

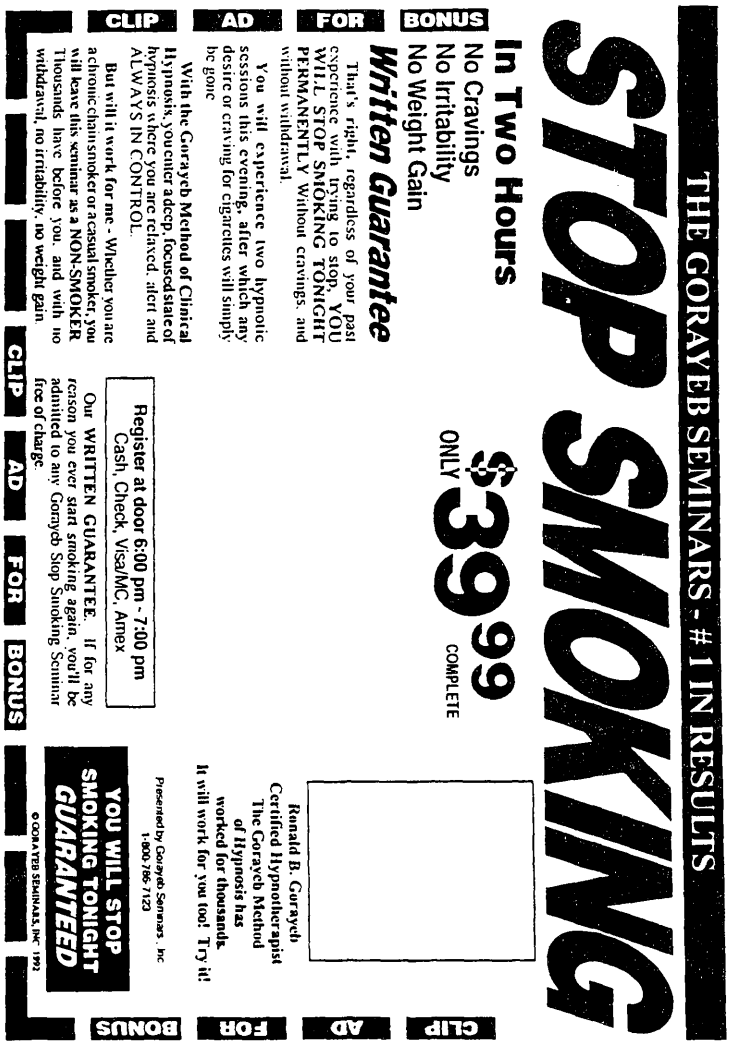


EXHIBIT A

THE GORAYEB SEMINARS - NO. 1 IN RESULTS

LOSE WEIGHT WITH HYPNOSIS

QUICKLY
SAFELY
WITHOUT HUNGER
WRITTEN GUARANTEE

ONLY $39.99 COMPLETE

That's right. You can **LOSE THE WEIGHT YOU'VE BEEN WANTING TO** - and keep it off permanently, without hunger, without dieting, without willpower.

Using the power of hypnosis, you will lose unwanted cravings, eliminate the addiction to sweets and break the impulsive/compulsive eating habit - once and for all.

With the Gorayeb Method of Clinical Hypnosis, there is NO SLEEP or LOSS OF CONTROL. You are awake and aware. Everyone who attends will be hypnotized. You'll leave refreshed - feeling good.

But will it work for me - You can expect results ranging from 30-60 lbs. in 3 months to 120 lbs. in one year. No willpower, no hunger, no dieting - JUST SUCCESS. Thousands have succeeded before you and you will too!

Register at door 6:00 pm - 7:00 pm
Cash, Check, Visa, MC, AMEX

Remember, diets don't work. You diet, lose weight and 6 months later it's all back. The only real answer for true behavior modification is the utilization of the subconscious mind.

Our WRITTEN GUARANTEE: You will lose all the weight you've been wanting to. If you don't, or if you ever want a reinforcement, you'll be admitted to any Gorayeb Weight Loss Seminar free of charge.

Ronald B. Gorayeb
Certified Hypnotherapist
The Gorayeb Method of Hypnosis
has worked for thousands.
It will work for you too! Try it!

STOP HAVING WEIGHT AS AN ISSUE IN YOUR LIFE — Join us and become the winner you've always wanted to be.

Presented by Gorayeb Seminars, Inc
1-800-786-7123

YOU WILL LOSE WEIGHT GUARANTEED

CLIP AD FOR BONUS

CLIP AD FOR BONUS

LOC2 – Small Accounts Disk #8 – Gorayeb Seminar - Locations 2 – (Megaron/A) – 5/21/92

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 attorney, 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 constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Gorayeb Seminars, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, with its offices and principal place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Gorayeb Learning Systems, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, with its offices and principal place of business at 101 Roundhill Drive, Rockaway, New Jersey.

Respondent Ronald B. Gorayeb is the sole director and shareholder of the corporate respondents. He formulates, directs, and controls the acts and practices of the corporate respondents, and his

principal office and place of business is the same as that of the corporate respondents.

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

DEFINITION

For the purposes of this order, *"competent and reliable scientific evidence"* shall mean those 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 Gorayeb Seminars, Inc., a corporation, Gorayeb Learning Systems, Inc., a corporation, their successors and assigns, and their officers, and Ronald B. Gorayeb, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any smoking cessation or weight loss program, including any such program that uses hypnosis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that participants who attend respondents' single-session group hypnosis seminar are cured of smoking addiction without experiencing withdrawal, anxiety, weight gain, or other side effects, unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

B. Making any representation, directly or by implication, about the relative or absolute performance or efficacy of any smoking cessation program or weight loss program, unless, at the time of

making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

C. Misrepresenting, directly or by implication, the performance or efficacy of any smoking cessation program or weight loss program.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

III.

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

IV.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves a

smoking cessation program or a weight loss program. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors, and employees who are involved in the preparation and placement of advertisements or promotional materials; and, for a period of three (3) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors, and employees.

VI.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

LOUIS BASS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3562. Complaint, March 13, 1995--Decision, March 13, 1995

This consent order prohibits, among other things, a Wisconsin corporation, doing business as Crestwood Company, from making false or unsubstantiated performance claims about any communication aid it offers in the future, and from making representations concerning the efficacy of the communication devices in enabling individuals with disabilities to communicate through facilitated communication, unless the respondent possesses competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Jeffrey Klurfeld, Kerry O'Brien* and *Erika Wodinsky.*

For the respondent: *David Meany, Michael, Best & Friedrich*, Milwaukee, WI.

COMPLAINT

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

PARAGRAPH 1. Respondent Louis Bass, Inc. (d/b/a Crestwood Company), is a Wisconsin corporation, with its principal office or place of business at 6625 North Sidney Place, Glendale, Wisconsin.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed communication aids for individuals with disabilities, including the "Crestalk" and the "Canon Communicator." These products are "devices" 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 the Crestalk and the Canon Communicator, including but not necessarily limited to the attached Exhibits A-C. These advertisements contain the following statements and depictions:

A. NEW ROAD TO COMMUNICATIONS
Mickey communicates with Crestalk™ one letter at a time...
Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."
Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.
He is using Crestwood's new electronic aid called, "CRESTALK,™" which can be used by many adults or children with communication difficulties.
{depicting the device's screen with the words "I LIKE DAVE DAVE FRIEND" appearing on it}
(Exhibit A)

B. Mickey communicates with Crestalk® one letter at a time...
Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."
Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.
He is using Crestwood's new electronic aid called, "CRESTALK,®" which can be used by many adults or children with various types of communication difficulties.
With the help of his facilitator, Dave Mikulecky, Mickey writes, "I LIKE DAVE DAVE FRIEND"
{depicting the device's screen with the words "I WANT A GRILLED CHEESE SANDWICH" appearing on it}
(Exhibit B)

C. Many autistic children are using Facilitated Communication with the Canon very successfully. (Exhibit C)

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

A. The Crestalk enables autistic individuals to communicate through facilitated communication.

B. The Canon Communicator enables autistic individuals to communicate through facilitated communication.

PAR. 6. In truth and in fact:

A. The Crestalk does not enable autistic individuals to communicate through facilitated communication.

B. The Canon Communicator does not enable autistic individuals to communicate through facilitated communication.

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

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

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

PAR. 9. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

EXHIBIT A

FOR
CHILDREN AND ADULTS

NEW ROAD TO COMMUNICATIONS

Mickey communicates with Crestalk™ one letter at a time . . .

Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called **"Facilitated Communication."**

Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.

He is using Crestwood's new electronic aid called, "CRESTALK,™" which can be used by many adults or children with communication difficulties. See page 9.

Actual Size of Display

1992-93 Catalog
CRESTWOOD COMPANY
Phone: (414)352-5678

MORE NEW DYNAMIC AIDS

- ▶ Talking Laser Beam®
- ▶ Big Orange Switch
- ▶ Sonic Frame-Mirror
- ▶ 39 Adapted Toys
- ▶ Talking Pictures® Kit V — In Sign Language

EXHIBIT A

EXHIBIT B

A New Exciting Portable Communication Aid — At An Incredibly Low Price

Mickey communicates with Crestalk® one letter at a time . . .

Mickey, 18, who is autistic, is communicating with his teacher, Dave Mikulecky, by using the very latest technique called "Facilitated Communication."

Mickey needs only light support on his forearm to type out the words that help him express his thoughts and feelings.

He is using Crestwood's new electronic aid called "CRESTALK®" which can be used by many adults or children with various types of communication difficulties.

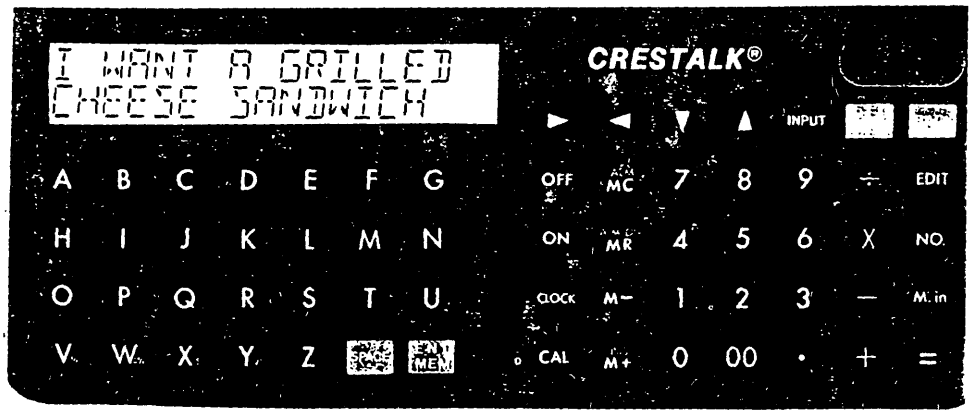
With the help of his facilitator, Dave Mikulecky, Mickey writes, "I LIKE DAVE DAVE FRIEND"

CRESTALK® is an efficient and economical communication device for children and adults who have difficulty expressing their needs orally and cannot be understood by others — a giant step forward towards greater independence. Extraordinary electronic aid is lightweight and portable to carry with you wherever you go. Easy to use, just press keys lightly to express thoughts, wants, needs, and feelings. Message prints 16 characters per line on 2 line display panel. Display continues scrolling for longer messages.

With 20K MEMORY you can also preprogram hundreds of sentences easily and then retrieve them on the spot quickly. Calculator function. High quality, compact. Batteries included. 1 year manufacturer's warranty. Spec sheet available.

3000 Crestalk® & Case With Handle $129.95

2119 New Book: Communication Unbound — Facilitated Communication, by Dr. Douglas Biklen, 1993. See #2119, p. 21 ..... $17.95



ACTUAL SIZE - 3½" x 8¼" x 1"

PORTABLE - Weight 9 ozs.

11

EXHIBIT B

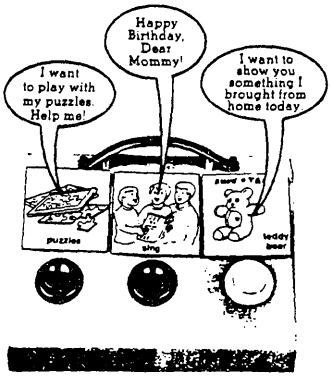
EXHIBIT C

CRESTWOOD INTRODUCES TALK BACK™ III

A new message center enables nonverbal and unintelligible children and adults to communicate with Real Speech!

WIDE VARIETY OF USES: Yes, no, I don't know; likes and dislikes, identifying information, favorite TV show; music games; food, clothing; messages; etc., etc.

VERSATILE: YOU CAN record up to three messages in any language Use at school, home, hospital, nursing home, rehabilitation center, recreational area, etc. Patent pending



Liza Sanders, Director of Speech Pathology and Audiology, of Central Virginia Training Center in Lynchburg, VA wrote *"Easy to program and use. I really like the voice quality! Very portable and easy to display or change pictures. This is really a great communication device for someone who is beginning to learn to communicate but can't use anything sophisticated."*

FEATURES

- Press one button to record up to three messages for a total of 20 seconds. Will mix phrase length to provide individual messages of 5, 10, or 20 seconds.
- Easy to play back. Lightly press one of three buttons or one of three optional external switches (not supplied).
- Can reprogram instantly.
- Very high quality sound.
- Built-in shelf to hold 3 pictures.
- Learning time - seconds.
- Built-in microphone.
- Battery failure will not result in lost messages. Automatic control conserves battery life. 9 volt battery is included.
- Carrying handle. Lightweight - only 1½ lbs.
- 6 month warranty.

Talk Back™III can be used together with Crestwood's (3 in 1) Momentary Control Center Switch or any other single momentary switch with 1/8" plug, for those requiring switch operation. See #3087, pg. 14.

3036 Talk Back™III $249.95
3087 Momentary Control Center Switch $149.95

3037 MESSAGE CENTER PACKAGE — SAVE $40.00
Talk Back™III with
Control Center Switch (3 in 1) $359.00

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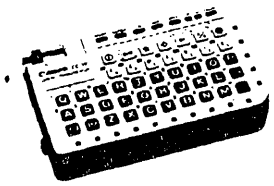
2 CANON TAPE COMMUNICATORS



Many autistic children are using Facilitated Communication with the Canon very successfully.

TWO NEW 1992 MODELS to help improve communication Model CC-7P PAPER printout only and Model CC-7S-SOUND and/or PAPER printout Both have the following features 1) Press the keys and print out MESSAGES ON TAPE 2) MESSAGE MEMORY Each stores up to 7,000 characters and prints out frequently used phrases Easy to use record and recall modes 3) CALCULATOR FUNCTION 4) ENLARGED PRINT Lower case and capitals, regular or double width 5) Insert any momentary switch with ⅛" plug (p 13) to row and column scan intersect Enables person who can't press keys to print out message (Switch not included) 6) Built in rechargeable battery pack gives 6-7 hours of continuous use. Compact, 7" x 4 9/16" x 1 9/16" Weight 7P Model - 17.6 ozs., 7S Model - 18.5 ozs ASK US FOR A SPEC SHEET

Only Model CC-7S has SOUND MEMORY YOU can record up to 240 seconds total recording time, microphone provided Playback done thru built-in speaker

SET INCLUDES Canon Communicator, battery pack, charger, keyboard cover, saliva guard, soft case, neck strap, and 20 rolls of paper OPTIONAL ACCESSORIES wheelchair attachment, armbelt, extension bells No return on any Canon or equipment

This does not void 1 yr Canon warranty of parts and labor

3053 Canon CC-7P Print Only ..... DLVD PRICE $850.00
3054 Canon CC-7S Speech/Print ..... DLVD PRICE $1,100.00
3051 20 Rolls of Paper $19.50

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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. Respondent Louis Bass, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located in the City of Glendale, State of Wisconsin.

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

ORDER

DEFINITIONS

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

A. The term *"communication aid"* means any alphabet display chart, computer, typewriter or other device, which is created or marketed for use by persons with communication impairments, including the "Crestalk" and "Canon Communicator."

B. The term *"facilitated communication"* means any method or technique or process that entails an individual providing physical support to a person with a communication impairment, while that person types or points to a communication aid.

I.

It is ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), 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, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, 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, that such product enables autistic individuals to communicate through facilitated communication.

II.

It is further ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), 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, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, 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 product enables individuals with disabilities to communicate through facilitated communication, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent, Louis Bass, Inc. (d/b/a Crestwood Company), 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, labelling, advertising, promotion, offering for sale, sale, or distribution of any communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the performance or attributes of any such product, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

IV.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V.

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

VI.

It is further ordered, That the corporate respondent shall, within sixty (60) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, licensees, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order to all of respondent's future such officers, agents, representatives, licensees, independent contractors, and employees.

VII.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Azcuenaga recused.

IN THE MATTER OF

ABOVO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3563. Complaint, March 22, 1995--Decision, March 22, 1995

This consent order prohibits, among other things, a Massachusetts company and its president from making false or unsubstantiated performance claims about any communication aid they offer in the future, and from making representations concerning the efficacy of their communication devices in enabling individuals with disabilities to communicate through facilitated communication, unless the respondents possess competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Kerry O'Brien.*

For the respondents: *Leland B. Seabury, Ely & King*, Springfield, MA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Abovo, Inc., a corporation, and Susan L. Lakso, individually and as an officer 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 Abovo, Inc. is a Massachusetts corporation, with its principal office or place of business at Cabotville Industrial Park, 165 Front Street, 4th Floor, B Building, Chicopee, MA.

Respondent Susan L. Lakso is an officer of the corporate respondent. Individually or in concert with others, she formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, offered for sale, sold, and distributed the "Abovo Personal Communicating Device" ("Abovo PCD"), a communication aid for individuals with disabilities. These products are "devices" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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 for the Abovo PCD, including but not necessarily limited to the attached Exhibits A-F. These advertisements contain the following statements and depictions:

A. You're doing very well...let's finish...
{depicting Susan Lakso and John using the Abovo PCD in conjunction with the technique of facilitated communication}
Six months ago, John was thought to be mentally retarded. For over 30 years, his speech and motor skills didn't allow him to communicate meaningfully through speech, writing, or American sign language. Until six months ago, he had never been able to carry on purposeful dialog. It is hard to imagine how frustrating that was for John. In fact, he is intelligent, caring, and witty. But he had no way to let anyone else know. Over the past six months, John has been demonstrating his abilities to communicate by using an innovative technique, and a breakthrough product. The technique is facilitated communication. The product is the personal communicating device from Abovo.
{depicting the device with the words "SUSAN HEW RE YOU TODAY" appearing on its screen}
Together, they open up a world of communication possibilities for John and countless other individuals across America and around the world.
... This is a breakthrough product for persons who have not been able to communicate verbally. This product allows persons like John to have the opportunity to communicate their thoughts, their feelings, and their needs. It allows people for the first time, perhaps in their entire life, to be able to have full conversations with family members, teachers, and important people.
For individuals like John with disabilities that restrict speech and motor skills, acquiring this ability is nothing short of revolutionary.... You'll also be able to understand how this innovative product line, the first ever, designed specifically for facilitated communication, can make a phenomenal difference in the lives of persons like John who are non-verbal. . . .
Providing a voice for persons who are non-verbal has been a team effort driven by a shared desire -- the desire to bring to market a product line that raises the potential for facilitated communication to a level never before achieved....
Although the individuals who use Abovo products are a diverse group, they share a need and desire to communicate and express themselves. Our products are being used by persons with motor disabilities resulting from such conditions as apraxia,

and motor speech disorders, autism, mental retardation, RETT syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and cerebral palsy.... The ability to meaningfully communicate changes the lives of persons with restricted speech or motor skills....
Thank you for sharing Abovo's interest in giving persons who are non-speaking the ability to communicate.
(Exhibit A: promotional video)

B. Communication Breakthrough For Non-Speaking Persons...
The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit B: print ad)

C. "Just because a person can't speak doesn't mean he has nothing to say."
Personal Communicating Device™ For Non-Speaking Persons...
The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit C: print ad)

D. Breakthrough Typing Device for Non-Speaking Persons...PCD
The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit D: print ad)

E. Personal Communicating Device...PCD™
Breakthrough in Facilitated Communication and unassisted typing.
The Abovo PCD™ was designed especially for personal communication through typing. The portable PCD™ allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit E: print ad)

F. Breakthrough Typing Device for Persons with Speaking Disabilities.
The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. (Exhibit F: print ad)

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-F, respondents have represented, directly or by implication, that the Abovo PCD enables autistic and mentally retarded individuals to communicate through facilitated communication.

PAR. 6. In truth and in fact, the Abovo PCD does not enable autistic and mentally retarded individuals to communicate through

facilitated communication. 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 A-F, respondents have represented, directly or by implication, that the Abovo PCD enables individuals who are disabled as a result of apraxia, motor speech disorders, RETT Syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and/or cerebral palsy to communicate through facilitated communication.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-F, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraph five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Azcuenaga recused.

EXHIBIT A

ABOVO, INC. PROMOTIONAL DOCUMENTARY
"LISTEN TO WHAT I TYPE"

You're doing very well ... let's finish...

{depicts Susan Lakso facilitating with John}

Six months ago, John was thought to be mentally retarded. For over 30 years, his speech and motor skills didn't allow him to communicate meaningfully through speech, writing, or American sign language. Until six months ago, he had never been able to carry on purposeful dialog. It is hard to imagine how frustrating that was for John. In fact, he is intelligent, caring, and witty. But he had no way to let anyone else know. Over the past six months, John has been demonstrating his abilities to communicate by using an innovative technique, and a Breakthrough product. The technique is facilitated communication. The product is the personal communicating device from Abovo.

{"SUSAN HEW RE YOU TODAY" appears on the device's screen}

Together, they open up a world of communication possibilities for John and countless other individuals across America and around the world.

Hello, my name is Susan Lakso. I'm the founder of the Abovo Project, and the President of Abovo, the makers of the Personal Communicating Device you just saw John using. This is a breakthrough product for persons who have not been able to communicate verbally. This product allows persons like John to have the opportunity to communicate their thoughts, their feelings, and their needs. It allows people for the first time, perhaps in their entire life, to be able to have full conversations with family members, teachers, and important people.

For individuals like John with disabilities that restrict speech and motor skills, acquiring this ability is nothing short of revolutionary. The film you are about to see describes a breakthrough product, the new Abovo Personal Communicating device. John and so many others are using this product to make the most of facilitated communication. In the next few minutes, we'll show you the Abovo product line, describe important features and benefits, and introduce you to the people who turn the Abovo project into reality. You'll also be able to understand how this innovative product line, the first ever, designed specifically for facilitated communication, can make a phenomenal difference in the lives of persons like John who are non-verbal.

Whether using the facilitator, or for independent typing, the Abovo product line was designed with one goal in mind: to help people communicate.

The Abovo personal communicating device, or PCD, is a portable electronic tool designed for single finger communication by persons who wish to communicate through typing. The Abovo PCD is the main component in the first and only line of products designed specifically as electronic tools for facilitated communication. While other companies have promoted their existing products, everything from label-makers to salesman's appointment calendars, for use with facilitated communication, only Abovo products were conceived for this purpose. Developed in conjunction with leading specialists in facilitated communication, microelectronics and human factors design, the Abovo PCD simplifies the motor skill involved in typing.

Let's take a look at some of the special features and benefits you'll find in the Abovo product line.

In Latin, Abovo means, "From the ground up." The Abovo PCD was conceived and developed from the ground up as a tool for facilitated communication. This approach offers the user substantial benefits.

Using the Abovo PCD is simple and intuitive. it is ergonomically designed to minimize the motor skill necessary for typing. Forty-one large keys are recessed in size to accept a finger. The keys' tactile feel and single impression action prevent unintended multiple entries.

The Abovo PCD's light weight and small size helps it fit in a coat pocket, purse, or briefcase. Dimensions are only 3-1/2" x 8-1/2" x 2". By comparison, the smallest notebook computers are many times larger and heavier. The PCD attaches conveniently to the user's chair arm, tray, or table top. You can use it just about anywhere. It's rechargeable. Nicad batteries are built-in and last about eight to ten hours between charges. An on-screen message tells you when it's time to charge, and if you want, you can even continue using your PCD while it's charging.

The Abovo PCD is easy to read, whether you are typing, facilitating, or observing. The super twist liquid crystal display is clearly visible from all angles. An optional remote display receives an infrared signal from PCD, allowing others to read the typist's words from any convenient line of sight location. An optional distribution unit creates a network of up to eight remote displays for use around a board room, classroom, or family dinner table.

The Abovo PCD has an 8,000 character memory built-in. It can store the equivalent of five pages of typewritten text. The data in memory is retained even when the user turns the power off, and the memory can be downloaded to a personal computer. This is especially useful for writers or researchers working with facilitated communication.

The Abovo PCD P model includes a built-in printer that prints directly to a thermal tape. The typist may print directly from the keyboard, one character at a time, print everything in the 40 character display, or print the complete 8K memory buffer.

A four function calculator is built-in, giving the typist complete arithmetic capabilities directly from the keyboard. This is particularly useful for classroom work, homework assignments, and conducting money transactions.

The Abovo product line includes a range of standard and optional accessories that enable you to customize your system to your needs. The typing stand cradles the PCD. It's made of extremely durable closed cell foam, with a non-skid surface that won't slide on a tabletop. The typing stand can also be firmly attached to the typist's chair arm or tray. The stand snugly accommodates the PCD and on the opposite side a remote display unit for visible communication with others. The typing stand also does double duty as a shipping cushion, reducing the amount of packaging. The remote display unit gives users the ability to Communicate with others, up to 20 feet away. This enables everyone who wants to see the PCD's display to do so without leaving to crowd in behind the typist. The remote display unit has an infrared sensor that receives a signal from the PCD showing exactly what appears on the PCD's display.

The distribution unit is ideal when the typist wishes to Communicate with many people at once. This unit receives the infrared message from the PCD, and

distributes it by wire to as many as eight remote display units. This is ideal for use in a classroom, board room, or around the family dinner table. The unit is conveniently powered by the PCD charger, and plugs into a standard 110V AC outlet.

The PC wedge opens the Abovo typist to the world of computerized Communications. The PC wedge is an interface device that downloads the memory of the PCD to Apple or IBM-compatible personal computers. It uses the industry-standard ASCII Character format, which is accessible to popular software Packages. With access to a computer, Abovo users can take advantage of modem-based services, including the Abovo bulletin board.

Providing a voice for persons who are non-verbal has been a team effort driven by a shared desire -- the desire to bring to market it product line that raises the potential for facilitated communication to a level never before achieved. One member of the Abovo product development team described his work as a high-tech mission for humanity. The team's work is not stopped with the introduction of the Abovo product line just described. New ideas are constantly under development, and work is underway on complimentary technologies.

Today the Abovo project continues to focus on creating communication tools to give a voice to non-verbal individuals who wish to communicate through typing.

Although the individuals who use Abovo products are a diverse group, they share a need and desire to communicate and express themselves. Our products are being used by persons with motor disabilities resulting from such conditions as apraxia, and motor speech disorders, autism, mental retardation, RETT syndrome, stroke, tracheotomy, laryngeal cancer, traumatic brain injury, Alzheimer's disease, Parkinson's disease, multiple sclerosis, muscular dystrophy, and cerebral palsy. Individuals with disorders affecting speech use the Abovo PCD for unassisted typing. A person who is hearing impaired, for example, can use the PCD to communicate with another individual who doesn't interpret signing. For every user, the Abovo PCD allows for communication that inspires confidence, independence, and dignity.

As a speech language pathologist, too, I'm always interested in the person as a person, and when dealing with adults, you would like them to be able to access equipment or technology that continues to allow them to function as an adult, and feel like an adult. And when we look at the equipment that's aesthetically appealing, and I think helps the individual to feel more like a viable adult, and not that he or she is using some type of equipment that is demeaning. So, in general, I see multiple use for this equipment, and am personally having some excellent experiences on an individual basis and in classroom settings with this equipment.

One of the major advantages I see with this equipment for classroom use is that we have the remote unit that allows the teacher to read immediately what the student is transmitting. And it allows for more face-to-face kind of communication which is more normal. I also see this equipment as almost a necessity in hospital rehabilitation settings that might have a population of newly laryngectomized, newly tracheotomized patients, or patients that are on a ventilator that don't have access to oral communication. This would then allow them a chance to express their thoughts, feelings, concerns, and have their information read in a more adult manner.

Mom suffered a stroke about two years ago, and it's been tough communicating with her. A lot of times, because she's voice impaired, and also because of the aphasia she suffered. It's been playing 20 questions. Really couldn't know exactly what she wanted until maybe two, three, four minutes, and sometimes she gets so frustrated she'd just stop. The nice thing about the typing is that it's easy to communicate, and it is amazing how much is actually retained that we just haven't been able to see. We hope that this will help us in terms of making things better for my mom, and for her enjoyment.

The ability to meaningfully communicate changes the lives of persons with restricted speech or motor skills. Abovo is proud that our products can have so profound an impact on these individuals and their families, friends and teachers. Facilitated communication is a powerful tool, and the personal Communicating device from Abovo maximizes its potential, from the mistake-proof keyboard, to the remote displays, to the computer interface. No other product gives the user more options, more flexibility, and more independence than the Abovo PCD. It's easy to learn more about the personal communicating device.

You can call Abovo, area code 413 594-5279. You can fax Abovo, area code 413 594-8175, or you can write to Abovo at the Cabotville Industrial Park, 165 Front Street, PO Box 89, Chikopee, Massachusetts.

Thank you for sharing Abovo's interest in giving persons who are nonspeaking the ability to communicate.

EXHIBIT B

ictor of Child Obesity

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Involving the parents in treatment should not be construed as "blaming the parents for a child's obesity," said Ms. Mellin. "Often, only one child in a family is obese. That child may be particularly vulnerable to obesity because of genetics or temperament. The success of these programs demonstrates that there is an opportunity to build on the strength of the family unit as part of child obesity treatment."

For effective, long-term weight loss, a program must emphasize small, sustainable modifications in diet, exercise and communication. Parents should be involved from the start, receiving instruction on how limits are met as well as developing a healthier family lifestyle.

Ms. Mellin said child-onset obesity has been associated with higher rates of morbidity and mortality. There also are psychological consequences of being an overweight child, she noted.

In addition, overweight children have a 70 percent chance of being obese adults, which puts them at higher risk for many diseases.

Among adults who are morbidly obese (150 to 200 percent overweight), "moderate weight loss can mean a 20 to 75 percent reduction in risk factors for several chronic diseases, a leading researcher reported in another session at the ADA meeting.

George Blackburn, MD, PhD, a national authority on obesity, cited a recent study that found significantly overweight patients who lost 10-20 percent of their body weight and kept it off during a three-year follow-up period reduced their risk factors for hypertension, Type II diabetes mellitus, cardiovascular disease, gastrointestinal tract and sleeping disorders and a variety of dyslipidemias.

"The most critical pounds lost are the first and beyond a certain point taking off more pounds wasn't necessarily better from a health perspective," Dr. Blackburn said. "The key is to lose fat while increasing the percentage of lean tissue. It's essential to modify life-long eating habits, not just go on a crash diet."

Ideally, at least 75 percent of weight loss should be body fat.

He endorsed the U.S. government report, *Healthy People 2000*, that identi-

EXHIBIT C

"Just because a person can't speak doesn't mean he has nothing to say."

Personal Communicating Device™ For Non-Speaking Persons...

The Abovo™ Personal Communicating Device (PCD™) may be used for facilitated communication or unassisted typing. A proven aid for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Victims of TBI, Stroke, Parkinsons disease, Alzheimers disease, CP, laryngeal cancer and other conditions affecting speech may also benefit from the PCD™. Available options include: remote display units for communicating up to 20 feet away; printer version; alpha or qwerty keyboard and capability to download/interface with Apple® and IBM® compatible computers. Call, fax or write for further information.

- ***Design for single finger typing***
- ***Recessed, easy-to-strike keys***
- ***Easy to read, 40-character display***
- ***Portable, easy to use and carry***
- ***Bold Alpha or Qwerty keyboard***
- ***Non-Repeatable Keystrokes***

**Call 413-594-5279 to order the Abovo™ video, "Listen to what I Type", an informative introduction to the PCD™ product line.*

See us at TASH Booth 415

A · B · O · V · O™

Technologies For Communicating

P.O. Box 89, Dept. T, Chicopee, MA USA 01014-0089 413-594-5279 fax: 413-594-8175

EXHIBIT C

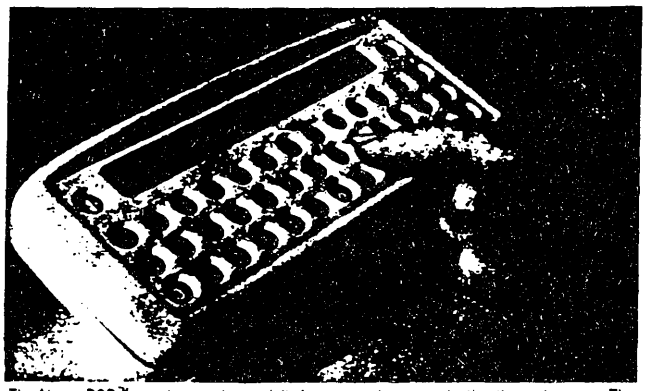
EXHIBIT D

EXHIBIT D

EXHIBIT E

Personal Communicating Device...PCD™

Breakthrough In Facilitated Communication and unassisted typing.



The Abovo PCD™ was designed especially for personal communication through typing. The portable PCD™ allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Individuals with TBI, CP, laryngeal cancer and other disorders affecting speech may use the PCD™ for unassisted typing. Features include:

- ***Design for single finger typing***
- ***Recessed, easy-to-strike keys***
- ***Easy to read, 40-character display***
- ***Portable, easy to use and carry***
- ***Bold graphic tactile keyboard***
- ***8K character memory***

Options include. Remote display units for group or classroom communications; printer version; downloading capability to Apple® and IBM®/compatible computers. Call, write or fax for more information on the Abovo PCD™.

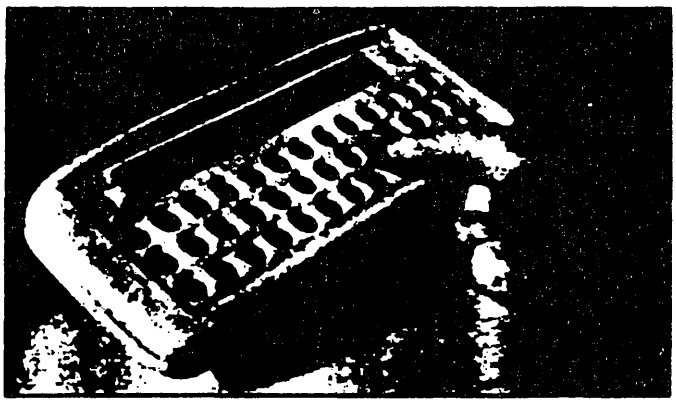
A · B · Ō · V · O

Technologies For Communicating.

96 Rhinebeck Ave., Dept. CP, Springfield, MA 01129 413-594-5279 fax: 413-594-5809

EXHIBIT F

Breakthrough Typing Device for Persons with Speaking Disabilities.



The Abovo™ Personal Communicating Device (PCD) was designed especially for personal communication through typing. This advanced portable device allows Facilitated Communication for people who have been labeled as having autism, mental retardation, RETT Syndrome and other speaking disabilities. Victims of TBI, stroke, Parkinsons disease, Alzheimers disease, CP, laryngeal cancer and other disorders affecting speech may also benefit from the Abovo™ PCD through unassisted typing. Available options include a remote display unit for communicating up to 20 feet away and a PC downloading device for writers. Please call, fax or write for further information.

A · B · O · V · O

96 Rhinebeck Avenue, Springfield, MA 01129
413-594-5279 fax 413-594-5809

EXHIBIT F

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 San Francisco 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 attorney, 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. Respondent Abovo, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located in the City of Chicopee, State of Massachusetts.

Respondent Susan Lakso is an officer of said corporation. She formulates, directs and controls the policies, acts and practices of said corporation and her 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 the purposes of this order, the following definitions shall apply:

A. The term "*communication aid*" means any alphabet display chart, computer, typewriter or other device, which is created or marketed for use by persons with communication impairments, including the "Abovo Personal Communicating Device."

B. The term "*facilitated communication*" means any method or technique or process that entails an individual providing physical support to a person with a communication impairment, while that person types or points to a communication aid.

I.

It is ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director 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 communication aid, 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, that such product enables autistic and/or mentally retarded individuals to communicate through facilitated communication.

II.

It is further ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director 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 communication aid, 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 product enables individuals with disabilities to communicate through facilitated communication, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents, Abovo, Inc., a corporation, its successors and assigns, and its officers, and Susan L. Lakso, individually and as an officer and director 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 communication aid, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, the performance or attributes of any such 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.

IV.

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

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

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

V.

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

VI.

It is further ordered, That the individual respondent shall, for a period of five (5) years after the date of service of this order upon her, promptly notify the Commission, in writing, of her discontinuance of her present business or employment and of her affiliation with a new business or employment. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

VII.

It is further ordered, That the corporate respondent shall, within sixty (60) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, representatives, licensees, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order; and for a period of three (3) years, from the date of issuance of this order, distribute a copy of this order

to all of respondent's future such officers, agents, representatives, licensees, independent contractors, and employees.

VIII.

It is further ordered, That respondents shall, within sixty (60) days from the date of service of this order upon them, 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 they have complied with this order.

Commissioner Azcuenaga recused.

IN THE MATTER OF

WRIGHT MEDICAL TECHNOLOGY, INC., ET AL.

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

Docket C-3564. Complaint, March 23, 1995--Decision, March 23, 1995

This consent order requires, among other things, a Tennessee-based research and development corporation to transfer to the Mayo Foundation, the licensor of the implant technology to Orthomet, Inc., a complete copy of all assets relating to Orthomet's business of researching and developing orthopaedic implants for use in human hands, and also requires Wright Medical Technology to obtain Commission approval before acquiring any interest in any firm that has received, or has applied for, Food and Drug Administration approval to market orthopaedic hand implants in the United States.

Appearances

For the Commission: *Richard B. Dagen* and *Benjamin H. Tahyar.*

For the respondents: *Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y. *Edward R. Mandell, Parker, Chapin, Flattau & Klimpl*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, Wright Medical Technology, Inc., a corporation subject to the jurisdiction of the Commission, Kidd, Kamm Equity Partners, L.P. ("KKEP"), a limited partnership subject to the jurisdiction of the Commission, KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), a limited partnership subject to the jurisdiction of the Commission, and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), a corporation subject to the jurisdiction of the Commission, have agreed to acquire all of the outstanding shares of common and convertible preferred stock issued by Orthomet, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the

Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent Wright Medical Technology, Inc. ("WMTI") is a corporation organized and existing under the laws of the State of Delaware, with its principal offices located at 5677 Airline Road, Arlington, Tennessee.

2. Respondent Kidd, Kamm Equity Partners, L.P. ("KKEP") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal offices located at Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent Kidd, Kamm Investments, L.P. ("KKI") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent Kidd, Kamm Investments, Inc. ("KKI, Inc.") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

5. For purposes of this proceeding, WMTI, KKEP, KKI, and KKI, Inc. are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and WMTI is a corporation, KKEP is a limited partnership, KKI is a limited partnership, and KKI, Inc. is a corporation whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

6. Orthomet, Inc. ("Orthomet") is a corporation organized and existing under the laws of the State of Minnesota, with its principal offices located at 6301 Cecilia Circle, Minneapolis, Minnesota.

7. Orthomet is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton

Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

8. On or about October 15, 1994, WMTI and Orthomet entered into an Agreement and Plan of Merger whereby WMTI would make a cash tender offer for all the outstanding shares of common stock and for all the outstanding shares of convertible preferred stock issued by Orthomet for a total aggregate price of approximately $66 million (the "Acquisition").

IV. THE RELEVANT MARKETS

9. The relevant lines of commerce in which to analyze the effects of the Acquisition are (i) manufacture and sale of orthopaedic implants used or intended for use in the human hand approved by the United States Food and Drug Administration ("FDA") for sale in the United States, and (ii) the research and development of orthopaedic implants used or intended for use in the human hand.

10. The relevant section of the country in which to analyze the effects of the Acquisition is the United States.

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

12. Entry into the relevant markets is difficult.

13. Orthomet is a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA. WMTI and Orthomet are actual competitors in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

V. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the, Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. Eliminate Orthomet as a potential competitor of WMTI in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA;

b. Increase the likelihood that WMTI will unilaterally exercise market power in the market for orthopaedic implants used or intended for use in the human hand approved by the FDA; and

c. Eliminate actual competition between WMTI and Orthomet in the market for the research and development of orthopaedic implants used or intended for use in the human hand.

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

VI. VIOLATIONS CHARGED

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

17. The acquisition described in paragraph eight, 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 of all the outstanding shares of common and convertible preferred stock of Orthomet, Inc. ("Orthomet") by Wright Medical Technology, Inc. ("WMTI"), a subsidiary of Kidd, Kamm Equity Partners, Inc. ("KKEP"), KKEP's general partner, Kidd, Kamm Investments, L.P. ("KKI"), and KKI's general partner, Kidd, Kamm Investments, Inc. ("KKI, Inc."), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 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 WMTI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 5677 Airline Road, Arlington, Tennessee.

2. Respondent KKEP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Three Pickwick Plaza, Greenwich, Connecticut.

3. Respondent KKI is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

4. Respondent KKI, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located c/o Kidd, Kamm & Company, 9454 Wilshire Boulevard, Suite 920, Beverly Hills, California.

5. 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. *"WMTI"* means Wright Medical Technology, Inc., its subsidiaries, divisions, groups and affiliates controlled by WMTI, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. *"KKEP"* means Kidd, Kamm Equity Partners, L.P., its subsidiaries (including WMTI), divisions, groups and affiliates controlled by KKEP, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. *"KKI"* means Kidd, Kamm Investments, L.P., its subsidiaries, divisions, groups and affiliates controlled by KKI, and their respective general partners, directors, officers, employees, agents and representatives, and their respective successors and assigns.

D. *"KKI, Inc."* means Kidd, Kamm Investments, Inc., its subsidiaries, divisions, groups and affiliates controlled by KKI, Inc., and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

E. *"Orthomet"* means Orthomet, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its principal place of business located at 6301 Cecilia Circle, Minneapolis, Minnesota.

F. *"Respondents"* mean WMTI, KKEP, KKI, and KKI, Inc.

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

H. *"Acquisition"* means the acquisition by WMTI of outstanding shares of stock of Orthomet pursuant to a cash tender offer commenced on October 17, 1994.

I. *"Mayo"* means the Mayo Foundation for Medical Education and Research, a Minnesota Charitable Corporation, with its principal place of business located at 200 First Street SW, Rochester, Minnesota.

J. *"Mayo PIP Orthopaedic Finger Implant Design"* means the Mayo proximal interphalangeal prosthesis design together with modifications, enhancements, and improvements, whether or not

patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of December 24, 1992.

K. *"Mayo MCP Orthopaedic Finger Implant Design"* means the metacarpophalangeal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

L. *"Mayo CMC Orthopaedic Finger Implant Design"* means the carpometacarpal prosthesis design developed as a cooperative effort between Mayo and Orthomet, together with modifications, enhancements, and improvements, whether or not patentable, that is the subject of a technology license contract between Mayo and Orthomet dated as of May 1, 1993.

M. *"Licensed Inventions"* means (1) the Mayo PIP Orthopaedic Finger Implant Design, (2) the Mayo MCP Orthopaedic Finger Implant Design, and (3) the Mayo CMC Orthopaedic Finger Implant Design.

N. *"Technology License Contracts"* means the contracts between Mayo and Orthomet (1) relating to the Mayo PIP Orthopaedic Finger Implant Design and any amendments thereto, (2) relating to the Mayo MCP Orthopaedic Finger Implant Design and any amendments thereto, and (3) relating to the Mayo CMC Orthopaedic Finger Implant Design and any amendments thereto.

O. *"Orthopaedic Finger Implants"* means orthopaedic implants designed for use in the proximal interphalangeal joint, the metacarpophalangeal joint, and the carpometacarpal joint of the human hand.

P. *"Orthomet/Mayo Orthopaedic Finger Implant Business"* means Orthomet's or WMTI's business of researching and developing Orthopaedic Finger Implants for eventual commercialization based upon the Licensed Inventions.

Q. *"Orthomet/Mayo Orthopaedic Finger Implant Research Assets"* means all tangible and intangible assets constituting or otherwise relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including but not limited to:

1. All books, records, CAD files and other documents;

2. All data, materials, and information relating to the Orthomet/Mayo Orthopaedic Finger Implant Business, including, but

not limited to, FDA approvals for Orthopaedic Finger Implants, list of clinicians, clinical testing, surgical techniques and protocols, surgical instrumentation design development, and biomechanical materials;

3. All intellectual property, including, but not limited to, patents and patent applications, formulas, processes, technology, know-how, trade secrets, manufacturing information, specifications, plans, drawings, designs and data, product prototypes, and other tangible embodiments of know-how, including, but not limited to, the technology and know-how required to manufacture commercially acceptable products; and

4. All product testing and laboratory research data and samples, including, but not limited to, bench testing, wear testing, and materials testing.

R. *"Orthopaedic Finger Implant Licensee"* means the party or parties, other than respondents, to whom Mayo licenses the Licensed Inventions.

S. *"FDA"* means the United States Food and Drug Administration.

T. *"510(k) Application"* means an application made to the FDA pursuant to 21 U.S.C. 360(k), or successor provisions.

U. *"IDE Application"* means an application made to the FDA pursuant to 21 CFR 812.20, or successor provisions, for an investigational device exemption.

II.

It is further ordered, That:

A. Within five (5) days after the date this order becomes final, respondents shall:

1. Transfer to Mayo a full and complete copy of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets;

2. Grant Mayo a license to such assets, where applicable, with full right of sublicense thereunder, in perpetuity; and

3. Make any and all such arrangements and transfers as are necessary to enable Mayo to license an Orthopaedic Finger Implant Licensee.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets transferred pursuant to paragraph II.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

C. Pending the transfer (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of Orthomet/Mayo Orthopaedic Finger Implant Research Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of Orthomet/Mayo Orthopaedic Finger Implant Research Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents do not, within six (6) months of the date this order becomes final, obtain the Commission's approval for an Orthopaedic Finger Implant Licensee pursuant to the procedures set forth in Section 2.41(f) of the Commission's Rules of Practice, 16 CFR 2.41(f), respondents shall:

1. Take whatever steps are necessary to effect the immediate termination of the Technology License Contracts within five (5) days after the end of the six (6)-month period;

2. After the termination of the Technology License Contracts, refrain from entering into any agreement of any sort with Mayo

relating to the Licensed Inventions or to the Orthomet/Mayo Orthopaedic Finger Implant Research Assets; and

3. Within ten (10) days of the termination of the Technology License Contracts ordered in this paragraph, divest to Mayo absolutely and in good faith the Orthomet/Mayo Orthopaedic Finger Implant Research Assets and grant Mayo, where applicable, a license to such assets with full right of sublicense thereunder, in perpetuity. Respondents shall retain no interest or rights in the Orthomet/Mayo Orthopaedic Finger Implant Research Assets. Mayo shall have the exclusive power and authority to grant a license relating to the Licensed Inventions.

The purpose of licensing an Orthopaedic Finger Implant Licensee other than respondents is to ensure the continuation of the Orthomet/Mayo Orthopaedic Finger Implant Research Assets as an ongoing research project for Orthopaedic Finger Implants to be approved by the FDA for sale in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Upon reasonable notice and request from the Orthopaedic Finger Implant Licensee, respondents shall provide reasonable assistance to the Orthopaedic Finger Implant Licensee regarding the Orthomet/Mayo Orthopaedic Finger Implant Research Assets divested pursuant to paragraph III.A of this order. Such assistance shall include consultation with knowledgeable employees of respondents at the Orthopaedic Finger Implant Licensee's facilities or at such other place as is mutually satisfactory to respondents and the Orthopaedic Finger Implant Licensee for a period of time sufficient to satisfy the Orthopaedic Finger Implant Licensee's management. However, respondents shall not be required to continue providing such assistance for more than six (6) months. Respondents may require reimbursement from the Orthopaedic Finger Implant Licensee for all the actual hourly cost of pay and benefits for respondents' personnel providing the assistance and, if travel is required, the travel cost and per diem subsistence incurred by respondents in providing the assistance to the Orthopaedic Finger Implant Licensee.

IV.

It is further ordered, That respondents shall not without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. For a period of ten (10) years from the date this order becomes final, acquire more than 1% of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, that (1) has filed a 510(k) Application or IDE Application relating to Orthopaedic Finger Implants or, within two (2) years prior to any such proposed acquisition, has announced publicly its intention to submit either of such applications, or (2) has received FDA approval relating to Orthopaedic Finger Implants.

B. For a period of ten (10) years from the date this order becomes final, acquire any assets (including, but not limited to, any technology, know-how, and other intellectual property) that relate to Orthopaedic Finger Implants (1) for which a 510 (k) Application or IDE Application has been filed or for which the intention to file such applications has been publicly announced within two (2) years prior to any such proposed acquisition, or (2) for which FDA approval has been received. The foregoing prohibition shall not apply to (i) the acquisition of materials, supplies, inventory, testing equipment or manufacturing equipment in the ordinary course of business, or (ii) the acquisition of product evaluations and product testing and laboratory research data (relating to Orthopaedic Finger Implants owned by respondents), including, but not limited to, bench testing, wear testing and materials testing, from outside laboratories, outside testing facilities or other third parties, in the ordinary course of respondents' business.

C. For a period of ten (10) years from the date the Technology License Contracts are terminated pursuant to paragraph III.A of this order, enter into any agreement with Mayo relating to Orthopaedic Finger Implants.

V.

It is further ordered, That,

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations undertaken by respondents, and assistance offered by respondents to Mayo for accomplishing the provision (and licensing, where applicable) of Orthomet/Mayo Orthopaedic Finger Implant Research Assets required by this order, including the identity of all parties contacted by respondents. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the requirements of paragraphs II and III of this order.

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 the Commission may require, respondents shall file with the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VI.

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

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of respondents, relating to any matters contained in this consent order; and

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

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents 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 the order.

VIII.

It is further ordered, That, notwithstanding any other provision of this order, this order shall terminate twenty (20) years from the date this order becomes final.

IN THE MATTER OF

IVAX CORPORATION

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

Docket C-3565. Complaint, March 27, 1995--Decision, March 27, 1995

This consent order permits, among other things, IVAX, a Florida corporation, to acquire Zenith Laboratories, except for Zenith's rights to market or sell extended release generic verapamil under Zenith's exclusive distribution agreement with G.D. Searle & Co. Respondent is also required, for ten years, to obtain Commission approval before acquiring any stock in any entity that manufactures, or is an exclusive distributor for another manufacturer of, extended release generic verapamil in the United States.

Appearances

For the Commission: *Ann Malester* and *Melissa Heydenreich.*

For the respondent: *Armando A. Tabernilla*, in-house counsel, Miami, FL.

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 IVAX Corporation ("IVAX"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger all of the voting stock of Zenith Laboratories, Inc. ("Zenith"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"FDA"* means the United States Food & Drug Administration.

2. *"Isoptin SR"* means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

3. *"Generic verapamil"* means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

II. RESPONDENT

4. Respondent IVAX is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

5. Respondent is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

6. Respondent manufactures and sells generic verapamil to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

III. ACQUIRED COMPANY

7. Zenith Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 140 LeGrand Avenue, Northvale, New Jersey.

8. Zenith is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

9. At the time of the Acquisition described in paragraph ten of this complaint, Zenith was the exclusive distributor of generic verapamil for G.D. Searle & Co., which product it marketed and sold to wholesalers, retailers, mail order firms, hospitals, and managed care organizations.

IV. ACQUISITION

10. On or about August 26, 1994, IVAX and Zenith entered into an agreement whereby IVAX will acquire all of the voting securities of Zenith ("Acquisition").

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the sale of generic verapamil.

12. For purposes of this complaint, the relevant section of the country in which to analyze the Acquisition is the United States.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm concentration ratio.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of this complaint because it is difficult and time-consuming to develop a bioequivalent, sustained-release pharmaceutical drug and receive the necessary FDA approvals for it. In addition, generic drugs in development or awaiting FDA approval have no impact on approved generic-drug pricing until they have been approved by the FDA.

15. IVAX and Zenith are the only two companies that supply generic verapamil and as such are the only two actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

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

a. By eliminating direct actual competition between IVAX and Zenith;

b. By increasing the likelihood that IVAX will unilaterally exercise market power; and

c. By increasing the likelihood that generic verapamil customers will be forced to pay higher prices and/or endure having reduced amounts of generic verapamil available for purchase.

17. All of the above increase the likelihood that the only remaining firm in the relevant market will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

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

19. The acquisition described in paragraph ten, 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 certain assets and businesses of the IVAX Corporation, 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 IVAX Corporation ("IVAX") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 8800 N.W. 36th Street, Miami, Florida.

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

B. *"Zenith"* means Zenith Laboratories, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Zenith, their directors, officers, employees, agents, and representatives, and their successors and assigns.

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

D. *"Acquisition"* means the acquisition of all voting securities of Zenith by IVAX.

E. *"FDA"* means the United States Food & Drug Administration.

F. *"Isoptin SR"* means the sustained-release form of verapamil hydrochloride for which Knoll Pharmaceutical Company holds an approved New Drug Application.

G. *"Verapamil HCl"* means any pharmaceutical drug receiving the therapeutic equivalence evaluation code "AB" by the FDA, which designates such product as being therapeutically equivalent to Isoptin SR.

H. *"Searle Distribution Agreement"* means the agreement, dated March 7, 1994, between G.D. Searle & Co. ("Searle") and Zenith, pursuant to which Zenith is appointed the exclusive distributor of Verapamil HCl for Searle.

II.

It is further ordered, That, respondent shall not acquire, or otherwise obtain, any rights to market or sell Verapamil HCl pursuant to the Searle Distribution Agreement.

III.

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

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the manufacture of Verapamil HCl in the United States, or any concern that is an exclusive distributor of Verapamil HCl in the United States for a manufacturer of Verapamil HCl; provided, however, that each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or concern; and further provided, however, that an acquisition will be exempt from the requirements of this paragraph III.A. if it is solely for the purposes of investment and respondent will hold cumulatively no more than two (2) percent of the shares of any class of security;

B. Acquire any assets used in or previously used in (and still suitable for use in) the manufacture of Verapamil HCl in the United States; provided, however, that this paragraph III.B. shall not apply

to any acquisition of goods, services, or equipment in the ordinary course of business;

C. Enter into any agreement with a manufacturer of Verapamil HCl granting respondent the exclusive right to distribute such manufacturer's Verapamil HCl for resale.

IV.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege and upon written request with reasonable notice, 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 it, to interview officers, directors, or employees of respondent, who may have counsel present regarding such matters.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

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

Docket C-2929. Consent Order, Sept. 26, 1978--Modifying Order, March 27, 1995

The order reopens a 1978 consent order (92 FTC 405) that settled allegations that the respondents had engaged in anticompetitive practices, including illegally fixing resale prices for their products. This order modifies the consent order so that the respondents are permitted to implement lawful price-restrictive cooperative advertising programs and to unilaterally terminate resellers for failure to adhere to previously announced resale prices or sales periods.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED SEPTEMBER 26, 1978

On October 26, 1994, London Fog Industries, Inc. ("London Fog"), as successor to Londontown Corporation, filed its Petition to Reopen Proceedings and Modify Consent Order ("Petition") in Docket No. C-2929, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Federal Trade Commission's Rules of Practice, 16 CFR 2.51. London Fog asks the Commission to reopen and modify the consent order issued by the Commission on September 26, 1978 ("order"), in *Interco Inc.*, 92 FTC 405 (1978).[1]

In its Petition, London Fog asks the Commission to reopen the order and modify provisions that limit London Fog's ability to restrict the prices advertised by its dealers for London Fog apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, London Fog maintains that reopening and modification is warranted by the public interest.[2] London Fog's Petition was placed on the public record for thirty days; one comment was received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

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[1] The order previously was reopened and modified in 1986, *Interco, Inc.*, 108 FTC 133 (1986) (deleting paragraphs II.1 and II.2 applicable to footwear), and in 1988, *Interco, Inc.*, 110 FTC 153 (1988) (deleting prohibition on preticketing with suggested resale prices).

[2] London Fog does not claim that reopening is required by changed conditions of law or fact.

I. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[3]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a

[3] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modified the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. REOPENING IS IN THE PUBLIC INTEREST

London Fog asserts in its Petition that its inability under the order to maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods impedes its ability to compete. Because of the restrictions, London Fog maintains, it is unable effectively to restructure its dealer network, introduce new product lines, and terminate business relationships with retailers that advertise and price London Fog products in a matter inconsistent with the brand's image and quality and with London Fog's marketing strategies.

London Fog's inability to institute price restrictive cooperative advertising programs and unilaterally to terminate discounting dealers has, in London Fog's view, caused an erosion of its dealer base, especially high end, customer service oriented department and specialty stores. According to London Fog, discounting of London Fog products by a number of retailers that use London Fog products as price leaders has caused other retailers to stop carrying London Fog products. London Fog contends that the order restrains it from effectively implementing marketing plans to meet this competitive challenge and to make it more competitive in the long run.

London Fog once sold its London Fog coats to "better" department and specialty stores,[4] but the company no longer counts that category of retailers among its customers. London Fog attributes its diminished appeal to better stores to the constant discount promotions of London Fog brand merchandise by discounting retailers that have changed the image of London Fog from a product marketed at "every day prices"[5] to a promotional product, reducing the appeal of London Fog merchandise to the better stores.

London Fog states that the discount pricing strategy of some retailers is damaging the quality image of its products and making its product less desirable to stores that compete by offering high levels of customer service with every day pricing rather than "discount" prices. Since the order became final, according to London Fog, many high-end service oriented stores have terminated their relationship with London Fog. These same retailers continue to carry coats marketed by London Fog's competitors even though some of these brands also are sold at discounters, apparently because London Fog's competitors are better able to control how their products are advertised and promoted by discounters, according to London Fog.

London Fog claims that its competitors are able to do business with both categories of retailers by using marketing programs that are not permitted to London Fog under the order. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices and sale periods encourages service oriented stores to compete with the discount stores with respect to these brands, according to London Fog. London Fog claims that the requested modifications would give it the necessary latitude to compete more effectively for sales to better department and specialty stores.

London Fog has demonstrated that discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers. It also has shown that the

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[4] According to London Fog, these stores provide a significant level of customer service and do not offer everyday discounts, although most have seasonal sales with price reductions. In general, the merchandise offered by better department and specialty stores is higher priced than that carried by mainstream department stores and is marketed as high quality, designer, prestige or status items.

[5] According to London Fog, an "every day pricing" strategy means pricing a product at a certain retail price, to be distinguished from designating a high "original" price against which discounts are immediately taken. London Fog explains that every day prices are not necessarily higher than discount or promotional prices; the every day price at one store might be the discount price at another. The difference is the consumer's perception of the product (discounted brand versus non-discounted brand) and the degree of the bargain he or she is getting.

order is inhibiting London Fog's efforts to implement certain marketing strategies that could increase its sales. Therefore, London Fog has established that reopening would be in the public interest.

III. THE ORDER SHOULD BE MODIFIED

London Fog requests that the order be modified to permit London Fog to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller who refuses to sell London Fog brands at London Fog's previously published resale prices. For this purpose, London Fog has requested that the following proviso be added to paragraph I of the order:

> Provided that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

The Commission previously has modified orders to permit implementation of price restrictive cooperative advertising programs. Such programs are not *per se* unlawful and do not prevent a dealer from selling at discount prices or from advertising discount prices at the dealer's own expense. *See Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).[6] The Commission also noted that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful." *Id.* The Commission has said that price restrictive cooperative advertising programs likely are procompetitive or competitively neutral in most cases "by, for example, . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." 109 FTC at 147.[7]

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[6] *See also* Clinique Laboratories, Inc., Docket C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; *The Magnavox Co.*, 113 FTC 255 (1990).

[7] In Advertising Checking Bureau, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Advertising Programs (viewing such programs as *per se* unlawful). 109 FTC at 146 n.1; *see* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Modifying the order to permit London Fog to institute lawful price restrictive cooperative advertising programs is consistent with Commission policy and cases. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances.[8] London Fog's use of price restrictive cooperative advertising programs, absent further agreement on the price or price levels to be charged by the retailers, is not likely to restrict interbrand competition or reduce output. Of course, any cooperative advertising program implemented by London Fog as part of a scheme to fix resale prices would be *per se* unlawful and would violate paragraph I.1 of the order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to paragraph I also would permit London Fog unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply."[9] Accordingly, the Commission has determined to add the described proviso to paragraph I of the order. The modification would permit London Fog to attract high end retailers and implement its overall marketing plans.

IV. ADDITIONAL MODIFICATIONS OF THE ORDER

London Fog has requested other modifications to remove language that London Fog maintains is inconsistent with the new proviso to paragraph I of the order. We consider each of these requests below.

Paragraph I.4. According to London Fog, paragraph I.4. of the order limits its ability to disseminate advertising and promotional materials in connection with a price restrictive cooperative advertising program, by requiring London Fog to state that suggested

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[8] *See* In re Nissan Antitrust Litig., 577 F.2d 910 (5th Cir. 1978), *Cert. denied*, 439 U.S. 1072 (1979) (price restrictive cooperative advertising not *per se* unlawful); *see also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

[9] The restriction in the order was in the nature of fencing in relief. Fencing in provisions in orders restrict otherwise lawful conduct to prevent repetition of the violation or to mitigate the effects of prior unlawful conduct.

prices are "suggested only" in any "list, book, advertising, promotional material or other document." To enable London Fog to implement a price-restrictive cooperative advertising program, London Fog requests that the Commission delete the underlined language in paragraph I.4., and replace it with the language in parentheses, as follows:

. . .it shall be clearly stated on the pages of any list, book, advertising, promotional material or other document (list, order form, catalog or stock control book) where any suggested resale price or sale period appears:

"THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS]."

The Commission believes that language of the proviso added to paragraph I of the order is sufficient to permit London Fog to implement a price restrictive cooperative program, notwithstanding paragraph I.4. Regardless of the type of document on which London Fog chooses to disseminate suggested prices, dealers remain free to determine their own resale prices, even if London Fog may condition the payment of advertising allowances on the advertisement of a particular price. To further clarify that London Fog is permitted under the order to specify prices in connection with such a program, paragraph I.4 should be modified to state that "except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices."

Paragraph I.6. London Fog has requested that paragraph I.6 of the order be deleted. Paragraph I.6 bars London Fog from "[c]ommunicating with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period." London Fog claims that this paragraph of the order prevents it from sharing market information with and recommending pricing strategies to its retailers, communications that would tend to enhance the competitiveness of London Fog's products in the marketplace. The provision does not bar London Fog from disseminating market information and pricing strategies and recommendations to its retailers. Instead, it prohibits London Fog from communicating concerning a reseller's "deviation" from "resale price[s] or sale period[s]." Communications about deviations from

the seller's suggested resale prices could provide an opportunity to achieve an unlawful meeting of the minds concerning price and should continue to be prohibited.

London Fog claims that implementation of a price restrictive cooperative advertising program would involve communications barred by paragraph I.6. Because communications to implement a price restrictive cooperative advertising plan would be permissible under the new proviso to paragraph I, deletion of paragraph I.6 is not necessary. Under the proviso, London Fog can communicate with resellers within the context of London Fog's cooperative advertising program regarding advertising that is ineligible for reimbursement. In addition, an announcement by London Fog, consistent with Colgate and the new proviso to paragraph I, that it would terminate discounters could be characterized as a communication prohibited by this provision. In an excess of caution, in order to make clear that communications permitted under the new proviso are not barred by paragraph I.6, the phrase "except communications consistent with the proviso to paragraph I" should be added.

Paragraph I.7. London Fog also requests that paragraph I.7 of the order be modified by deleting the underlined words, as follows:

> Suggesting or requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

London Fog says that the provision may inhibit its communications with dealers in connection with a lawful price restrictive cooperative advertising program. The requested modification would permit London Fog to suggest prices at which a reseller may wish to advertise a product without permitting London Fog to require a reseller to advertise products at a specified price. It also would allow London Fog to share information with its dealers regarding advertised prices for London Fog merchandise and to make seasonal advertising suggestions without violating the order. London Fog would continue to be barred under the order from fixing advertised prices. A lawful price restrictive cooperative advertising program permitted under the new proviso of paragraph I necessarily allows London Fog to condition the payment of advertising allowances on specific advertised prices. These communications could be barred as "suggestions" for pricing under this provision of

the order. Therefore, the words "Suggesting or" should be deleted from paragraph 1.7 of the order.

Paragraph I.8. London Fog has requested that the Commission add the language in parentheses to paragraph I.8., which prohibits:

> Representing that any action (other than termination or any action related to a lawful price restrictive cooperative advertising program) may or will be taken against any reseller if it deviates from any resale price or sale period.[10]

The addition of the phrase "other than termination" is consistent with the new proviso to paragraph I of the order and will allow London Fog to represent its intention to terminate a reseller for failure to adhere to London Fog's previously announced resale prices. The modification would not allow London Fog to threaten to terminate a dealer for discounting. Consistent with Colgate, London Fog would have the option to terminate the dealer, not to threaten the dealer to attempt to coerce its compliance. The language "other than termination" will be added to paragraph I.8 as described above.

The remainder of the modification that London Fog requests is too broad. Addition of the phrase "or any action related to a lawful price restrictive cooperative advertising program" does not appear to be necessary for a lawful price restrictive cooperative advertising program, and it could permit London Fog to use its cooperative advertising program to retaliate against discounting dealers and to coerce an agreement on resale prices. Under the new proviso to paragraph I, London Fog may withhold cooperative advertising credits for advertisements that do not meet the cooperative program's specifications. The order, as modified, does not contemplate that London Fog could take (or threaten to take) other action to enforce a price restrictive cooperative advertising program. Therefore, the request to add "or any action related to a lawful price restrictive cooperative advertising program" to paragraph I.8 of the order is denied.

Paragraph 1.9. London Fog has requested that the Commission delete paragraph I.9, which prohibits "[t]hreatening to withhold or withholding advertising allowances . . . from any reseller . . . because said reseller advertises or sells at a certain resale price." The

[10] By letter dated December 30, 1994, London Fog requested that the word "lawful" be added before the words "price restrictive cooperative advertising program."

paragraph should be modified to the extent that it is inconsistent with the new proviso to paragraph I that permits London Fog to condition the payment of advertising allowances on the price at which a retailer advertises a product. The Commission similarly modified the orders in Pioneer and Magnavox to permit price restrictive cooperative advertising programs.[11] The requested modification of paragraph I.9 is not warranted, however, to the extent that the provision bars London Fog from conditioning such allowances on the retailer's "sell[ing] at a certain resale price." The modifications to the order do not permit London Fog to use a cooperative advertising program to fix resale prices or to coerce retailer adherence to them. Therefore, paragraph I.9 will be modified by deleting the words "advertises or."

Paragraph I.12. London Fog also has requested that the Commission add the bold language to and delete the underlined language from paragraph I.12, which prohibits:

> Terminating, suspending, delaying shipments to or taking or threatening any action (**other than terminating**) against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

This paragraph would bar London Fog from unilaterally terminating a reseller consistent with Colgate and the new proviso to paragraph I of the order. The deletion of the word "Terminating" from paragraph I.12 makes it consistent with the new proviso. Unilateral termination of a dealer for discounting is not unlawful. Therefore, the word "Terminating" will be deleted from paragraph I.12.

The addition of the words "other than terminating" to paragraph I.12, however, would allow London Fog to threaten to terminate resellers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. *See Monsanto Co. v. Spray-Rite*

[11] *See* note 6 *supra.*

Corporation, 465 U.S. 752, 765 & n.10 (1984); *see also Lenox, Inc.*, 111 FTC 612, 617 (1989). London Fog may, consistent with the order, announce in advance its intention to terminate any dealer who fails to adhere to London Fog's previously announced resale prices and it may terminate any such dealer, but it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices. Therefore, London Fog's request to add the words "other than terminating" to paragraph I.12 is denied.

V. CONCLUSION

London Fog has shown that reopening the order and adding the proviso to paragraph I and making the above described modifications are warranted in the public interest. The order as modified retains the prohibition on resale price maintenance, but will permit London Fog to engage in otherwise lawful, potentially procompetitive conduct.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's modified order in Docket No. C-2929 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

> Provided, that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4 of the order is modified by adding the following language at the end of the provision:

> Except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices.

(c) Paragraph I.6 of the order is modified by adding "except communications consistent with the proviso to paragraph I," as follows:

Communicating, except communications consistent with the proviso to paragraph I, with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period.

(d) Paragraph I.7 of the order is modified by deleting the words "Suggesting or," as follows:

Requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

(e) Paragraph I.8 is modified by adding the words "(other than termination)," as follows:

Representing that any action (other than termination) may or will be taken against any reseller if it deviates from any resale price or sale period.

(f) Paragraph I.9 is modified by deleting the words "advertises or," as follows:

Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting the eligibility of any reseller to receive such benefits because said reseller sells at a certain resale price.

(g) Paragraph I.12 is modified by deleting the word "Terminating," as follows:

Suspending, delaying shipments to or taking or threatening any action against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

Commissioner Starek concurring in part and dissenting in part.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to reopen and modify the order in Docket No. C-2929 in the public interest. However, for the reasons described in my statements in California and Hawaiian Sugar Co.[12] and Service Corporation International,[13] I do not join in the analysis the Commission uses to reach its result. Moreover, I dissent with respect to the decision to deny the respondent's requested modifications to the "fencing-in" relief contained in paragraphs I.4, I.6, I.7, I.8, I.9, and I.12.

The Commission states that respondents petitioning for order modification under the public interest standard "must demonstrate as a threshold matter some affirmative need to modify the order." Order at 2. The Commission has applied this "threshold" inconsistently and has often found it satisfied by very tenuous showings. In this matter, even a relatively strict interpretation of "affirmative need" does not create a significant obstacle to modification. Thus, the Commission can require a separate affirmative need showing in this case without engaging in the sort of tortuous reasoning that less hospitable facts have required in some past cases. Nevertheless, I continue to favor an integrated cost-benefit analysis in the evaluation of petitions for order modification under the public interest rubric of Section 2.51. Such an analysis supports the conclusion that the order in this case should be reopened and modified.

I would grant respondent's requests to delete any language in the underlying order that expands on the core prohibition against unlawful resale price maintenance ("RPM"). Although RPM remains unlawful *per se*,[14] its competitive effects in most circumstances are ambiguous at worst. In this context, fencing-in relief is inappropriate: the otherwise lawful fenced-in conduct carries little risk of significant competitive harm and is at least as likely to be

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[12] Order Reopening the Proceeding and Modifying Cease and Desist Order in Docket No. C-2858 (Jan. 17, 1995) (Starek, concurring).

[13] Order Reopening and Modifying Order in Docket No. 9071 (May 12, 1994) (Starek, concurring).

[14] *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (RPM held unlawful upon mere proof of agreement). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988) (reaffirming and distinguishing the *per se* rule against RPM).

procompetitive. Where the Commission has reopened an existing order for purposes of modification, this analysis suggests that requests to alleviate or eliminate fencing-in prohibitions should be granted liberally.[15]

Presented with an opportunity to pare this 1978 order to its core prohibitions and to eliminate constraints on efficient conduct, the Commission instead attempts in today's order to specify with greater precision the metes and bounds of permissible conduct in respondent's vertical relationships. As long as the core prohibition remains in place, and where the Commission cannot find that the fenced-in conduct is likely to be anticompetitive, granting the relief as requested appears more likely to serve the public interest than this sort of fine-tuning.

[15] In fashioning a new order to address RPM, the Commission should strictly tailor injunctive relief to the *per se* allegations. Where the Commission has reopened an existing order for purposes of modification, the same considerations favor granting requests for reducing or eliminating fencing-in relief. Here, the Commission has already determined that the competitive benefits of reopening and modification outweigh the interest in repose and finality, and has proceeded to modify the order. Under these circumstances, the costs of granting the requested modifications certainly are not higher than the costs of devising alternative modifications. Therefore, the Commission's choice of modifications can be based on the relative competitive merits. Having reopened the order, I would have preferred to grant all of the requested modifications to the fencing-in provisions

IN THE MATTER OF

PITTSBURGH PLATE GLASS COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

Docket 6699. Consent Order, April 19, 1957 -- Set Aside Order, April 4, 1995

This order reopens a 1957 consent order -- which prohibited the respondent from discriminating in price between competing purchasers by charging auto manufacturers less for automotive safety glass than it charged glass distributors and glass dealers -- and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On December 9, 1994, PPG Industries, Inc., the successor to Pittsburgh Plate Glass Company, ("PPG"), filed a Petition to Reopen and Set Aside Consent Order ("Petition") in this matter. PPG requests that the Commission set aside the 1957 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, PPG affirmatively states that it has not engaged in any conduct violating the terms of the order. The request was placed on the public record, and the thirty-day comment period expired on January 16, 1995. Two public comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."[1] The Commission's order in Docket No. 6699 was issued on April 19, 1957, and has been in effect for more than 37 years. Consistent with the Commission's July 22,

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

1994, 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. 6699.

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. 6699 be, and it hereby is, set aside, as of the effective date of this order.

IN THE MATTER OF

RECKITT & COLMAN 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-3571. Complaint, April 4, 1995--Decision, April 4, 1995

This consent order allows, among other things, Reckitt & Colman to acquire L&F Products Inc., with the required prior approval, on the condition that it sells its own rug cleaning assets, within six months, to a Commission approved acquirer. 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 consent order requires the respondent to obtain Commission approval, for ten years, before acquiring any interest in the carpet-deodorizer business in the United States.

Appearances

For the Commission: *Ann Malester, Michael R. Moiseyev, David L. Inglefield* and *Elizabeth A. Jex.*

For the respondent: *Jeffrey Schmidt, Pillsbury, Madison & Sutro,* Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Reckitt & Colman plc ("Reckitt & Colman"), a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. *"Carpet deodorizer products"* means powder products designed to combat and eliminate offensive odors in rugs and carpets that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

II. RESPONDENT

2. Respondent Reckitt & Colman is a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its principal place of business located at One Burlington Lane, London, England W4 2RW. Reckitt & Colman does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its principal place of business located at 1655 Valley Road, Wayne, New Jersey.

III. THE ACQUIRED COMPANY

3. L&F Products Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business at 225 Summit Avenue, Montvale, New Jersey.

IV. JURISDICTION

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

V. THE ACQUISITION

5. On September 26, 1994, Reckitt & Colman entered into an asset purchase agreement with Eastman Kodak Company ("Kodak"), L&F Products Inc. ("L&F"), a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F, to

acquire substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F ("the Acquisition"). Reckitt & Colman will also purchase 100% of the outstanding voting securities of Schulke & Mayr GmbH and certain other wholly-owned subsidiaries of L&F (collectively, "the transferred subsidiaries"). Prior to the consummation of the sale of the L&F assets to Reckitt & Colman, Kodak intends to cause Sterling to transfer the assets and voting securities of the transferred subsidiaries to L&F and one or more affiliates of Kodak unless Reckitt & Colman otherwise consents.

VI. TRADE AND COMMERCE

6. The relevant line of commerce in which to analyze the effects of the Acquisition is the development, manufacture, marketing and sale for resale of carpet deodorizer products.

7. The relevant section of the country in which to evaluate the effects of the acquisition is the United States.

8. The relevant market set forth in paragraphs six and seven above is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios.

9. Entry into the development, manufacture, marketing and sale of carpet deodorizer products is difficult, time-consuming and expensive.

10. Reckitt & Colman and L&F are actual competitors in the relevant market.

VII. EFFECTS OF THE ACQUISITION

11. 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 Reckitt & Colman and L&F in the relevant market; and

(b) Enhancing the likelihood of collusion or coordinated interaction between or among the firms in the relevant market.

VIII. VIOLATIONS CHARGED

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing 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 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. Respondent Reckitt & Colman plc ("Reckitt & Colman") is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales with its principal executive offices located at One Burlington Lane, London, England W4 2RW. Reckitt & Colman does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its offices and principal place of business at 1655 Valley Road, Wayne, New Jersey.

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. DEFINITIONS

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

A. "*Reckitt & Colman*" means Reckitt & Colman plc, its predecessors, successors and assigns, the divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Reckitt & Colman controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Kodak*" means Eastman Kodak Company, its predecessors, successors and assigns, the divisions, subsidiaries, affiliates, companies, groups, partnerships and joint ventures that Kodak controls, directly or indirectly, and their directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*L&F*" means the United States Assets and Businesses acquired by Reckitt & Colman in the Acquisition.

D. "*Respondent*" means Reckitt & Colman.

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

F. "*Acquisition*" means Reckitt & Colman's acquisition of substantially all of the assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc. pursuant to an asset purchase agreement dated September 26, 1994, with Eastman Kodak Company, L&F Products

Inc., a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F Products Inc.

G. "*Carpet Deodorizer Products*" means powder products designed to combat and eliminate offensive odors in rugs and carpets that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Carpet Deodorizer Products does not include Rug Cleaning Products.

H. "*Carpet Deodorizer Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Carpet Deodorizer Products, including, but not limited to, the brands, trademarks and tradedress "Carpet Fresh," "Rug Fresh"; and

(2) All of Reckitt & Colman's Carpet Deodorizer Products assets and businesses delineated in Schedule A, attached hereto and made a part hereof.

Carpet Deodorizer Assets excludes any assets or businesses acquired in the Acquisition.

I. "*Rug Cleaning Products*" means products designed to clean rugs and carpets that are applied by aerosol spray, or in liquid, foam or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Rug Cleaning Products does not include Carpet Deodorizer Products.

J. "*Rug Cleaning Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Rug Cleaning Products, including, but not limited to, the right to use the brands, trademarks and tradedress "Woolite Heavy Traffic Carpet Cleaner," "Woolite One Step Carpet Cleaner," "Woolite Spot & Stain Carpet Cleaner," "Woolite Fabric and Upholstery Cleaner," and "Woolite Pet Stain Carpet Cleaner" in connection with the production, marketing and sale of Rug Cleaning Products; and

(2) All of Reckitt & Colman's Rug Cleaning Products assets and businesses delineated in Schedule B, attached hereto and made a part hereof.

Rug Cleaning Assets excludes any assets or businesses acquired in the Acquisition.

K. "*Woolite Fabric Care Products*" means products designed to clean fabric and clothing that are applied by aerosol spray, or in

liquid, foam or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores. Woolite Fabric Care Products excludes Rug Cleaning Products.

L. "*Woolite Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Woolite Fabric Care Products, including, but not limited to, the brand and trademark "Woolite"; and

(2) All of Reckitt & Colman's Woolite Fabric Care Products assets and businesses delineated in Schedule C, attached hereto and made a part hereof.

Woolite Assets excludes any assets or businesses acquired in the Acquisition.

M. "*Air Freshener Products*" means products that are specifically designed to scent the air in the home that are applied by aerosol spray, or in liquid, solid, wick or other forms and that are distributed to consumers primarily through grocery, drug, and mass merchandise stores.

N. "*Air Freshener Assets*" means all of Reckitt & Colman's United States rights, title and interest in and to:

(1) Air Freshener Products, including, but not limited to, the brands and trademarks "Airwick," "Stick Ups," "Air Waves," "Wizard," "Botanicals," and "Airwick Neutra Air"; and

(2) All of Reckitt & Colman's Air Freshener Products assets and businesses delineated in Schedule D, attached hereto and made a part hereof.

Air Freshener Assets excludes any assets or businesses acquired in the Acquisition.

II. DIVESTITURE OF CARPET DEODORIZER ASSETS

It is ordered, That:

A. Reckitt & Colman shall divest the Carpet Deodorizer Assets, absolutely and in good faith, within six (6) months of the date this order becomes final, and shall also divest such additional ancillary assets and effect such arrangements as are necessary to assure the

marketability, viability, and competitiveness of the Carpet Deodorizer Assets; provided, however, that Reckitt & Colman is not required to divest any of the Carpet Deodorizer Assets identified in Schedule A, Part 2, if such assets are not required by the acquirer.

B. Reckitt & Colman shall divest the Carpet Deodorizer Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Carpet Deodorizer Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Carpet Deodorizer Assets presently are employed, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Upon reasonable notice from the acquirer of the Carpet Deodorizer Assets to Reckitt & Colman, for a period of six (6) months following the date of the divestiture, Reckitt & Colman shall provide such personnel, information, assistance, advice and training to the acquirer as is necessary to transfer the Carpet Deodorizer Assets pursuant to paragraph II.A. of this order and establish such business as a viable, ongoing concern. Such assistance shall include reasonable consultation with knowledgeable employees of Reckitt & Colman as necessary to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture, distribution and marketing of Carpet Deodorizer Products. Reckitt & Colman shall not charge the acquirer a rate more than its own direct costs for providing such assistance.

D. Reckitt & Colman shall cooperate and assist the acquirer in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Carpet Deodorizer Assets.

E. Reckitt & Colman shall take such actions as are necessary to maintain the viability and marketability of the Carpet Deodorizer Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Carpet Deodorizer Assets except in the ordinary course of business and except for ordinary wear and tear.

III. RUG CLEANING DIVESTITURE

It is further ordered, That:

A. Reckitt & Colman shall divest, absolutely and in good faith, within six (6) months of the date the Commission approves the Acquisition pursuant to paragraph V of the order in Docket No. C-3306, the Rug Cleaning Assets, and shall also divest such additional ancillary assets and effect such arrangements as are necessary to assure the marketability, viability, and competitiveness of the Rug Cleaning Assets; provided, however, that Reckitt & Colman is not required to divest any of the Rug Cleaning Assets identified in Schedule B, Part 2, if such assets are not required by the acquirer.

B. Reckitt & Colman shall divest the Rug Cleaning Assets only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Rug Cleaning Assets is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the same businesses in which the Rug Cleaning Assets presently are employed, and to remedy the lessening of competition resulting from the Acquisition as described in the Commission's letter approving the Acquisition.

C. Upon reasonable notice from the acquirer of the Rug Cleaning Assets to Reckitt & Colman, for a period of six months following the date of the divestiture, Reckitt & Colman shall provide such personnel, information, assistance, advice and training to the acquirer as is necessary to transfer the Rug Cleaning Assets pursuant to paragraph III.A. of this order and establish such business as a viable, ongoing concern. Such assistance shall include reasonable consultation with knowledgeable employees of Reckitt & Colman to satisfy the acquirer's management that its personnel are appropriately trained in the manufacture, distribution and marketing of Rug Cleaning Products. Reckitt & Colman shall not charge the acquirer a rate more than its own direct costs for providing such assistance.

D. Reckitt & Colman shall cooperate and assist the acquirer in obtaining approvals for the transfer of all registrations, leases, licenses, certifications, permits, or similar documents relating to the Rug Cleaning Assets.

E. Reckitt & Colman shall take such actions as are necessary to maintain the viability and marketability of the Rug Cleaning Assets

to prevent the destruction, removal, wasting, deterioration or impairment of any of the Rug Cleaning Assets except in the ordinary course of business and except for ordinary wear and tear.

IV. TRUSTEE PROVISIONS

It is further ordered, That:

A. (1) If Reckitt & Colman has not divested, absolutely and in good faith and with the Commission's prior approval the Carpet Deodorizer Assets within six (6) months of the date this order becomes final, the Commission may appoint a trustee to divest the Carpet Deodorizer Assets and the Air Freshener Assets; provided, however, that the trustee is not required to divest any of the Carpet Deodorizer Assets identified in Schedule A, Part 2, or any of the Air Freshener Assets identified in Schedule D, Part 2, if such assets are not required by the acquirer.

(2) If Reckitt & Colman has not divested, absolutely and in good faith and with the Commission's prior approval the Rug Cleaning Assets within six (6) months of the date the Commission approves the Acquisition pursuant to the order in Docket No. C-3306, the Commission may appoint a trustee to divest the Rug Cleaning Assets and the Woolite Assets; provided, however, that the trustee is not required to divest any of the Rug Cleaning Assets identified in Schedule B, Part 2, or any of the Woolite Assets identified in Schedule C, Part 2, if such assets are not required by the acquirer.

B. In the event 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, Reckitt & Colman 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 Reckitt & Colman to comply with this order, or the order in Docket No. C-3306.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph IV.A.(1) or paragraph IV.A.(2) of this order, Reckitt &

Colman 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 Reckitt & Colman, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Reckitt & Colman 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 Reckitt & Colman of the identity of any proposed trustee, Reckitt & Colman shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission and under the terms and conditions described in paragraph IV.A. of this order, the trustee shall have the exclusive power and authority to divest the Carpet Deodorizer Assets and the Air Freshener Assets, and/or the Rug Cleaning Assets and the Woolite Assets, together with any additional, incidental assets of Reckitt & Colman that may be reasonably necessary to assure the viability and competitiveness of the Carpet Deodorizer Assets and the Air Freshener Assets, and/or the Rug Cleaning Assets and the Woolite Assets.

3. Within ten (10) days after the appointment of the trustee, Reckitt & Colman 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 effect the divestiture(s) required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.C.3. of this order to accomplish the divestiture(s). If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture(s) can be accomplished 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 only extend the divestiture period two (2) times.

5. The trustee shall have full and complete access (subject to the terms and conditions described in paragraph IV.A. of this order) to the personnel, books, records, and facilities related to the Carpet Deodorizer Assets, Air Freshener Assets, Rug Cleaning Assets and Woolite Assets and to any other relevant information, as the trustee

may reasonably request. Reckitt & Colman shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Reckitt & Colman shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in the divestiture(s) caused by Reckitt & Colman 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. Subject to Reckitt & Colman's absolute and unconditional obligation to divest at no minimum price the assets described in paragraph IV.A. of this order (and subject to the terms and conditions described paragraph IV.A. of this order), and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint and as described in the Commission's letter approving the Acquisition, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquirer for each divestiture described in paragraph IV.A of this order. If the trustee receives *bona fide* offers from more than one acquirer for each divestiture, and if the Commission determines to approve more than one such acquirer, the trustee shall divest the assets described in paragraph IV.A. of this order to each acquirer selected by Reckitt & Colman from among those approved by the Commission for each divestiture.

7. The trustee shall serve, without bond or other security, at the cost and expense of Reckitt & Colman, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of Reckitt & Colman, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the 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 Reckitt & Colman 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 described in paragraph IV.A. of this order.

8. Reckitt & Colman 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 trusteeship, 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, claims, or expenses result from misfeasance, 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 IV.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 each divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the assets described in paragraph IV.A. of this order.

12. The trustee shall report in writing to Reckitt & Colman and to the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestitures.

V. HOLD SEPARATE

It is further ordered, That, Reckitt & Colman shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect according to its terms until Reckitt & Colman has divested all of the Rug Cleaning Assets and all of the Carpet Deodorizer Assets as required by this order.

VI. PRIOR APPROVAL

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, Reckitt & Colman shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships or otherwise:

(1) Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of

such acquisition, or within the two years preceding such acquisition engaged in the development, production, distribution, or sale for resale of Carpet Deodorizer Products in the United States; or

(2) Acquire any assets used or previously used (and still suitable for use) in the manufacture, distribution, or sale for resale of Carpet Deodorizer Products in the United States.

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

VII. COMPLIANCE REPORTS

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Reckitt & Colman has fully complied with the provisions of paragraphs II, III, IV and V of this order, Reckitt & Colman shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Reckitt & Colman shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for each divestiture, including the identity of all parties contacted. Reckitt & Colman also shall include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning each divestiture.

B. One (1) year from the date this order becomes final and annually thereafter for nine (9) years on the anniversary date of this order, Reckitt & Colman shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII. ACCESS

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 Reckitt & Colman, Reckitt & Colman 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 Reckitt & Colman or L&F relating to any matters contained in this consent order; and

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

IX. CORPORATE CHANGE

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

SCHEDULE A

Reckitt & Colman shall divest all of the Carpet Deodorizer Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.H.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Carpet Deodorizer Products in the United States, including, but not limited to, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents;

(7) All items of prepaid expense; and

(8) A perpetual license at no royalty to use the brands, trademarks and tradedress "Airwick Neutra Air" and "Botanicals" in connection with the production, marketing and sale of Carpet Deodorizer Products in the United States.

PART 2

(1) A perpetual license at no royalty to use the brand, trademark and tradedress "Airwick" in connection with the production, marketing and sale of Carpet Deodorizer Products in the United States;

(2) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(3) Inventory;

(4) Accounts and notes receivable; and

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

SCHEDULE B

Reckitt & Colman shall divest all of the Rug Cleaning Products assets and businesses pursuant to the terms of this order. The assets

and businesses identified in paragraph I.J.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Rug Cleaning Products in the United States, including, but not limited to, the following:

PART 1

(1) A perpetual license at no royalty to use the brand, trademark, and tradedress "Woolite" in connection with the production, marketing and sale of Rug Cleaning Products in or into the United States;

(2) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(3) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, service marks, and UPC codes;

(4) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

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

(6) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(7) All books, records, files, financial statements, business plans and supporting documents; and

(8) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

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

SCHEDULE C

The trustee shall divest all of the Woolite Fabric Care Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.L.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Woolite Fabric Care Products in the United States, including, but not limited to, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents; and

(7) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

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

SCHEDULE D

The trustee shall divest all of the Air Freshener Products assets and businesses pursuant to the terms of this order. The assets and businesses identified in paragraph I.N.(2) of this order shall include all assets, properties, business and goodwill, tangible and intangible, utilized by Reckitt & Colman in the development, production, distribution and sale of Air Freshener Products in the United States, including, but not limited to, the following:

PART 1

(1) All customer lists, vendor lists, catalogs, sales promotion literature, existing advertising materials, marketing information, product development information, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;

(2) Intellectual property rights, patents and patent applications and the formulas, copyrights, trademarks, trade names, tradedress, service marks, and UPC codes;

(3) All rights, title and interest in and to the contracts entered in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, brokers and distributors, agents, inventors, product testing and laboratory research institutions, providers of electronic data exchange services, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

(4) All rights under warranties and guarantees, express or implied;

(5) All Environmental Protection Agency and all other federal and state regulatory agency registrations and applications, and all documents related thereto;

(6) All books, records, files, financial statements, business plans and supporting documents; and

(7) All items of prepaid expense.

PART 2

(1) All machinery, fixtures, equipment, molds, vehicles, furniture, tools and all other tangible personal property;

(2) Inventory;

(3) Accounts and notes receivable; and

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Reckitt & Colman plc ("Reckitt & Colman"), a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business at One Burlington Lane, London 4W 2RW, England, which does business in the United States through its wholly-owned subsidiary Reckitt & Colman Inc., with its offices and principal place of business at 1655 Valley Road Wayne, New Jersey; and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively the "Parties").

PREMISES

Whereas, on September 26, 1994, Reckitt & Colman entered into an agreement with Eastman Kodak Company ("Kodak") to acquire substantially all of the United States assets and liabilities of the household products, professional products and personal products businesses of L&F Products Inc. (Such assets and businesses hereinafter referred to as "L&F"), as well as the voting securities of

certain wholly-owned subsidiaries of L&F or Kodak that sell products outside the United States (hereinafter "Acquisition"); and

Whereas, on October 22, 1990, the Commission, with the consent of Reckitt & Colman, issued its complaint and made final its order to settle charges that the acquisition by Reckitt & Colman of the Boyle-Midway Division of American Home Products Corporation violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45 (In the Matter of Reckitt & Colman plc, FTC Docket No. C-3306); and

Whereas, the order in docket No. C-3306 provides that for a period of ten (10) years Reckitt & Colman shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any interest in, or the whole or any part of the stock or share capital of any person or business that is engaged in the rug cleaning products business in the United States, or, except in the ordinary course of business, any assets used or previously used in (and still suitable for use in) the rug cleaning products business; and

Whereas, Reckitt & Colman produces and markets, among other things, Carpet Deodorizer Products and Rug Cleaning Products, as defined in paragraph I of the agreement containing consent order ("consent agreement" or "consent order") to which this Hold Separate is attached and made a part thereof as Appendix 1; and

Whereas, L&F, with its principal office and place of business located at 225 Summit Avenue, Montvale, New Jersey, produces and markets, among other things, Carpet Deodorizer Products and Rug Cleaning Products, as defined in paragraph I of the consent order; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission and whether the Commission should approve the Acquisition pursuant to the order In the Matter of Reckitt & Colman plc, FTC Docket No. C-3306; and

Whereas, the Commission has determined to grant Reckitt & Colman the prior approval required for its acquisition of L&F conditioned, however, upon Reckitt & Colman divesting, as required under the consent agreement, the Carpet Deodorizer Assets and the Rug Cleaning Assets, as defined in paragraph I of the consent agreement; and

Whereas, if the Commission accepts the consent agreement, the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Carpet Deodorizer Assets and the Rug Cleaning Assets, as defined in paragraph I of the consent agreement, and the Commission's right to have the Carpet Deodorizer Assets and the Rug Cleaning Assets continue as viable competitors; and

Whereas, the purpose of the Hold Separate and the consent agreement is:

1. To preserve the Carpet Deodorizer Assets, the Air Freshener Assets, and the Rug Cleaning Assets as viable, independent, ongoing enterprises pending the divestiture of the Carpet Deodorizer Assets, the Air Freshener Assets, and Rug Cleaning Assets required under the terms of the consent agreement;

2. To remedy any anticompetitive effects of the Acquisition; and

3. To preserve the Carpet Deodorizer Assets, the Air Freshener Assets, and the Rug Cleaning Assets as ongoing and competitive entities engaged in the same businesses in which they are presently employed until each of the respective divestitures required under the terms of the consent agreement is achieved; and

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

Whereas, Reckitt & Colman understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or

exempt from the provisions of the antitrust laws of the FTC Act by reason of anything contained in this consent agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's conditional approval of the Acquisition and its agreement that, at the time it accepts the consent agreement, for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the consent agreement, it will not seek further relief from Reckitt & Colman with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the consent agreement to which it is annexed and made a part thereof, and the order in Docket No. C-3306, and in the event the required divestiture of the Carpet Deodorizer Assets is not accomplished, to appoint a trustee to seek divestiture of the Air Freshener Assets as well as the Carpet Deodorizer Assets, and in the event the required divestiture of the Rug Cleaning Assets is not accomplished, to appoint a trustee to seek divestiture of the Woolite Assets as well as the Rug Cleaning Assets, or to seek civil penalties or a court appointed trust or other equitable relief, as follows:

1. Reckitt & Colman agrees to execute and be bound by the consent agreement.

2. Reckitt & Colman agrees that from the date this Hold Separate is accepted until the earlier of the dates listed below in subparagraphs 2.a and 2.b, it will comply with the provisions of paragraph four of this Hold Separate:

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

b. The day after the divestiture of the Carpet Deodorizer Assets required by the consent order has been completed.

3. Reckitt & Colman agrees that from the date this Hold Separate is accepted until the day after the divestiture of the Rug Cleaning Assets required by the consent order has been completed it will comply with the provisions of paragraph five of this Hold Separate.

4. Reckitt & Colman agrees to manage and maintain the Carpet Deodorizer Assets and the Air Freshener Assets, as they are presently constituted, on the following term and conditions:

a. Reckitt & Colman shall appoint four individuals, one each from among Reckitt & Colman's current employees working in Reckitt & Colman's marketing, sales, materials management, and finance operations, to manage and maintain the Carpet Deodorizer Assets and the Air Freshener Assets. These individuals, ("the management team") shall manage the Carpet Deodorizer Assets and the Air Freshener Assets independently of the management of Reckitt & Colman's other businesses, except that these individuals will arrange for the Reckitt & Colman Carpet Deodorizer Products and the Reckitt & Colman Air Freshener Products to be marketed and sold by Reckitt & Colman's marketing and sales forces. The management team shall not thereafter, until the Carpet Deodorizer Assets are divested pursuant to the consent order, be in any way involved in the marketing, selling or materials management of any other Reckitt & Colman product.

b. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Reckitt & Colman. The independent auditor/manager shall have exclusive control over the operations of the Carpet Deodorizer Assets and the Air Freshener Assets, with responsibility for the management of the Carpet Deodorizer Assets and the Air Freshener Assets and for maintaining the independence of those businesses.

c. Reckitt & Colman shall not exercise direction or control over, or influence directly or indirectly, the independent auditor/manager or the management team or any of its operations relating to the operations of the Carpet Deodorizer Assets and the Air Freshener Assets; provided however, that Reckitt & Colman may exercise only such direction and control over the management team and the Carpet Deodorizer Assets and the Air Freshener Assets as is necessary to assure compliance with this Hold Separate or the consent order.

d. Reckitt & Colman shall maintain the viability and marketability of the Carpet Deodorizer Assets and the Air Freshener Assets and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses it may have to divest except in the ordinary course of business and

except for ordinary wear and tear. Reckitt & Colman shall not sell, transfer, or encumber the Carpet Deodorizer Assets or the Air Freshener Assets except in the ordinary course of business, or to effect the divestitures contemplated by the consent order pursuant to the terms of the consent order.

e. Except for the management team, Reckitt & Colman shall not permit any other Reckitt & Colman employee, officer, or director to be involved in the of the Carpet Deodorizer Assets or the Air Freshener Assets except to the extent the services of Reckitt & Colman's sales, marketing, and materials management personnel are necessary as set forth in subparagraph 4.a.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigation, or negotiating agreements to divest assets, Reckitt & Colman shall not receive or have access to, or the use of, any material confidential information not in the public domain about the Carpet Deodorizer Assets or the Air Freshener Assets or the activities of the management team in managing those businesses, nor shall the management team receive or have access to, or use of, any material confidential information not in the public domain about Reckitt & Colman's competing Carpet Deodorizer Products or Air Freshener Products businesses, or the activities of Reckitt & Colman in managing its Carpet Deodorizer Products or Air Freshener Products businesses. Reckitt & Colman may receive on a regular basis from the management team aggregate financial information necessary and essential to allow Reckitt & Colman to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in the subparagraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Reckitt & Colman from sources other than the management team, including, but not limited to, customer lists, price lists, marketing methods (except to the extent marketing and sales plans need to be divulged to the Reckitt & Colman marketing and sales force in the ordinary course of business), patents, technologies, processes, or other trade secrets).

g. Nothing in this Hold Separate shall prohibit Reckitt & Colman from providing cash management, tax preparation and/or insurance

functions for the Carpet Deodorizer Assets and the Air Freshener Assets heretofore provided by Reckitt & Colman. Reckitt & Colman personnel providing such support services must retain and maintain all material confidential information relating to the Carpet Deodorizer Assets and the Air Freshener Assets on a confidential basis and, except as permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing such information to or with any person whose employment involves any other Reckitt & Colman Carpet Deodorizer Product business or Rug Cleaning Products business. Reckitt & Colman personnel providing these support services to the Carpet Deodorizer Assets and the Air Freshener Assets shall execute a confidentiality agreement prohibiting the disclosure of any Carpet Deodorizer Assets or Air Freshener Assets confidential information.

h. Reckitt & Colman shall not change the composition of the management team, and the independent auditor/manager shall have the power to remove employees only for cause.

i. All material transactions, out of the ordinary course of business and not precluded by paragraph four hereof, shall be subject to a majority vote of the management team. In the case of a tie, the independent auditor/manager shall cast the deciding vote.

j. Reckitt & Colman shall establish written procedures to be approved by the independent auditor/manager, covering the management, maintenance, and independence of the Carpet Deodorizer Assets and the Air Freshener Assets and the conduct of the management team in accordance with this consent agreement. Reckitt & Colman shall also circulate to its employees and appropriately display a notice of this Hold Separate Agreement and consent order in the form attached hereto as Appendix A.

k. All earnings and profits from the Carpet Deodorizer Assets and the Air Freshener Assets shall be available for use in those businesses until divestiture. In computing earnings and profits for the Carpet Deodorizer Assets and the Air Freshener Assets, Reckitt & Colman may deduct from the revenues generated by the Carpet Deodorizer Assets and the Air Freshener Assets only direct product costs and indirect overheads allocated to those businesses.

l. Reckitt & Colman shall make available for use in the Carpet Deodorizer Assets and the Air Freshener Assets businesses until divestiture an amount not lower than those budgeted for 1995 and 1996 for advertising, trade promotion, and product development of

the Reckitt & Colman Carpet Deodorizer Products and Air Freshener Products, and shall increase such spending as deemed reasonably necessary by the management team in light of competitive conditions. If necessary, Reckitt & Colman shall provide the management team with any funds to accomplish the foregoing.

m. Reckitt & Colman shall pay all direct product costs and indirect overheads for the Carpet Deodorizer Assets and the Air Freshener Assets businesses. The management team and the independent auditor/manager shall serve at the cost and expense of Reckitt & Colman, and the Carpet Deodorizer Assets and the Air Freshener Assets businesses shall not be charged with the compensation and expenses of the independent auditor/manager.

n. If the independent auditor/manager ceases to act or fails to act diligently, a substitute independent auditor/manager shall be appointed in the same manner as provided in subparagraph 4.b. of this Hold Separate. Any replacement for independent auditor/manager shall be appointed with the consent of the Commission.

o. Reckitt & Colman shall indemnify the management team and the independent auditor/manager against any losses or claims of any kind that might arise out of involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team or the independent auditor/manager.

p. The independent auditor/manager shall report in writing to the Commission every thirty (30) days concerning the efforts to accomplish the purposes of this Hold Separate.

5. To ensure the complete independence and viability of L&F and to assure that no competitive information is exchanged between L&F and Reckitt & Colman, Reckitt & Colman shall hold L&F as it is presently constituted separate and apart on the following terms and conditions:

a. L&F, as defined in paragraph I of the consent agreement, shall be held separate and apart and shall be operated independently of Reckitt & Colman, except to the extent that Reckitt & Colman must exercise direction and control over L&P to assure compliance with this Hold Separate Agreement, the consent order, or the order in Docket No. C-3306.

b. Reckitt & Colman shall assign to L&F its rights under the transition services agreements and all supply agreements contemplated, respectively, by Sections 5.12 and 5.13 of the September 26, 1994, Asset Purchase Agreement among Eastman Kodak Company, L&F Products Inc., Sterling Winthrop Inc., and Reckitt & Colman plc; and, as contemplated by Sections 5.12 and 5.13 of the September 26, 1994 Asset Purchase Agreement, Sterling Winthrop Inc. ("Sterling") personnel will continue the support and administrative services being provided by such Sterling personnel to L&F as of the date this Hold Separate was signed, and all arrangements, existing on the date this Hold Separate was signed, that provide for the supply by Sterling of materials to L&F will remain in place. Reckitt & Colman shall enforce all its rights to cause such Sterling personnel providing support and administrative services and maintaining existing supply arrangements to retain and maintain all material confidential information relating to L&F on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person, whose employment involves any other Reckitt & Colman business, including the Reckitt & Colman Rug Cleaning Products business.

c. Reckitt & Colman shall appoint four individuals, one each from among L&F's current employees working in L&F's marketing, sales, materials management, and finance operations to manage and maintain L&F. These individuals, ("the management team") shall manage L&F independently of the management of Reckitt & Colman's other businesses. The management team shall not thereafter, until the Rug Cleaning Assets are divested pursuant to the consent order, be in any way involved in the marketing, selling or materials management of any competing Reckitt & Colman products.

d. The management team, in its capacity as such, shall report directly and exclusively to an independent auditor/manager, to be appointed by Reckitt & Colman. The independent auditor/manager shall have exclusive control over the operations of L&F with responsibility for the management of L&F and for maintaining the independence of those businesses. Provided, however, that the auditor/manager appointed pursuant to this paragraph five shall not be the same auditor/manager appointed pursuant to paragraph four.

e. Reckitt & Colman shall not exercise direction or control over, or influence directly or indirectly, L&F, the independent auditor/manager or the management team or any of their operations relating to the operations of L&F; provided however, that Reckitt & Colman may exercise only such direction and control over the management team and L&F as is necessary to assure compliance with this Hold Separate, the consent order, and the order in Docket No. C-3306.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or defending or prosecuting litigations or negotiating agreements to divest assets, Reckitt & Colman shall not receive or have access to, or the use of, any material confidential information not in the public domain about L&F or the activities of the management team in managing L&F; nor shall L&F or the management team receive or have access to, or use of, any material confidential information not in the public domain about Reckitt & Colman's businesses or the activities of Reckitt & Colman in managing its businesses. Reckitt & Colman may receive on a regular basis from L&F aggregate financial information necessary and essential to allow Reckitt & Colman to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information" as used herein, means competitively sensitive or proprietary information not independently known to Reckitt & Colman from sources other than L&F or the management team including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

g. Nothing in this Hold Separate shall prohibit Reckitt &Colman from providing cash management, tax preparation and/or insurance functions for L&F heretofore provided by Sterling or Kodak. Reckitt & Colman personnel providing such support services must retain and maintain all material confidential information relating to L&F on a confidential basis and, except as permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing such information to or with any person whose employment involves any other Reckitt & Colman Carpet Deodorizer Product business or Rug Cleaning

Products business. Reckitt & Colman personnel providing these support services to L&F shall not be involved in any other Reckitt & Colman Carpet Deodorizer Products business or Rug Cleaning Products business, and shall execute a confidentiality agreement prohibiting the disclosure of any L&F confidential information.

h. L&F shall be staffed with sufficient employees to maintain the viability and competitiveness of L&F, which employees shall be selected from L&F's existing employee base and may also be hired from sources other than L&F. Each director, officer and management employee of L&F shall execute a confidentiality agreement prohibiting the disclosure of any L&F confidential information.

i. Reckitt & Colman shall not change the composition of the management team and the independent auditor/manager shall have the power to remove employees only for cause.

j. All material transactions, out of the ordinary course of business and not precluded by paragraph five hereof, shall be subject to a majority vote of the management team. In case of a tie, the independent auditor/manager shall cast the deciding vote.

k. Reckitt & Colman shall establish written procedures to be approved by the independent auditor/manager, covering the management, maintenance, and independence of L&F and the conduct of the management team in accordance with this consent agreement.

l. All earnings and profits of L&F shall be retained separately by L&F. If necessary, Reckitt & Colman shall provide L&F with sufficient working capital to operate at the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

m. Reckitt & Colman shall cause L&F to continue to expend funds for the advertising, trade promotion, and product development of L&F products at levels not lower than those budgeted for 1995 and 1996, and shall increase such spending as deemed reasonably necessary by the management team in light of competitive conditions. If necessary, Reckitt & Colman shall provide L&F with any funds to accomplish the foregoing.

n. If the independent auditor/manager ceases to act or fails to act diligently, a substitute independent auditor/manager shall be appointed in the same manner as provided in subparagraph 5.d. of this Hold Separate. Any replacement for independent

auditor/manager shall be appointed with the consent of the Commission.

o. The management team and the independent auditor/manager shall serve at the cost and expense of Reckitt & Colman. Reckitt & Colman shall indemnify the management team and the independent auditor/manager against any losses or claims of any kind that might arise out of involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team or the independent auditor/manager.

p. The independent auditor/manager shall report in writing to the Commission every thirty (30) days concerning the efforts to accomplish the purposes of this Hold Separate.

6. Should the Commission seek in any proceeding to compel Reckitt & Colman to divest itself of the Carpet Deodorizer Assets or the Rug Cleaning Assets or any additional assets, as provided in the consent agreement, or to seek any other equitable relief, Reckitt & Colman shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Reckitt & Colman also waives all rights to contest the validity of this Hold Separate.

7. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Reckitt & Colman made to its principal office in the United States, Reckitt & Colman shall permit any duly authorized representative or 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 Reckitt & Colman or L&F relating to compliance with this Hold Separate; and

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

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

APPENDIX A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Reckitt & Colman has entered into a consent order and Hold Separate Agreement with the Federal Trade Commission relating to the divestiture of certain Reckitt & Colman carpet deodorizer assets and products, including Carpet Fresh, Rug Fresh, Botanicals, and Airwick Neutra Air; or alternatively, if that divestiture is not accomplished within six months, the additional divestiture of certain Reckitt & Colman air freshener assets and products, including Airwick, Stick Ups, Air Waves, Wizard, Botanicals, and Airwick Neutra Air. Until such divestitures as are required by the consent order are accomplished, the Reckitt & Colman carpet deodorizer assets and products, including Carpet Fresh, Rug Fresh, Botanicals, and Airwick Neutra Air, and the Reckitt & Colman air freshener assets and products, including Airwick, Stick Ups, Air Waves, Wizard, Botanicals, and Airwick Neutra Air must be managed and maintained as a separate, ongoing business, independent of all other competing lines of Reckitt & Colman as provided by the Agreement to Hold Separate. All competitive information relating to these product lines must be retained and maintained by the persons responsible for the management of these products on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing any such information to or with any other person whose employment involves any competing Reckitt & Colman carpet deodorizer or air freshener product. Similarly, all persons responsible for the management of any competing Reckitt & Colman carpet deodorizer product or air freshener product shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing any such information to or with any other person responsible for the Carpet Fresh, Rug Fresh, Botanicals, or Airwick Neutra Air carpet deodorizer products, or the Airwick, Stick Ups, Air Waves, Wizard, Botanicals, or Airwick Neutra Air air freshener products.

Any violation of the consent order or the Hold Separate Agreement, incorporated by reference as part of the consent order, subjects the violator to civil penalties and other relief as provided by law.

IN THE MATTER OF

ARKLA, INC.

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-3265. Consent Order, Oct. 10, 1989--Modifying Order, April 5, 1995

This order reopens a 1989 consent order that settled allegations that Arkla's acquisition of natural gas pipeline assets from TransArk Transmission Co. could reduce competition in the transportation of natural gas out of the Arkoma basin and the transmission of gas to consumers in the Russellville, Arkansas, area. This order modifies the consent order by deleting the divestiture requirement, because changed market conditions, such as regulatory changes and new entry in the market, make it no longer necessary.

ORDER MODIFYING ORDER

On December 6, 1994, NorAm Energy Corporation, successor to Arkla, Inc. ("Arkla"), filed a Petition To Reopen and Vacate or Modify Consent Order ("Petition") in Docket C-3265, 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, 16 CFR 2.51. Arkla requests that the Commission reopen the consent order issued on October 10, 1989 ("order"), and set it aside or modify the order by eliminating the requirement to divest. For the reasons discussed below, the Commission has determined to reopen the order and to set aside the divestiture requirement.

I. BACKGROUND

The order, which became final on October 23, 1989, was issued by the Commission to remedy the alleged anticompetitive effects of Arkla's 1986 acquisition of a pipeline and right of way of TransArk Transmission Company ("TransArk Assets"). The Commission's complaint alleged that the acquisition eliminated the TransArk Assets as an actual and a potential competitor in the transportation of gas to consumers in the Russellville-Morrilton-Conway, Arkansas, area and in the transportation of gas out of the Affected portion of the Arkoma

Basin ("APAB"), as defined in the order. The complaint also alleged that entry into the relevant markets "is very difficult or unlikely."

The order requires Arkla, among other things, to divest by April 23, 1991, the TransArk Assets or, in the alternative, at the sole discretion of the Commission, the Arkla Pipeline Assets, as defined in the order.[1] The purpose of divestiture under the order is to remedy the lessening of competition alleged in the complaint. *See Arkla, Inc.*, 112 FTC 509 (1989), modified (March 28, 1994).

II. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[2]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter").[3] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from

[1] The Commission in June 1991 and March 1994 granted requests by Arkla for approval of proposed divestitures of the Arkla Pipeline Assets. Neither of the proposed divestitures was approved by the Federal Energy Regulatory Commission, however, and neither was completed. *See* Petition at 8-12.

[2] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[3] Reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. ARKLA'S PETITION

Arkla asserts in its Petition that reopening is required by changed conditions of fact. The changed conditions identified by Arkla are order 636 of the Federal Energy Regulatory Commission ("FERC"),[4] substantial new entry in the relevant markets and excess capacity in the relevant markets.[5] Arkla states that FERC order 636 has resulted

[4] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 3 FERC Stats. & Regs. (CCH) ¶ 30,939 (1992); order on rehearing, order No. 636-A, 57 Fed. Reg. 36,128, 3 FERC Stats. & Regs. (CCH) ¶ 30,950 (Aug. 3, 1992); order on rehearing, order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (Nov. 27, 1992) (collectively "FERC order 636").

[5] Petition at 13-26.

in sweeping changes in the pipeline industry, by requiring pipelines to unbundle their services into separate components and to become open access pipelines and by enabling shippers to sell unneeded pipeline capacity through a capacity release program. According to Arkla, these changes have fostered new entry. Arkla also claims that entry has occurred since the order was issued, that other pipeline companies are potential entrants in the markets, and that an incumbent firm has proposed increasing its capacity. Arkla's Petition was placed on the public record for thirty days; no comments were received.

IV. ARKLA HAS SHOWN CHANGED CONDITIONS OF FACT THAT REQUIRE REOPENING

Arkla has shown changed conditions of fact that require reopening to consider whether the order should be modified as requested. FERC order 636, issued in 1992, altered the nature of competition in the natural gas industry. Among other things, FERC order 636 requires interstate pipeline companies to "unbundle" the charges for the services that they provide. Before FERC order 636, a pipeline acted as a merchant of gas, buying gas at the wellhead, gathering and storing it, transporting it through the pipeline, and charging customers a single price for this integrated service. FERC order 636 requires pipeline companies to separate out the charges for each service, and customers may deal with different suppliers for each service. The unbundling required by FERC order 636 enables pipeline companies to compete in providing one or more services without being fully integrated. According to Arkla, FERC order 636 has converted pipelines "from merchants of gas into transporters of gas offering transportation-only service for hire for third parties." Petition at 19. FERC order 636 enables firms to engage in pipeline transportation without incurring the costs of building or acquiring gathering and storage facilities, thus easing conditions of entry. Petition at 35-36. The Commission previously reopened and modified the order to set aside the requirement that Arkla divest gathering facilities associated with pipeline assets, because a pipeline company no longer needs to own gathering facilities to compete.[6]

FERC order 636 requires virtually all pipelines to be open access carriers, that is, to provide transportation service to and from any

[6] Arkla, Inc., Docket C-3265, order (March 28, 1994).

point on the pipeline system, and eases the regulatory requirements to build new pipelines. FERC order 636 also altered competition in the pipeline transportation of natural gas by enabling customers that are contractually obligated to take a certain amount of gas on a daily basis (firm commitment customers) to resell unneeded capacity under so-called capacity release programs. In addition, under the flexible receipt and delivery points required by FERC order 636, a buyer of firm commitment capacity need not deliver gas to or receive gas from the same points as its seller but may use any receipt and delivery points along the pipeline system. As a result, firm commitment customers can compete with pipeline companies in offering pipeline transportation services to some customers. According to Arkla, capacity release by shippers is rapidly increasing. Petition at 32.

Significant entry and capacity expansion have occurred in the Affected Area of the Arkoma Basin ("APAB"), as defined in the order.[7] Ozark Gas Transmission Systems in 1991 converted its pipeline to open access.[8] Ozark also obtained FERC approval for a capacity expansion (although the project has not been completed). Petition at 15. NOARK Pipeline System in 1992 completed construction of and began operating a pipeline in the APAB.[9] The Ozark and NOARK pipelines have added capacity to the APAB that is six times the capacity of TransArk; if Ozark completes its planned expansion, the combined capacity will be ten times the capacity of TransArk.

The entry and expansion that have occurred since the order was issued have substantially reduced concentration in the APAB. In 1989, Arkla was the only open access pipeline in the market, and TransArk was a potential competitor.[10] The entry and expansion in the market reduce concentration, as does the availability of capacity

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[7] *Cf.* Louisiana Pacific Corp., Docket C-2956, letter to John C. Hart, June 5, 1986, at 8 (unpublished) (denying reopening and modification when respondent failed to show changes in structural conditions, such as ease of entry, that might obviate need for divestiture requirement).

[8] The Ozark pipeline is within 10 miles of the TransArk line through the APAB. Petition at 15.

[9] NOARK began construction of its pipeline in October 1991 and opened it for service in September 1992. The NOARK pipeline crosses the TransArk pipeline and is within 18 miles of it through the APAB.

[10] Independent entry by TransArk would have reduced the Herfindahl-Hirschmann Index ("HHI") by approximately 1404 points from 10,000 to 8596. The HHI is used by the enforcement agencies "[a]s an aid to the interpretation of market data." *See* 1992 Horizontal Merger Guidelines ¶ 1.5

under capacity release programs.[11] Although the volume of gas shipped by released capacity still is relatively small (8% nationally in 1994),[12] the proportion of capacity that is allocated to firm transportation contracts and, therefore, subject to release is increasing, which increases the potential for capacity release in the future. Petition at 32.

In addition to entry and expansion in the APAB, there has been substantial entry in other parts of the Arkoma Basin. Transok in 1989 began operating a pipeline in the Arkoma Basin and in 1990 built a second pipeline serving the Arkoma Basin. Natural Gas Pipeline of America ("NGPL") in 1991 completed a pipeline in the Arkoma Basin. The NGPL pipeline was completed in about six months after construction began. Petition at 14. Although the Transok and NGPL pipelines are not in the markets alleged in the complaint, their experience shows that entry conditions have eased. In addition, to the extent that Transok and NGPL may be potential entrants in the APAB, their presence in areas adjacent to the APAB helps alleviate the competitive concerns alleged in the complaint.

Entry and expansion coupled with flat production in the area have resulted in excess pipeline capacity. Petition at 25 & 39. In 1992, according to Arkla, most major pipelines in the Arkoma Basin were operating at less than 50% of capacity. Petition at 25. The existence of excess capacity may decrease the possibility of successful collusion, because participants will have incentives to undercut the collusive price. According to Arkla, excess pipeline capacity has increased competition in the Arkoma Basin. The Federal Energy Regulatory Commission, in setting rates for Ozark, said that "[t]he record reflects substantial excess capacity and thus considerable competition in the Arkoma Basin." Petition at 26, citing Ozark Gas Transmission System, 68 FERC ¶ 61,032, at 61,108 (1994). Under

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[11] Pipeline entry and expansion in the APAB reduces the HHI to 5140. Assigning capacity available for capacity release to the shippers that hold the capacity under contract reduces the HHI to 3346. *See* Petition at 33 n.22; letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 3.

[12] According to Arkla, "[a]s much as 90% of Ozark's total capacity was released through capacity release," driving pipeline rates down. Petition at 33. Rates for firm pipeline capacity consist of two parts: a demand or reservation charge, which must be paid whether or not the capacity is used; and a usage charge. According to Arkla, a firm shipper has incentives to sell its unused capacity rights to defray the demand or reservation charge. Petition at 22. According to the Energy Information Administration of the Department of Energy, although firm commitment customers theoretically could make a profit on released capacity, "[i]n practice so far . . . released capacity has sold at a discount." Energy Information Administration, Natural Gas 1994: Issues and Trends 49 (July 1994), Petition Exhibit Q.

conditions of excess capacity, Arkla is selling its services in the Arkoma Basin "at a considerable discount under the rates authorized by the FERC." Petition at 40.

Pipeline entry and expansion also have affected the Russellville-Morrilton-Conway ("RMC") corridor. Both the Ozark and NOARK pipelines are near the TransArk pipeline in the RMC corridor and could provide cost-effective hook ups for customers in the corridor. *See* Petition at 38 n.27. Therefore, Arkla has shown changed conditions that require reopening to consider whether the order should be modified as requested.

V. THE ORDER SHOULD BE MODIFIED

Arkla has shown significant changes in circumstances such that there is no further need for the order's requirement to divest. The changes in competitive conditions in the relevant markets resulting from FERC order 636 and the entry and expansion that have occurred since the order was issued eliminate the need for divestiture that was required by the order.

Arkla has not shown that the prior approval requirement of the order should be set aside. Paragraph V of the order, in relevant part, requires Arkla, for ten years, to obtain the approval of the Commission before acquiring certain pipeline interests in the relevant markets. Arkla claims that the prior approval requirement rested on the presumption that any pipeline acquisition by Arkla "would impermissibly augment [Arkla's] perceived ability to exercise market power in the relevant markets."[13] Arkla fails to show that there is no longer a continuing need for prior approval of acquisitions by Arkla in the relevant markets.

The relevant markets identified in the complaint still are highly concentrated, and Arkla still is a substantial competitor in the relevant markets. The conclusion that the requirement to divest the TransArk assets should be set aside in light of changed conditions does not imply that any subsequent acquisition by Arkla would not raise competitive concerns. For example, an acquisition by Arkla of either NOARK or Ozark, the two pipelines that compete directly with Arkla in both the APAB and the RMC corridor, would eliminate a significant, direct competitor, increase concentration substantially and likely raise antitrust concerns that would warrant further

[13] Letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 4.

examination. Under the circumstances, the prior approval clause should not be set aside. *See Damon Corporation*, Docket C-2916 (March 29, 1983) (denying request to set aside prior approval clause when respondent had not shown that acquisitions "would no longer pose any antitrust concern");[14] *see also Canada Cement Lafarge, Ltd.*, 111 FTC 590 (1989) (prior approval clause not set aside when respondent failed to show that no acquisition that it might make would raise competitive concerns).

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the order in Docket C-3265 be, and it hereby is, modified to set aside paragraphs II, III and IV, as of the effective date of this order.

Commissioner Starek concurring only in the result.

[14] Letter to Joel Hoffman, reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207, at 22,585.

IN THE MATTER OF

NINZU, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3566. Complaint, April 7, 1995--Decision, April 7, 1995

This consent order requires, among other things, the Maryland-based marketers to possess and rely upon competent and reliable scientific substantiating evidence to support any performance, benefits, efficacy, or safety claims they make for any weight loss or weight control product or program or any acupressure device they market in the future.

Appearances

For the Commission: *Richard L. Cleland.*

For the respondents: *Michael B. Metzger*, President, Baltimore, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc., corporations; and Michael Metzger, individually and as an officer and director of said corporations ("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 Ninzu, Inc. is a Maryland corporation doing business under its own name and under the names Davish Enterprises and Davish Health Products. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Davish Merchandising, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Order By Phone, Inc. is a Maryland corporation and the parent corporation of Auricle Clip, Inc. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Auricle Clip, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Michael Metzger is or was at relevant times herein an officer and director of Ninzu, Inc., Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc. Individually or in concert with others, he participated in and/or formulated, directed and controlled the acts and practices of the respondent corporations. His address is 12135 Heneson Garth, Owings Mills, Maryland.

PAR 2. Respondents have advertised, offered for sale, sold, and distributed the Ninzu, Auricle Clip, and B-Trim, acupressure weight-loss devices that clip onto the ear. The Ninzu, Auricle Clip, and B-Trim are devices within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

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, 15 U.S.C. 44.

NINZU

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Ninzu, including but not necessarily limited to the attached Exhibits A and B. The aforesaid advertisements contain the following statements:

A. NO DIET! NO EXERCISE! LOSE 30 POUNDS IN 30 DAYS!

No conventional diet is better than any other. Don't kid yourself, they just do not work (Read the June issue of *Consumer Reports*).

NINZU™ is the first effortless weight loss product that really works. Now available in the U.S. You must be satisfied with your results in just 30 days or we will completely refund your money... no questions asked!

NINZU™ is a tiny acupressure device that fits snugly on your ear. This product utilizes the ancient science of acupressure to make you lose weight. It's safe and it works...we guarantee it.

NINZU™ does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. Wearing NINZU™ for less than 3 hours a day will produce dramatic results.

JOIN OUR LIST OF SATISFIED CUSTOMERS

I have tried every diet known to man. This is the first time I actually lost weight and I'm keeping it off. Mr. C.D. of Texas.

I lost 32 pounds last month by using NINZU. My husband says that I've never looked better. Mrs. J.R. of Ohio.

At first I thought it was a joke but after dropping 47 pounds in 2 months, I'm a true believer. Mr. T.U. of Maryland. (Exhibit A).

B. Would you put a needle in your ear to help you lose weight? Medical doctors in China use acupuncture every day to successfully help millions of patients.

Now for the first time in America you can actually lose weight using the proven principles of acupuncture without needles.

Introducing Ninzu, an amazing device guaranteed to help you lose weight by controlling your hunger. Just attach the small device to the triangular portion of your outer ear for one hour before eating, during the meal, and one hour after eating. It's completely painless, and totally effective. In just seconds your hunger pains disappear. You eat less, you lose weight quickly and safely.

Here's how it works. In Chinese medicine the hunger point is the tragus. The tragus is connected to the major nerve ending that controls your stomach and upper intestine. When you apply pressure to the nerve ending it actually inhibits your stomach's contractions. Your brain receives the signal that your stomach is full, reducing your craving. Imagine, no calorie counting, no diet shakes, no special fads, no pills or drugs. Just a safe, effective method that really works.

* * * *

"I dropped two dress sizes, so simple, yet so incredibly effective."

* * * *

"You can't notice it but I'm wearing it right now and I literally cut my food intake in half." (Exhibit B).

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

A. Ninzu causes significant weight loss;
B. Ninzu causes significant weight loss without the need to diet or exercise;
C. Ninzu controls appetite or eliminates a person's craving for food; and
D. Ninzu is scientifically proven to cause significant weight loss and control appetite.

PAR. 6. In truth and in fact:

A. Ninzu does not cause significant weight loss;

B. Ninzu does not cause significant weight loss without the need to diet or exercise;

C. Ninzu does not control appetite or eliminate a person's craving for food; and

D. Ninzu is not scientifically proven to cause significant weight loss and control appetite.

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

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

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

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Ninzu reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 10. In truth and in fact, testimonials from consumers appearing in advertisements for the Ninzu do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

AURICLE CLIP

PAR. 11. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Auricle Clip, including but not necessarily limited to the attached Exhibit C. The aforesaid advertisement contains the following statements:

AURICLE CLIP™

The Effortless Weight Loss Product

A Board Certified internist born in China has uncovered the secret of using acupressure for quick and effortless weight loss. The introduction of the Auricle Clip makes available to the public the work of Dr. Daniel S.J. Choy, a qualified medical professional. The Auricle Clip is the product that will make dieting obsolete.

Through the science of acupressure, the Auricle Clip allows the user to lose weight without having to think about calories or grams of fat. Now, people who have failed as dieters because they could not stand to deprive themselves of the foods they love, will be able to take control of their lives and become happier, thinner people.

The Auricle Clip attaches to a pressure point on the tragus, the triangular portion of the outer ear, where it slows the wave-like muscular movement of food from the stomach into the intestines (peristalsis). This simply means that the stomach thinks that it is half-full before the user even begins eating. After a few bites the user feels full. In effect, the stomach seems smaller so the user eats less.

The Auricle Clip does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. By wearing the Auricle Clip on the tragus of each ear a half hour before eating and one hour after eating the user will change his/her eating habits, which is the real key to losing weight and keeping it off. (Exhibit C).

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that:

A. Auricle Clip causes significant weight loss;

B. Auricle Clip causes significant weight loss without the need to diet;

C. Auricle Clip controls appetite; and

D. Auricle Clip is scientifically proven to cause significant weight loss and control appetite.

PAR. 13. In truth and in fact:

A. Auricle Clip does not cause significant weight loss;

B. Auricle Clip does not cause significant weight loss without the need to diet;

C. Auricle Clip does not control appetite; and

D. Auricle Clip is not scientifically proven to cause significant weight loss and control appetite.

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

PAR. 14. Through the use of statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twelve (A), (B), and (C), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph twelve (A), (B), and (C), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

B-TRIM

PAR. 16. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the B-Trim, including but not necessarily limited to the advertisement attached as Exhibit D. The aforesaid advertisement contains the following statements:

SUCCESSFUL DIETING

(NAPS)--If you're ready to lose your share of the millions of pounds Americans are overweight, experts suggest you follow this sensible advice:

1. If you're thinking of a major weight loss, see a doctor before you start.

[DRAWING OF A WOMAN STANDING ON A BATHROOM SCALE OVER THE FOLLOWING CAPTION: A modern invention based on the ancient science of acupressure can reduce your craving for food.]

2. Make sure the diet you choose contains the proper amount of protein, fats, carbohydrates, water and vitamins. The U.S. Dept. of Health recommends that no more than 30 percent of your calories should come from fat.

3. Be aware of new techniques for dieters. One new product is reported to be able to help you lose weight without feeling hungry. Called B-Trim, this inexpensive acupressure product was developed by a Chinese born, board certified internist on the staff of two New York hospitals. When you attach a small, specially designed clip to the triangular portion of your outer ear, a message is sent to your brain via the vagus nerve that tells your stomach it is partially full. This effect makes dieting practically effortless. The device is worn for a half hour before and an hour after meals. (Exhibit D).

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that:

A. B-Trim causes significant weight loss; and

B. B-Trim reduces the user's craving for food and causes weight loss without the user feeling hungry.

PAR. 18. In truth and in fact:

A. B-Trim does not cause significant weight loss; and

B. B-Trim does not reduce the user's craving for food or cause weight loss without the user feeling hungry.

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

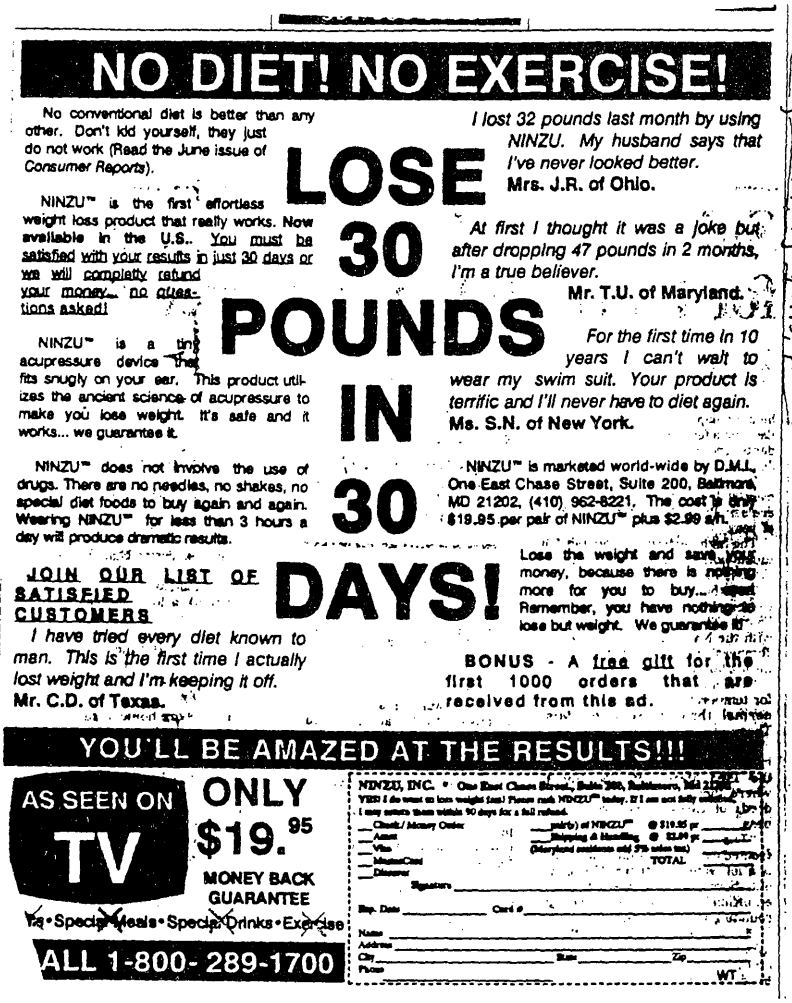
PAR. 19. Through the use of statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seventeen, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 20. In truth and in fact, at the time they made the representations set forth in paragraph seventeen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A



NO DIET! NO EXERCISE!

No conventional diet is better than any other. Don't kid yourself, they just do not work (Read the June issue of *Consumer Reports*).

NINZU™ is the first effortless weight loss product that really works. Now available in the U.S.. You must be satisfied with your results in just 30 days or we will completly refund your money... no questions asked!

NINZU™ is a tiny acupressure device that fits snugly on your ear. This product utilizes the ancient science of acupressure to make you lose weight. It's safe and it works... we guarantee it.

NINZU™ does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. Wearing NINZU™ for less than 3 hours a day will produce dramatic results.

JOIN OUR LIST OF SATISFIED CUSTOMERS

I have tried every diet known to man. This is the first time I actually lost weight and I'm keeping it off.
Mr. C.D. of Texas.

LOSE 30 POUNDS IN 30 DAYS!

I lost 32 pounds last month by using NINZU. My husband says that I've never looked better.
Mrs. J.R. of Ohio.

At first I thought it was a joke but after dropping 47 pounds in 2 months, I'm a true believer.
Mr. T.U. of Maryland.

For the first time in 10 years I can't wait to wear my swim suit. Your product is terrific and I'll never have to diet again.
Ms. S.N. of New York.

NINZU™ is marketed world-wide by D.M.I., One East Chase Street, Suite 200, Baltimore, MD 21202, (410) 962-8221. The cost is only $19.95 per pair of NINZU™ plus $2.99 s/h.

Lose the weight and save money, because there is nothing more for you to buy... Remember, you have nothing to lose but weight. We guarantee it!

BONUS - A free gift for the first 1000 orders that are received from this ad.

YOU'LL BE AMAZED AT THE RESULTS!!!

AS SEEN ON TV

ONLY $19.95

MONEY BACK GUARANTEE

~~Fat~~ • ~~Special Meals~~ • ~~Special Drinks~~ • ~~Exercise~~

CALL 1-800- 289-1700

NINZU, INC. • One East Chase Street, Suite 200, Baltimore, Md 21202

YES! I do need to lose weight fast! Please rush NINZU™ today. If I am not fully satisfied I may return them within 90 days for a full refund.

Check / Money Order ____ pair(s) of NINZU™ @ $19.95 pr ____

Amex ____ Shipping & Handling @ $2.99 pr ____

Visa ____ (Maryland residents add 5% sales tax) ____

MasterCard ____ TOTAL ____

Discover ____

Signature ____

Exp. Date ____ Card # ____

Name ____

Address ____

City ____ State ____ Zip ____

Phone ____ WT ____

Washington Times Aug 29 1993 p. A12

EXHIBIT B

DAVISH ENTERPRISES
"NINZU" 2 MIN.
VER. A $19.95
1-800-STAY TRIM
7/1/93

Would you put a needle in your ear to help you lose weight? Medical doctors in China use acupuncture every day to successfully help millions of patients.

Now for the first time in America you can actually lose weight using the proven principles of acupuncture without needles.

[ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]

Introducing Ninzu, an amazing device guaranteed to help you lose weight by controlling your hunger. Just attach the small device to the triangular portion of your outer ear for one hour before eating, during the meal, and one hour after eating. It's completely painless, and totally effective. [ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]. In just seconds your hunger pains disappear. You eat less, you lose weight quickly and safely.

Here's how it works. In Chinese medicine the hunger point is the tragus. The tragus is connected to the major nerve ending that controls your stomach and upper intestine. When you apply pressure to the nerve ending it actually inhibits your stomach's contractions. Your brain receives the signal that your stomach is full, reducing your craving. Imagine, no calorie counting, no diet shakes, no special fads, no pills or drugs. Just a safe, effective method that really works.

"Ninzu really change my life. It is so satisfying to feel good about myself again."
"I dropped two dress sizes, so simple, yet so incredibly effective."
"Since wearing the Ninzu I really can't wait to get dressed in the morning."
"You can't notice it but I'm wearing it right now and I literally cut my food intake in half."
The Chinese clip is based on 4000 years of ancient oriental medicine. It's totally safe and guaranteed to work. [ON SCREEN: Ted D. Annenberg, R.Ac., P.A., Registered Acupuncturist - Nutritional Medicine, Weight Loss, Food Allergist]

[ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)]

Now Ninzu can be yours for only $19.95. Best of all there's no additional purchases or refills. It's safe, painless, and it lasts forever.

"I can't believe how much money this little product has saved me, but best of all it works."

Ninzu comes with an iron-clad money-back guarantee. Try it for 90 days [ON SCREEN: 1-800-STAY TRIM (1-800-782-9874)] if you're not completely satisfied return them for a complete refund, no questions asked.

Ninzu for only $19.95, order today. Call now 1-800-STAY TRIM, that's 1-800-782-9874 for credit card orders, or send check or money order for $19.95 plus shipping to NINZU, Box 32088, Baltimore, Maryland 21208.
Ninzu comes with a 90 day money back guarantee. Order Ninzu now.

[ON SCREEN:
Visa, Master Card, American Express, Discover
Call Now 1-800-STAY TRIM
(1-800-782-9874)
or send check or money order for $19.95 plus $2.99 S+H to
NINZU, P.O. Box 32088, Baltimore, MD. 21208.

Free Gift Included
90 Day Money Back Guarantee
D.M.I. 1 E Chase Street, Suite 200, Baltimore, MD. 21202.]

EXHIBIT C

EXHIBIT C

AURICLE CLIP®

The Effortless Weight Loss Product

A Board Certified internist born in China has uncovered the secret of using acupressure for quick and effortless weight loss. The introduction of the *Auricle Clip* makes available to the public the work of Dr. Daniel S.J. Choy, a qualified medical professional. The *Auricle Clip* is the product that will make dieting obsolete.

Through the science of acupressure, the *Auricle Clip* allows the user to lose weight without having to think about calories or grams of fat. Now, people who have failed as dieters because they could not stand to deprive themselves of the foods they love, will be able to take control of their lives and become happier, thinner people.

The *Auricle Clip* attaches to a pressure point on the tragus, the triangular portion of the outer ear, where it slows the wave-like muscular movement of food from the stomach into the intestines (peristalsis). This simply means that the stomach thinks that it is half-full before the user even begins eating. After a few bites the user feels full. In effect, the stomach seems smaller so the user eats less.

The *Auricle Clip* does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. By wearing the *Auricle Clip* on the tragus of each ear a half hour before eating and one hour after eating the user will change his/her eating habits, which is the real key to losing weight and keeping it off.

The *Auricle Clip* is marketed world-wide by Davan Enterprises, One East Chase Street, Suite 200, Baltimore, MD 21202, (800) 289-1700. The cost is $39.95 per pair of *Auricle Clips* plus $3.95 s/h.

NO SPECIAL MEDICATION

NO SPECIAL MEALS

NO SPECIAL DRINKS

100% Satisfaction Guaranteed

AURICLE CLIP, INC.

EXHIBIT D

EXHIBIT D

SUCCESSFUL DIETING

(NAPS)—If you're ready to lose your share of the millions of pounds Americans are overweight, experts suggest you follow this sensible advice:

1. If you're thinking of a major weight loss, see a doctor before you start.

A modern invention based on the ancient science of acupressure can reduce your craving for food.

2. Make sure the diet you choose contains the proper amount of protein, fats, carbohydrates, water and vitamins. The U.S. Dept. of Health recommends that no more than 30 percent of your calories should come from fat.

3. Be aware of new techniques for dieters. One new product is reported to be able to help you lose weight without feeling hungry. Called B-Trim, this inexpensive acupressure product was developed by a Chinese born, board certified internist on the staff of two New York hospitals. When you attach a small, specially designed clip to the triangular portion of your outer ear, a message is sent to your brain via the vagus nerve that tells your stomach it is partially full. This effect makes dieting practically effortless. The device is worn for a half hour before and an hour after meals.

B-Trim is available by sending a check for $39.95, plus $3.95 S&H to: Davish Health Products, One East Chase Street, Suite 200, Baltimore, MD 21202; or by calling (800) 289-1700.

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 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, 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 Ninzu, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Davish Merchandising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Order By Phone, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Maryland, with its office and principal place of business located at 1 East Chase Street, Suite 200, in the City of Baltimore, State of Maryland.

Respondent Michael B. Metzger is an officer and director of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his 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

For the purposes of this order:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. *"Acupressure device"* shall mean any product, program, or service that is intended to function by means of the principles of acupressure.

I.

It is ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Ninzu, Auricle Clip, B-Trim or any other acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product causes significant weight loss;

B. Such product causes significant weight loss without the need to diet or exercise;

C. Such product controls appetite, eliminates a person's craving for food, or causes weight loss without the user feeling hungry; or

D. Such product is scientifically proven to cause significant weight loss and control appetite.

II.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy, or safety of such product, program, or device unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any

weight-loss or weight-control product or program or any acupressure device 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 product, program, or device represents the typical or ordinary experience of members of the public who use the product, program, or device unless this is the case.

IV.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, their successors and assigns, and their officers; Michael B. Metzger, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any weight-loss or weight-control product or program or any acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

V.

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

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

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VI.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc. shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents' 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 issuance of this order, provide a copy of this order to each of respondents' future 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 who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

VII.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, 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 corporate change that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That respondent, Michael B. Metzger, shall, for a period of five (5) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance

of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include 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.

IX.

It is further ordered, That respondents, Ninzu, Inc., Davish Merchandising, Inc. d/b/a Davish Enterprises and Davish Health Products, and Order By Phone, Inc. d/b/a Auricle Clip, Inc., corporations, and Michael B. Metzger, individually and as an officer and director of said corporations, 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.

IN THE MATTER OF

ALLIANT TECHSYSTEMS 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-3567. Complaint, April 7, 1995--Decision, April 7, 1995

This consent order permits, among other things, Alliant Techsystems Inc. ("Alliant"), a Minnesota-based defense contractor, to acquire Hercules Inc.'s propellant division, Hercules Aerospace Company, under certain conditions, and requires Alliant to prevent its newly acquired propellant division from sharing non-public information with Alliant's ammunition and munitions division. Alliant also has to notify its propellant customers of the Commission order before obtaining any non-public information from them.

Appearances

For the Commission: *Laura A. Wilkinson* and *Ann Malester.*

For the respondent: *Ronald A. Bloch* and *Timothy J. Waters*, *McDermott, Will & Emery*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Alliant Techsystems Inc. ("Alliant"), a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire certain stock and assets of Hercules Incorporated, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. *"Propellant"* and *"Explosives"* mean substances used to propel or activate Weapons.

2. *"Weapons"* means ammunition or munitions.

II. RESPONDENT

3. Respondent Alliant is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at 600 Second Street, N.E., Hopkins, Minnesota.

4. Respondent, through its Defense Systems Business Group, is engaged in the research, development, manufacture and sale of Weapons and weapon systems.

5. Respondent, through the proposed acquisition of substantially all of the stock and assets relating to Hercules Aerospace Company, would be engaged in the research, development, manufacture and sale of Propellant and Explosives, which are used to propel or activate Weapons.

III. THE ACQUIRED COMPANY

6. Hercules Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business at Hercules Plaza, Wilmington, Delaware.

7. Hercules Incorporated, through its unincorporated division, Hercules Aerospace Company, is engaged in the research, development, manufacture and sale of Propellant and Explosives, which are used to propel or activate Weapons.

IV. JURISDICTION

8. For purposes of this proceeding, respondent Alliant 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 in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

9. On July 11, 1994, Alliant agreed to acquire substantially all of the stock and assets relating to Hercules Aerospace Company, an unincorporated division of Hercules Incorporated, for consideration totalling approximately $466 million.

VI. TRADE AND COMMERCE

10. The relevant lines of commerce are the research, development, manufacture and sale of Propellant or Explosives and the research, development, manufacture and sale of Weapons.

11. The relevant section of the country in which to evaluate the effects of the acquisition is the United States.

12. The relevant line of commerce consisting of the research, development, manufacture and sale of Propellant or Explosives is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the research, development, manufacture and sale of Propellant or Explosives is difficult and unlikely.

VII. EFFECTS OF THE ACQUISITION

14. The effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the market for the research, development, manufacture and sale of Weapons in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The acquisition may increase and enhance the position and ability of Alliant to gain access to competitively significant and non-public information concerning other Weapons manufacturers.

15. The effect identified in paragraph fourteen may increase the likelihood that, in the market for the research, development, manufacture and sale of Weapons:

a. Direct actual competition between Alliant and other Weapons manufacturers will be reduced; and

b. Advancements in Weapons research, innovation, and quality will be reduced.

VIII. VIOLATIONS CHARGED

16. The acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

17. The acquisition described in paragraph nine, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of the Hercules Aerospace Company of Hercules Incorporated ("Hercules"), 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Alliant Techsystems Inc. ("Alliant") 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 600 Second Street, N.E., Hopkins, Minnesota.

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. *"Alliant"* or *"Respondent"* means Alliant Techsystems Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Alliant, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. *"Defense Systems"* means (1) Alliant's Defense Systems Business Group, an unincorporated division of Alliant with its principal place of business at 600 Second Street, N.E., Hopkins, Minnesota, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of the Defense Systems Business Group's divisions, subsidiaries, successors and assigns, and (2) Hercules Defense Electronics Systems, Inc., a corporation with its principal place of business at 13133 34th Street North, Clearwater, Florida, as well as its officers, employees, agents, divisions, subsidiaries, successors, and assigns, and the officers, employees or agents of Hercules Defense Electronics Systems, Inc.'s divisions, subsidiaries, successors and assigns. Defense Systems is principally engaged in the research, development, manufacture and sale of Weapons and weapon systems.

C. *"Hercules"* means Hercules Incorporated, a corporation organized, existing and doing business under the laws of Delaware with its principal place of business at Hercules Plaza, Wilmington, Delaware.

D. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

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

F. *"Propellant or Explosives"* means substances used to propel or activate Weapons.

G. *"Weapons"* means ammunition and munitions.

H. *"Acquisition"* means the acquisition by Alliant of substantially all of the assets and stock relating to Hercules Aerospace Company, an unincorporated division of Hercules.

I. *"Non-Public Information"* means any information not in the public domain furnished by a Weapons developer, manufacturer or systems contractor to Alliant in Alliant's capacity as a provider of Propellant or Explosives; provided (a) if written information is furnished, it is designated in writing by the Weapons developer, manufacturer or systems contractor as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (b) if oral, visual or other information is furnished, it is identified as proprietary information in writing by the Weapons developer, manufacturer or systems contractor prior to the disclosure to Alliant or within thirty (30) days after such disclosure. Non-Public Information shall not include (i) information already known to Alliant, (ii) information which subsequently falls within the public domain through no violation of this order by Alliant, (iii) information which subsequently becomes known to Alliant from a third party not in breach of a confidential disclosure agreement with a Weapons developer, manufacturer or systems contractor, or (iv) information after six (6) years from the date of disclosure to Alliant or such other period as agreed to in writing by Alliant and the Weapons developer, manufacturer or systems contractor.

II.

It is further ordered, That:

A. Alliant shall not, absent the prior written consent of the proprietor of Non-Public Information, provide, disclose, or otherwise make available to Defense Systems any Non-Public Information; and

B. Alliant shall use any Non-Public Information it obtains only in its capacity as a provider of Propellant or Explosives, absent the prior written consent of the proprietor of Non-Public Information.

III.

It is further ordered, That, Alliant shall deliver a copy of this order to any United States Weapons developer, manufacturer or systems contractor prior to first obtaining any Non-Public Information relating to the developer's, manufacturer's or systems contractor's Weapons either from the Weapons developer, manufacturer, or systems contractor or through the Acquisition; provided that for Non-Public Information described in paragraph I. Section I.(b) of this order, Alliant shall deliver a copy of this order within ten (10) days of the written identification by the Weapons developer, manufacturer or systems contractor.

IV.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, 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 and III of this order; and

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, 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. To the extent not prohibited by United States Government national security requirements, respondent shall include in its reports information sufficient to identify all United States Weapons developers, manufacturers or systems contractors with whom respondent has

entered an agreement for the research, development, manufacture or sale of Propellant or Explosives.

V.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in 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 respondent, that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government security requirements, upon written request, and on reasonable notice, respondent shall permit any duly authorized representative of the Commission:

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

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

VII.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today, the Commission accepts a consent agreement that resolves allegations that the acquisition of the stock and assets of Hercules

Aerospace Company, an unincorporated division of Hercules Incorporated, by Alliant Techsystems Inc. may substantially lessen competition in research, development, manufacture and sale of propellant, explosives or weapons. I concur in the finding of reason to believe the law has been violated, but write separately to add two observations about the remedy.

First, the consent order omits the ten-year prior approval provision that the Commission usually imposes in cases brought under Section 7 of the Clayton Act. My vote in favor of accepting the consent order despite this omission is based on the highly unusual facts of this case. I continue to believe that prior approval requirements should be standard in Section 7 cases.

Second, the order prohibits Alliant from misusing or appropriating nonpublic information obtained from a competitor in the development of weapons. Although we have had few similar cases, recently the Commission imposed a similar remedy in Martin Marietta Corp., Dkt. No. 3500 (June 22, 1994). I joined in that decision and again do so here. Nonetheless, I question the extent to which this provision of the order adds to the protection afforded by private contracts to respect confidentiality and the extent to which the Commission can effectively monitor compliance with this requirement. Enforcement experience and further analysis may well suggest a need for different, more effective remedies.

IN THE MATTER OF

FORMU-3 INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3568. Complaint, April 11, 1995--Decision, April 11, 1995

This consent order prohibits, among other things, the Ohio weight-loss centers from misrepresenting the performance, efficacy or safety of any weight-loss program they offer, or the competence or training of their personnel, in the future. The consent order requires the respondents to possess scientific evidence to substantiate future claims, and, in addition, to make certain disclosures in conjunction with weight-loss and safety maintenance claims in the future.

Appearances

For the Commission: *Brenda Doubrava, Phillip Broyles* and *Christian White.*

For the respondents: *Robert J. Newbold*, Canton, OH.

COMPLAINT

The Federal Trade Commission, having reason to believe that Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and Formu-3 of Southern Ohio, Inc., a corporation (referred to collectively herein as respondents or Formu-3) 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 Formu-3 International, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

Respondent Formu-3 of Northern Ohio, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

Respondent Formu-3 of Southern Ohio, Inc., is an Ohio corporation with its office and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

PAR. 2. Respondents advertise, offer for sale, sell, and otherwise promote throughout much of the United States weight loss and weight maintenance services and products, which respondents make available to consumers at respondents' numerous "Form-You-3 Weight Loss Centers" (centers) in many states. These products also include "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Through franchised and company-owned centers, respondents are engaged in the sale and offering for sale of low-calorie diet programs providing 800 calories or more per day.

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 for Form-You-3 Weight Loss Centers (also referred to herein as "Formu-3 Weight Loss Centers") services and products, including but not necessarily limited to the attached Exhibits A through M.

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits A-K, contain the following statements:

A. LORA JOHNSON LOST 15 ½ POUNDS IN 20 DAYS! (Total Weight Loss 119 Pounds) (Exhibit A)

B. At Formu-3 Weight Loss Centers you can lose 1 SIZE before summer ever gets here - and another 3 SIZES before summer ends!

A nutritiously balanced 5-step program that's EASY-TO-FOLLOW and guaranteed to work if followed as directed.

DEBRA: BEFORE SHE LOST 50 POUNDS WITH FORMU-3 (Exhibit B)

C. Five Months Ago People Said I Was A Heavyweight. Now They Say I'm a Knockout!

LOSE UP TO 30-40 POUNDS BY SPRING!

ROSANNE BERNDT LOST 30 POUNDS IN 60 DAYS!!!

BEFORE: 170 POUNDS (Exhibit C)

D. MARY GRIFFIN LOST 85 POUNDS AND 85 INCHES ON THE FORMU-3 PROGRAM.

Call Formu-3 TODAY and lose 20lb-35lb by THE FIRST OF SUMMER! That's at least 3 SIZES SMALLER than you are now!

SAFE, EFFECTIVE AND NUTRITIONALLY BALANCED! (Exhibit D)

E. LOSE UP TO 25-50 POUNDS IN 10 WEEKS!

SHARON SPEIGLE LOST 66 1/2 Pounds

Safe, effective and nutritionally balanced! (Exhibit E)

F. LOSE UP TO 15-30 POUNDS IN 30 DAYS!

KATHY KLAY LOST 22 POUNDS IN 30 DAYS! TOTAL WEIGHT LOST: 42 Pounds! (Exhibit F)

G. JULIE NARANCIC LOST 21 POUNDS IN 6 WEEKS!

You Can Lose Up To 30 Pounds By Summer! (Exhibit G)

H. JENELLE LOST 15 POUNDS IN 30 DAYS! FROM SIZE 16 TO 12 IN 30 DAYS!

BEFORE FORMU-3 180 POUNDS NOW! 125 POUNDS

Extensive Life Modification program to help KEEP your weight off! (Exhibit H)

I. "I went from size 36 to a size 7 in five months! And I've kept it off for a year and a half because of the Formu-3 program. . .

I was taught how to eat right - and I didn't have to depend on pre-packaged foods like a girl friend of mine did on another program. She had to spend $50 a week on THEIR pre-packaged food. The Formu-3 program works using real grocery store food." Barbara Schenkel

GUARANTEED if program is followed as directed. (Exhibit I)

J. We'll show you how to keep your weight and extra inches off permanently. . . In fact, we've helped many long-time, unsuccessful dieters achieve their goal and stay trim for years. (Exhibit J)

K. YOU'RE JUST ONE CALL AWAY FROM ONE OF AMERICA'S MOST AFFORDABLE WEIGHT LOSS PROGRAMS.... A PROGRAM THAT WORKS! IT'S EASY AT FORMU-3 BECAUSE OF OUR COMMITTMENT (sic) TO YOU! WE'LL BE THERE TO MAKE SURE YOU LOSE THAT EXTRA WEIGHT.... AND TO MAKE SURE YOU KEEP IT OFF! (Exhibit K)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-K, respondents have represented, directly or by implication, that:

A. Form-You-3 Weight Loss Centers customers typically are successful in reaching their weight loss goals;

B. Form-You-3 Weight Loss Centers customers typically are successful in maintaining their weight loss achieved under the Form-You-3 Weight Loss Centers diet program; and

C. Form-You-3 Weight Loss Centers customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached

as Exhibits A-K, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated such representations.

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

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits E, F, and I contain the following statements:

A. LOSE UP To 25-50 POUNDS IN 10 WEEKS! (Exhibit E)
B. LOSE UP TO 15-30 POUNDS IN 30 DAYS! (Exhibit F)
C. Lose up to 15-30 pounds in 30 days! GUARANTEED if program is followed as directed. (Exhibit I)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits E, F, and I, respondents have represented, directly or by implication, that:

A. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program lose weight at an average rate of fifty pounds in ten weeks; and

B. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program lose weight at an average rate of thirty pounds in thirty days.

PAR. 11. In truth and in fact:

A. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program do not lose weight at an average rate of fifty pounds in ten weeks; and

B. An appreciable number of consumers on the Form-You-3 Weight Loss Centers program do not lose weight at an average rate of thirty pounds in thirty days.

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

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits E, F, and I, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 13. In truth and in fact, at the time respondents made the representations set forth in paragraph ten, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit J, contain the following statement:

> A. What other weight loss program helps you lose 3 to 5 lbs. a week without expensive pre-packaged foods, required supplements, strenuous exercise, shots, pills or drugs? (Exhibit J)

PAR. 15. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that consumers on the Form-You-3 Weight Loss Centers Program typically lose weight at an average rate of three to five pounds per week.

PAR. 16. In truth and in fact, consumers on the Form-You-3 Weight Loss Centers Program do not typically lose weight at an average rate of three to five pounds per week. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph fourteen, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph

fifteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 18. In truth and in fact, at the time respondents made the representation set forth in paragraph fifteen, they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondents' representation as set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. In the routine course and conduct of their business, respondents have represented during initial sales presentations that consumers will typically reach their desired weight loss goal within the time frame computed for their weight loss program by Form-You-3 Weight Loss Centers personnel.

PAR. 20. Through the use of the statements described in paragraph nineteen, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph nineteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 21. In truth and in fact, at the time respondents made the representation set forth in paragraph nineteen they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondents' representation as set forth in paragraph twenty was, and is, false and misleading.

PAR. 22. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits D-H and L, contain the following statements:

A. Safe, effective and nutritionally balanced! (Exhibits D and E)
B. Safe, effective & nutritionally balanced! (Exhibit F)
C. SAFE and nutritionally balanced (Exhibits G and H)
D. FORMU-3 IS ONE OF THE NATIONS (sic) MOST AFFORDABLE WEIGHT LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY COST OF ONLY $7.65! (Exhibit L)

PAR. 23. In the routine course and conduct of their business, respondents provide their customers with diet instructions that require said customers, *inter alia*, to come in to a Form-You-3 Weight Loss Center several times per week for monitoring of their progress, including weighing in.

PAR. 24. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the statements in the advertisements attached as Exhibits D-H and L, and through the conduct of the monitoring described in paragraph twenty-three, respondents have represented, directly or by implication, on an ongoing basis to each customer that customers on respondents' weight loss program lose weight safely and do not experience an increased risk of developing health complications.

PAR. 25. In the course of regularly monitoring their customers' weight loss progress, respondents, in some instances, are presented with weight loss results indicating that a customer is losing weight significantly in excess of his or her expected rate of weight loss, which is an indication that the customer may not be consuming all of the calories prescribed by his or her diet instructions. Such conduct could, if not corrected promptly, result in health complications.

PAR. 26. When presented with the weight loss results described in paragraph twenty-five, respondents on many occasions have not disclosed to the customers that failing to follow the diet instructions and consume all of the calories prescribed could result in health complications. This fact would be material to consumers in their purchase and use decisions regarding the diet program. In light of the representation set forth in paragraph twenty-four, said failure to disclose was, and is, a deceptive practice.

PAR. 27. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits B, G, and L, contain the following statements:

A. $50 OFF!
OUR REGULAR PROGRAM PRICE!
At Formu-3 Weight Loss Centers you can lose 1 SIZE before summer ever gets here-and another 3 SIZES before summer ends!
Average cost is $7.65 (includes everything) per week. During this special, average weekly cost is lower. (Exhibit B)

B. You Can Lose Up to 30 Pounds By Summer!
AVG. COST OF: $7.65 PER WEEK.
INCLUDES EVERYTHING! (Exhibit G)

C. DON'T PANIC..... YOU STILL HAVE A FEW MONTHS! CALL A FORMU-3 WEIGHT LOSS CENTER TODAY AND USE THAT TIME TO TAKE OFF UP TO 25 TO 30 POUNDS .... UP TO 35 INCHES .... AND UP TO FOUR DRESS SIZES BEFORE YOU HANG YOUR FIRST HOLIDAY ORNAMENT! FORM-3 IS ONE OF THE NATIONS (sic) MOST

AFFORDABLE WEIGHT LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY COST OF ONLY $7.65! (Exhibit L)

PAR. 28. Through the use of the statements contained in the advertisements referred to in paragraph twenty-seven, including but not necessarily limited to the statements in the advertisements attached as Exhibits B, G, and L, respondents have represented, directly or by implication, that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price multiplied by the number of weeks required for a program participant to achieve his or her weight loss goal.

PAR. 29. In truth and in fact, the total cost of losing weight on the Form-You-3 Weight Loss Centers program is an amount equal to the advertised average weekly price for one full year, or the advertised average weekly price multiplied by fifty-two. Therefore, respondents' representation set forth in paragraph twenty-eight was, and is, false and misleading.

PAR. 30. In advertising the Form-You-3 Weight Loss Centers program, respondents have represented that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price multiplied by the number of weeks required for participants to achieve their weight loss goals. respondents have failed to disclose to consumers that the total cost of losing weight on the Form-You-3 Weight Loss Centers program is the advertised average weekly price for one full year, or the advertised average weekly price multiplied by fifty-two. This fact would be material to consumers in their purchase decisions regarding the program. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 31. In the routine course and conduct of their business, respondents provide participants in their weight loss program with diet instructions that contain, *inter alia*, diet menus. Said diet menus for respondents' program include two food products sold by respondents to be consumed by participants each day. Respondents have given additional diet instructions to participants who choose not to purchase and consume respondents' food products, directing them to substitute certain foods for the two food products listed in the diet menus. Said additional diet instructions, attached as Exhibit M, contain the following statements:

A. WHY SHOULD I USE FORMU-FAST FOOD PRODUCTS?
Because they. . .
• Decrease calories by at least 33% daily.
• Decrease fat by at least 7% daily. (Exhibit M)

PAR. 32. Through the use of the statements referred to in paragraph thirty-one, respondents have represented, directly or by implication, that participants who consume two Formu-Fast food products instead of substituting the foods specified in the additional instructions will decrease daily caloric intake by at least 33% and daily fat intake by at least 70%.

PAR. 33. In truth and fact, participants who consume two Formu-Fast food products instead of substituting the foods specified in the additional instructions will not decrease daily caloric intake by at least 33% and daily fat intake by at least 70%. Therefore, the representations set forth in paragraph thirty-two were, and are, false and misleading.

PAR. 34. Through the use of the statements described in paragraph thirty-one, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph thirty-two, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 35. In truth and in fact, at the time respondents made the representations set forth in paragraph thirty-two they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, respondents' representation as set forth in paragraph thirty-four was, and is, false and misleading.

PAR. 36. The advertisements referred to in paragraph four, including, but not limited to the attached Exhibit J, contain the following statement:

A. At Formu-3 a certified counselor monitors your progress, offers helpful suggestions and provides ongoing motivation and moral support to keep you on track. (Exhibit J)

PAR. 37. Through the use of the statements contained in the advertisements referred to in paragraph thirty-six, including but not necessarily limited to the statement in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that counselors employed by Form-You-3 Weight Loss Centers are

certified, through an objective evaluation process, in the treatment of obesity.

PAR. 38. In truth and fact, few, if any, counselors employed by Form-You-3 Weight Loss Centers are certified, through an objective evaluation process, in the treatment of obesity. Therefore, the representation set forth in paragraph thirty-seven was, and is, false and misleading.

PAR. 39. In providing advertisements and promotional materials such as those referred to in paragraph four to its individual franchised centers for the purpose of inducing consumers to purchase their weight loss services and products, respondent Formu-3 International, Inc., has furnished the means and instrumentalities to those centers to engage in the acts and practices alleged in paragraphs five through thirty-eight.

PAR. 40. The acts and practices of respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

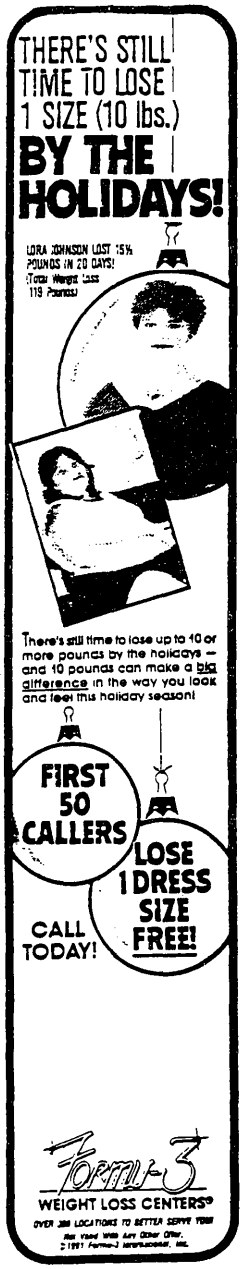


Exhibit A

005027

EXHIBIT B

Exhibit B

EXHIBIT C


Five Months Ago People Said I Was A Heavyweight.
Now They Say I'm A Knockout!
ROSANNE BERNDT LOST 30 POUNDS IN 60 DAYS!!!
Lose UP TO 30-40 Pounds By Spring!
Eat Regular Grocery Store Food!
SAFE and Nutritionally Balanced!
Includes a Comprehensive LIFE MODIFICATION PROGRAM designed to make you feel good about YOU!
BEFORE: 170 POUNDS
FOR 3 WEEKS ONLY: $50 OFF OUR REGULAR PROGRAM PRICE!
SAVE UP TO 73% over other nationally advertised weight loss programs (based on 40 pounds).
OVER 300 LOCATIONS TO BETTER SERVE YOU!
Formu-3
WEIGHT LOSS CENTERS
Not Valid With Any Other Of
© 1991 Formu-3 International
Exhibit C

EXHIBIT D


LOSE UP TO 3 DRESS SIZES OR 20"-35"
BY THE FIRST OF SUMMER!
MARY GRIFFIN LOST 85 POUNDS AND 85 INCHES ON THE FORMU-3 PROGRAM.
FOR AN AVERAGE COST OF $6.70 PER WEEK!
INCLUDES EVERYTHING: WEIGHT LOSS, STABILIZATION AND MAINTENANCE FOR BALANCE OF ONE YEAR.
PRE-SUMMER SPECIAL!
Call Formu-3® TODAY and lose 20"-35" by THE FIRST OF SUMMER! That's at least 3 SIZES SMALLER than you are right now!
■ LOSE UP TO 15-30 POUNDS YOUR FIRST 30 DAYS!
■ EAT REGULAR GROCERY STORE FOOD!
■ NO HIDDEN EXTRAS OR REQUIRED PURCHASES!
■ SAFE, EFFECTIVE AND NUTRITIONALLY BALANCED!
■ UP TO 65% LESS THAN OTHER NATIONALLY ADVERTISED WEIGHT LOSS PROGRAMS! (Based on 30 Pound Program.)
CALL TODAY!!!
Exhibit D
OVER 300 LOCATIONS TO BETTER SERVE YOU!
Formu-3®
WEIGHT LOSS CENTERS™
Not Valid With Any Other Offer.
© 1991 Formu-3 International, Inc.

EXHIBIT E


LOSE UP TO 25-50 POUNDS IN 10 WEEKS!
SHARON SPEIGLE
LOST 66½ Pounds
BEFORE
UP TO 65% LESS THAN OTHER NATIONALLY ADVERTISED WEIGHT LOSS PROGRAMS.
(Based on 52-Week Program)
AVG. COST $7.65 PER WEEK!
INCLUDES EVERYTHING
Weight Loss, Stabilization and Maintenance for Balance of One Year.
■ Lose up to 15-30 pounds your first 30 days!
■ Safe, effective and nutritionally balanced!
■ Eat regular grocery store food!
■ No hidden extras or required purchases!
Formu-3®
WEIGHT LOSS CENTERS™
Exhibit E
OVER 300 LOCATIONS TO BETTER SERVE YOU!
Not Valid With Any Other Offer.
© 1991 Formu-3 International, Inc.

EXHIBIT F

Exhibit F

EXHIBIT G

Exhibit G

EXHIBIT H

AT FORMU-3 WEIGHT LOSS CENTERS

30 DAYS CAN MAKE A BIG DIFFERENCE!

3 WEEKS ONLY!

30 DAYS FOR 30 DOLLARS!

- Eat regular grocery store food! ■ SAFE and nutritionally balanced!
- SAVE up to 73% over other nationally advertised weight loss programs based on 40 pounds!
- Extensive Life Modification program to help KEEP your weight off!

NO HIDDEN COSTS!!!

OVER 300 LOCATIONS TO BETTER SERVE YOU!

Formu-3 WEIGHT LOSS CENTERS

Not Valid With Any Other Offer. © 1991 Formu-3 International, Inc.

2 WEEKS FINAL

Exhibit H

EXHIBIT I

FORMU-3® WEIGHT LOSS CENTERS

"I went from size 36 to a size 7 in five months! And I've kept it off

for a year and a half because of the Formu-3 program. . .

. . .I was taught how to eat right — and I didn't have to depend on pre-packaged foods like a girl friend of mine did on another program. She had to spend $50 a week on THEIR pre-packaged food. The Formu-3 program works using real grocery store food."

Barbara Schenkel

- The Formu-3 program costs up to 60% less than other weight loss programs!
- No hidden costs!
- No required food supplements!
- Lose up to 15-30 pounds in 30 days!
- GUARANTEED if program is followed as directed.

FOR AN AVERAGE WEEKLY COST OF ONLY **$7.65**

INCLUDES EVERYTHING

WEIGHT LOSS, STABILIZATION AND MAINTENANCE FOR BALANCE OF ONE YEAR.

BASED ON A 52 WEEK PROGRAM.

NO REQUIRED FOOD SUPPLEMENTS.

Another reason why Formu-3 Weight Loss Centers are America's 1st choice in weight loss.

Formu-3®

WEIGHT LOSS CENTERS™

With Over 300 Locations To Better Serve You.

Exhibit I

You'll Enjoy a Whole New Lifestyle

Formu-3 Weight Loss Centers is one of the fastest growing weight loss companies in America. Why? Because the Formu-3 program really works!

You can eat regular grocery store food - right from the start of your individual program. We'll show you how to keep your weight and extra inches off permanently. That's a promise because long-term weight loss depends on developing sensible eating habits for life.

Imagine the advantages you'll enjoy as a Formu-3 member while you're on the road to successful weight loss:

- Freedom from Excess Pounds
- Freedom from Boring Diets
- Freedom from Freeze Dried Meals
- Freedom from Required Supplements

Whether your goal is to lose 20 lbs. or 200 lbs., the Formu-3 Weight Loss Program costs up to 60% less than other nationally advertised programs. (Based on a 50 lb. weight loss.)

Regular Grocery Store Food Adds Variety, Cuts Cost

Menu variety and eating pleasure are key ingredients in an effective weight loss plan. Formu-3 gives you the opportunity to eat delicious, satisfying meals and still lose weight without required food supplements or freeze dried meals.

Our Formu-Fast® Food Products are *optional*. You can enjoy our soups, puddings, desserts and beverages in addition to regular grocery store food without spending an extra $60 to $75 a week. Confidential, one-on-one counseling helps you plan your weekly menu while providing delicious choices to escape mealtime boredom.

One-on-One Counseling Builds Confidence

You probably know how hard it is to stay on any diet. It takes constant support from your family, friends, even co-workers to lose unwanted pounds and inches.

At Formu-3 a certified counselor monitors your progress, offers helpful suggestions and provides ongoing motivation and moral support to keep you on track. All it takes is a visit with your counselor two or three times a week to get weighed and measured. The cost of these routine visits to your local Formu-3 Center is covered by our low program price.

We Make Weight Loss Easy and Affordable

The Formu-3 Weight Loss Program is tailored to your individual lifestyle. In fact, we've helped many long-time, frustrated dieters achieve their goal and trim for years.

You'll enjoy the large selection Formu-3 recipes based on all the major food groups. In fact, many of the most popular dishes have been perfected by our members in their own kitchens.

Even though Formu-3 doesn't require you to exercise strenuously we do encourage walking. And its many health benefits: walking boosts your energy level and helps accelerate your weight loss by raising body metabolism.

What other weight loss plan helps you lose 3 to 5 lbs. a week without expensive pre-packaged foods, required supplements, strenuous exercise, shots, pills or drugs?

Exhibit J

EXHIBIT K

FINE ADVERTISING AND MEDIA SERVICES

2 SUMMIT PARK DR., INDEPENDENCE, OHIO 44131
(216)642-3830 FAX 642-1179

COPY

CLIENT: FORMU-3 WEIGHT LOSS CENTERS
SPOT#: FWL-22
RADIO : :52 (WITH :08 LIVE TAG)
TITLE : COMMITMENT
DATE : DECEMBER 4, 1991

ANNCR:
ARE YOU READY TO MAKE A COMMITTMENT TO LOSE WEIGHT THIS YEAR? WELL IF YOU ARE.....ALL YOU HAVE TO DO IS MAKE ONE SIMPLE CALL!

MUSIC BED:
CALL A FORMU-3 WEIGHT LOSS CENTER TODAY AND TAKE THE FIRST STEP TO BECOMING THE REAL YOU! THAT'S RIGHT.....YOU'RE JUST ONE CALL AWAY FROM ONE OF AMERICA'S MOST AFFORDABLE WEIGHT LOSS PROGRAMS.....A PROGRAM THAT WORKS! IT'S EASY AT FORMU-3 BECAUSE OF OUR COMMITTMENT TO YOU! WE'LL BE THERE TO MAKE SURE YOU LOSE THAT EXTRA WEIGHT..... AND TO MAKE SURE YOU KEEP IT OFF!
YOU'LL EAT REGULAR GROCERY STORE FOOD WHILE ON THE FORMU-3 PROGRAM.....NOT PRE-PACKAGED ENTREES THAT CAN COST UP TO SEVENTY FIVE DOLLARS EXTRA EVERY WEEK! SO CALL FORMU-3 TODAY,
AND FOR THE NEXT FEW WEEKS WE'LL EVEN TAKE FIFTY DOLLARS OFF THE REGULAR PROGRAM PRICE. THAT'S LIKE LOSING TEN POUNDS FREE! IF YOU'RE READY TO MAKE THE COMMITTMENT TO LOSE WEIGHT.....WE'LL MAKE SURE YOU DO.....AND YOU WILL!
CALL FORMU-3 TODAY.....C'MON.....CALL US!
(:07 LIVE TAG)

Exhibit K 003120

EXHIBIT L

FINE ADVERTISING AND MEDIA SERVICES
2 SUMMIT PARK DR., INDEPENDENCE, OHIO 44122
(216)642-3830 FAX 642-1179

COPY

CLIENT: FORMU-3 WEIGHT LOSS CENTERS
SPOT#: FWL-14
RADIO: :53 (WITH :07 LIVE TAG)
TITLE: LOSE WEIGHT BY THE HOLIDAYS
DATE: AUGUST 16, 1991

ANNCR:

DID YOU KNOW THAT FALL IS WHEN MORE PEOPLE DECIDE TO LOSE WEIGHT THAN AT ANY OTHER TIME? THAT'S PROBABLY BECAUSE THE HOLIDAYS ARE JUST AROUND THE CORNER.....

MUSIC BED:

DON'T PANIC.....YOU STILL HAVE A FEW MONTHS! CALL A FORMU-3 WEIGHT LOSS CENTER TODAY AND USE THAT TIME TO TAKE OFF UP TO 25 TO 30 POUNDS.....UP TO 35 INCHES.....AND UP TO FOUR DRESS SIZES BEFORE YOU HANG YOUR FIRST HOLIDAY ORNAMENT! FORMU-3 IS ONE OF THE NATIONS MOST AFFORDABLE WEIGHT LOSS PROGRAMS, AND IS DESIGNED TO GET YOUR WEIGHT OFF AS QUICKLY AS IS SAFELY POSSIBLE FOR AN AVERAGE WEEKLY COST OF ONLY $7.65! NOW.....PICTURE YOURSELF THIS DECEMBER; IF YOU'RE A SIZE 18, SEE YOURSELF IN A SIZE 12. IF YOU'RE A SIZE 16, PICTURE YOURSELF UNDER THE MISTLETOE IN A SIZE 10! IT CAN BE YOU.....IT WILL BE YOU! FALL IS THE PERFECT TIME TO START LOSING WEIGHT. CALL FORMU-3 TODAY AND GET YOUR HEAD START ON THE HOLIDAYS! C'MON.....CALL US!

(:07 LIVE TAG)

Exhibit L

003120

EXHIBIT M

Formu-3
WEIGHT LOSS CENTERS®

SUBSTITUTION OF FORMU-FAST® FOOD PRODUCTS

As a substitution for the Breakfast and Lunch Formu-Fast® Food Products on Levels 1, 2, and 3, add the following:

LUNCH

4 oz. Poultry/Seafood

AND

1 Slice High-Fiber
Low-Calorie Wheat Bread

PLEASE NOTE: When substituting the poultry/ seafood and bread for the Formu-Fast® Food Products, a slower weight loss may occur. When substituting the above, you may have two Formu-Fast® Food Products per day. If the substitution is not used, you may have up to four Formu-Fast® Food Products per day.

WHY SHOULD I USE FORMU-FAST® FOOD PRODUCTS?

Because they...

- Decrease calories by at least 33% daily.
- Decrease fat by at least 70% daily.
- Taste great!
- Appease temptation by providing dessert items.
- Help you develop more control to achieve quicker results.
- Create a feeling of fullness by providing the body with healthful nutrients.
- Provide a rapid, smooth transition from old eating habits to new eating habits.
- Help you to resist the temptation to eat more fattening foods when dining out.
- Can be easily prepared anytime, anywhere!
- Provide the best results possible on your program.

 FORM #276 R-10/91

Exhibit M

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents had 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. Proposed respondent Formu-3 International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

2. Proposed respondent Formu-3 of Northern Ohio, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

3. Proposed respondent Formu-3 of Northern Ohio, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at 4790 Douglas Circle N.W., Canton, Ohio.

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

ORDER

DEFINITIONS

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

A. *"Competent* and *reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence, based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results;

B. *"Weight loss program"* shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A *"broadcast medium"* shall mean any radio or television broadcast, cablecast, home video or theatrical release;

D. For any order-required disclosure in a print medium to be made "clearly and prominently" or in a "clear and prominent" manner, it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently" or in a "clear and prominent manner", the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

E. A *"short broadcast advertisement"* shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That respondents, Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and

Formu-3 of Southern Ohio, Inc., a corporation, their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

1. Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants using the program, said evidence shall, at a minimum, be based on a representative sample of:

a. All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

b. All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

2. Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program or earlier termination, as applicable; and

3. Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

a. Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

b. Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary."; provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

1. The average percentage of weight loss maintained by those participants;

2. The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

3. If the participant population referred to is not representative of the general participant population for respondents' programs:

a. The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

b. The statement: "Form-You-3 Weight Loss Centers makes no claim that this [these] result[s] is [are] representative of all participants in the Form-You-3 Weight Loss Centers program.";

Provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

1. Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record.";

2. For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

a. Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C.1-3 of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D.2 shall be included therein:

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes here xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.] For many dieters, weight loss, is temporary.

I have read this notice._____
(Client Signature) (Date)

b. Require each potential client to sign such document; and
c. Give each client a copy of such document; and

3. Retain in each client file a copy of the signed maintenance notice required by this paragraph;

Provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and

(ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term"; and

Provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss

programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants in respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

1. What the generally expected success would be for Form-You-3 Weight Loss Centers customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Form-You-3 Weight Loss Centers customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

2. One of the following statements:

a. "You should not expect to experience these results."
b. "This result is not typical. You may not do as well."
c. "This result is not typical. You may be less successful."
d. "_____'s success is not typical. You may not do as well."
e. "_____'s experience is not typical. You may achieve less."
f. "Results not typical."
g. "Results not typical of program participants.";

Provided, further, that if the endorsements or testimonials covered by this paragraph are made in, a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; and

Provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E.1. by accurately disclosing the generally expected success in the following phrase: "Form-You-3 Weight Loss Centers clients lose an average of ____ pounds over an average _____ week treatment period"; and (ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally

achieve, then, in lieu of the disclosures required in either subparagraph I.E.1. or 2. herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents' customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, the average or typical rate or speed at which participants or prospective participants in any weight loss program have lost or will lose weight, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

G. Representing, directly or by implication, that participants or prospective participants in respondents, weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

H. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants, when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

I. Representing, directly or by implication, the daily, weekly, or monthly price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, and in close proximity to such representation, either: (1) the number of days, weeks, or months participants will be obligated to pay the weekly price represented; or (2) the total cost of the weight loss program;

Provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

J. Misrepresenting, directly or by implication, the competence, skill, training, credentials or expertise of any of respondents' employees or any of the employees of respondents' franchisees.

K. Misrepresenting, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of calories, fat, or any other nutrient or ingredient in any food product, or otherwise misrepresenting the performance, efficacy, safety, nutritional composition, or benefits of any food or drug, as those terms are defined in Section 15 of the Federal Trade Commission Act.

L. Misrepresenting, directly or by implication, the performance, efficacy, price, or safety of any weight loss program.

II.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

III.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

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

V.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

VI.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees, who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of five (5) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VII.

It is further ordered, That:

A. Respondent Formu-3 International, Inc., shall distribute a copy of this order to each of its franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondent may satisfy this contractual requirement by incorporating such order requirements into its current Operations Manual; and

B. Respondent Formu-3 International, Inc., shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the order provisions; respondent may satisfy this

requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, diligently pursuing reasonable and appropriate remedies available under its franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

Provided, however, that respondent Formu-3 International, Inc.'s compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondent's franchisees or licensees that violates this order where respondent: a) has not authorized, approved or ratified that conduct; b) has reported that conduct promptly to the Federal Trade Commission under this Part; and c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, has diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about cessation of that conduct by the franchisee or licensee.

VIII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

DEL MONTE FOODS COMPANY, ET AL.

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

Docket C-3569. Complaint, April 11, 1995--Decision, April 11, 1995

This consent order requires, among other things, Del Monte Corporation and Pacific Coast Producers to terminate the purchase option agreement and the provisions of the supply agreement that relate to planning for the 1995 canning season within three days after this order becomes final, and to terminate the remaining provisions of the supply agreement by June 30, 1995. In addition, the order requires the California-based respondents to obtain, for ten years, Commission approval before acquiring any stock or assets of a United States canned fruit manufacturer and before entering into a variety of marketing, packing, or other agreements with competitors.

Appearances

For the Commission: *Ronald B. Rowe* and *Marimichael O. Skubel.*

For the respondents: *Terry Calvani* and *Terrence A. Callan, Pillsbury, Madison & Sutro*, San Francisco, CA.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, and Pacific Coast Producers have entered into an agreement 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 it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

THE RESPONDENTS

1. Respondent Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

3. Respondent Pacific Coast Producers ("PCP") is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.

4. Del Monte Corporation is a leading producer of canned fruit (peaches, pears, fruit cocktail, and fruit mix, which consists primarily of peaches and pears, that are processed and canned) in the United States.

5. PCP is a leading producer of canned fruit in the United States.

6. At all times relevant herein, Del Monte Foods Company and Del Monte Corporation (hereinafter collectively referred to as "Del Monte") and PCP have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and each 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.

DEL MONTE/PCP AGREEMENTS

7. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP, whereby PCP provides to Del Monte virtually all of PCP's output of canned fruit, canned tomatoes, and canned apricots ("Supply Agreement"). The Supply Agreement between Del Monte and PCP provides that PCP prepares, manufactures, processes, packages and loads for shipping canned fruit. Under the Supply Agreement, Del Monte markets the canned fruit output of PCP. Del Monte makes all the pricing decisions; arranges the "bookings," or orders with the customers; and directs PCP as to what products Del Monte will need manufactured for the coming pack year. Del Monte runs the combined canned fruit businesses of the respondents. The Supply Agreement went into effect on July 1, 1992, continues for six

years, and runs for successive five-year periods unless the Supply Agreement is terminated by either party, upon two years' written notice and a $10 million penalty.

8. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers ("Option Agreement").

TRADE AND COMMERCE

9. The relevant line of commerce in which to analyze the effects of the Supply Agreement and Option Agreement is the manufacture and sale of canned fruit.

10. The relevant section of the country in which to analyze the effects of the Supply Agreement and the Option Agreement is the United States.

MARKET STRUCTURE

11. The manufacture and sale of canned fruit in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the manufacture and sale of canned fruit in the United States is difficult and would be neither timely, likely, nor sufficient to prevent anticompetitive effects in the relevant line of commerce in the relevant section of the country.

ACTUAL COMPETITION

13. Prior to entering into the Supply Agreement and the Option Agreement, Del Monte and PCP were actual competitors in the relevant line of commerce in the relevant section of the country. As a result of the Supply Agreement and Option Agreement, PCP has been removed from the market as an independent entity, and Del Monte has acquired the business of PCP.

EFFECTS

14. The effect of the Supply Agreement and the Option Agreement may be substantially to lessen competition in the relevant line of commerce in the relevant section of the country in any of the following ways, among others:

a. By eliminating direct competition between Del Monte and PCP;

b. By increasing the likelihood that Del Monte will unilaterally exercise market power; or

c. By increasing the likelihood of, or facilitating, collusion or coordinated action among firms that manufacture and sell canned fruit.

VIOLATIONS CHARGED

15. The agreements entered into by Del Monte and PCP violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the supply agreement entered into between Del Monte Foods Company through its wholly-owned subsidiary, Del Monte Corporation, and Pacific Coast Producers (hereinafter collectively "respondents") and respondents, 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 respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

3. Respondent Pacific Coast Producers is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.

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

ORDER

I.

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

A. *"Del Monte Corporation"* means Del Monte Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Del Monte Corporation, and their respective directors, officers, employees, agents, and their respective successors and assigns.

B. *"Del Monte"* means Del Monte Foods Company, its predecessors, subsidiaries (including Del Monte Corporation), divisions, groups and affiliates controlled by Del Monte Foods Company, and their respective directors, officers, employees, agents, and their respective successors and assigns.

C. *"PCP"* means Pacific Coast Producers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Pacific Coast Producers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

D. *"Respondents"* means PCP and Del Monte (including Del Monte Corporation).

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

F. *"Canned Fruit"* means peaches, pears, fruit cocktail, and fruit mix, which consists primarily of diced peaches and diced pears, that are processed and canned.

G. *"Option Agreement"* means the Option Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers.

H. *"Supply Agreement"* means the Supply Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte agreed to purchase virtually all of PCP's output of Canned Fruit, canned tomatoes, and canned apricots.

I. *"Spot Market"* means ad hoc inter-canner transactions for Canned Fruit placed on an irregular basis where all Canned Fruit ordered under such an arrangement is delivered within nine weeks of placing the order.

J. *"Tri Valley Growers"* means Tri Valley Growers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Tri Valley Growers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

II.

It is further ordered, That:

A. Within three (3) days after the date this order becomes final, respondents shall terminate the Option Agreement;

B. Within three (3) days after the date this order becomes final, respondents shall declare null and void the following paragraphs of the Supply Agreement: paragraph two, subparagraphs (b), (c), (e),

and (f), paragraph twenty-three, paragraph twenty-four, and paragraph twenty-five as it relates to the budget for canning after June 30, 1995; and

C. On or before June 30, 1995, respondents shall absolutely and in good faith terminate the Supply Agreement.

III.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than $1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed $1,500,000.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to seek

prior approval from the Commission pursuant to paragraph III, and unless Del Monte has obtained such prior approval, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

The notification required by this paragraph shall be provided to the Commission at least thirty (30) days prior to the acquisition. Such notification shall include a description of the assets to be acquired, the purchase price, the name of the person from whom the assets are to be acquired, including the name of the individual employed by such person that is most knowledgeable about the proposed acquisition, Del Monte's purpose in acquiring the assets from such person, and the use to which Del Monte intends to put such assets. Del Monte shall comply with reasonable requests from Commission staff for additional information within ten (10) days of service of such requests.

V.

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

A. Except with respect to agreements covered by paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

VI.

It is further ordered, That

A. For a period of five (5) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

B. For a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States. Said notification shall be provided to the Commission by Del Monte thirty (30) days before the entity begins manufacturing the Canned Fruit pursuant to such co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement and all schedules and attachments. Del Monte shall comply with reasonable requests from Commission staff for additional information concerning such co-pack agreements within ten (10) days of service of such requests.

VII.

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

subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 ½ can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek prior approval from the Commission pursuant to paragraph VI, and unless respondents have obtained such prior approval, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 ½ can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

IX.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until the Supply Agreement is terminated, respondents shall submit to the Commission a verified written report setting forth in detail the steps taken to comply with paragraph II of the order; and

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 such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which each has complied and is complying with the provisions of this order.

X.

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

XI.

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 respondents, each of the respondents shall permit any duly authorized representative of the Commission:

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

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

of such respondent, who may have counsel present,regarding such matters.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Some provisions of the present order -- paragraph VII is the extreme example -- seem to prescribe the behavior of Del Monte and Pacific Coast Producers ("PCP") with an unfortunate degree of detail. As a general proposition, I prefer clear, simple, easily enforceable cease-and-desist language over orders that establish complex metes and bounds for permissible conduct.

In this case, however, the order is unlikely to place undue constraints on the parties' operations. In particular, the "regulatory"-looking proviso to paragraph VII clearly constitutes a substantial accommodation -- *i.e.*, an exception to what would otherwise be a moratorium on co-pack arrangements between Del Monte and PCP -- designed to allow the parties to realize efficiencies. To the extent that the parties need even more latitude than that proviso affords, paragraph VII allows them to seek the Commission's approval for a more extensive co-pack arrangement. Thus, if the parties wish to expand their co-pack agreement beyond what the proviso to paragraph VII contemplates, the paragraph operates as it should: it puts on the parties the burden of establishing that a more extensive arrangement will yield net efficiencies.

IN THE MATTER OF

HEALTHSOUTH REHABILITATION CORPORATION

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

Docket C-3570. Complaint, April 12, 1995--Decision, April 12, 1995

This consent order requires, among other things, HEALTHSOUTH, an Alabama-based corporation, to divest Nashville Rehabilitation Hospital and related assets in Nashville, TN. within twelve months to a Commission approved entity. If the divestiture is not completed on time, the Commission is permitted to appoint a trustee to complete the transaction. In addition, the consent order requires HEALTHSOUTH to terminate management contracts to operate rehabilitation units at Medical Center East in Birmingham, AL. and Roper Hospital in Charleston, S.C. Also, the consent order requires HEALTHSOUTH, for ten years, to obtain Commission approval before merging, by acquisition, lease, management contract or otherwise, any of its rehabilitation hospital facilities in any of the three areas with any competing facilities in those areas.

Appearances

For the Commission: *Oscar Voss* and *Mark Horoschak.*

For the respondent: *Jeffrey Schmidt* and *Todd Miller, Pillsbury, Madison & Sutro*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that HEALTHSOUTH Rehabilitation Corporation (hereinafter sometimes referred to as "respondent" or "HEALTHSOUTH") has entered into an agreement whereby HEALTHSOUTH will merge with ReLife, Inc. ("ReLife"); that the merger agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

A. *"Rehabilitation hospital facility"* means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, which specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from conditions such as stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

B. To *"operate"* a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

II. THE PARTIES

PAR. 2. Respondent HEALTHSOUTH Rehabilitation Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Two Perimeter Park South, Birmingham, Alabama. HEALTHSOUTH operates more than 300 rehabilitation health care facilities, including more than 40 rehabilitation hospital facilities, in 34 states. Among the rehabilitation hospital facilities HEALTHSOUTH operates are:

A. A rehabilitation hospital facility within Medical Center East, a general acute care hospital in Birmingham, Alabama;

B. Trident Neurosciences Center, a rehabilitation hospital in Charleston, South Carolina; and

C. Vanderbilt Stallworth Rehabilitation Hospital, a rehabilitation hospital in Nashville, Tennessee.

PAR. 3. ReLife, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 813 Shades Creek Parkway, Suite 300, Birmingham, Alabama. ReLife operates more than 45 rehabilitation health care facilities, including more than 15 rehabilitation hospital facilities, in 12 states. Among the rehabilitation hospital facilities ReLife operates are:

A. Lakeshore Hospital, a rehabilitation hospital in Birmingham, Alabama, as well as rehabilitation hospital facilities within Bessemer Carraway Medical Center, Brookwood Medical Center, and Carraway Methodist Medical Center, all general acute care hospitals in Birmingham, Alabama or adjacent communities in Jefferson County, Alabama;

B. A rehabilitation hospital facility within Roper Hospital, a general acute care hospital in Charleston, South Carolina; and

C. Nashville Rehabilitation Hospital in Nashville, Tennessee, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility, as well as a rehabilitation hospital facility within Sumner Memorial Hospital, a general acute care hospital in Gallatin, Tennessee, northeast of Nashville.

III. JURISDICTION

PAR. 4. HEALTHSOUTH and ReLife are, and at all times relevant herein have been, engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of HEALTHSOUTH, ReLife, and the HEALTHSOUTH- or ReLife-operated rehabilitation hospital facilities identified in paragraphs two and three above, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE PROPOSED ACQUISITION

PAR. 5. On or about September 18, 1994, HEALTHSOUTH entered into an agreement with ReLife, under which ReLife would become a wholly-owned subsidiary of HEALTHSOUTH, through the merger of a HEALTHSOUTH subsidiary into ReLife. The value of

the consideration to be given by HEALTHSOUTH to ReLife's shareholders is approximately $180 million.

V. NATURE OF TRADE AND COMMERCE

PAR. 6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale by rehabilitation hospital facilities of comprehensive, acute inpatient medical rehabilitation services, and/or any narrower group of services contained therein.

PAR. 7. For purposes of this complaint, the relevant sections of the country are:

A. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;

B. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and

C. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

VI. MARKET STRUCTURE

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

VII. ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult. Entry is difficult due to, among other things, certificate-of-need regulation of the establishment of new rehabilitation hospital facilities in the States of Alabama, South Carolina, and Tennessee.

VIII. COMPETITION

PAR. 10. In each relevant market, the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife are actual and potential competitors.

IX. EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

A. By eliminating actual and potential competition between the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife;

B. By significantly increasing the already high levels of concentration in the relevant markets;

C. By eliminating the rehabilitation hospital facilities operated by ReLife from the relevant markets as substantial, independent competitive forces;

D. By increasing the possibility of collusion or interdependent coordination by the remaining firms in the relevant markets; and

E. By denying patients, physicians, third-party payers, and other consumers of the benefits of free and open competition based on price, quality, and service.

X. VIOLATIONS CHARGED

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

PAR. 13. The merger described in paragraph five above, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of ReLife, Inc. with HEALTHSOUTH Rehabilitation Corporation ("HEALTHSOUTH"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section

5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent HEALTHSOUTH 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 Two Perimeter Park South, Birmingham, Alabama.

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 *"HEALTHSOUTH"* means HEALTHSOUTH Rehabilitation Corporation, its predecessors, subsidiaries, divisions, and partnerships, joint ventures, groups, and affiliates controlled by HEALTHSOUTH; their respective directors, officers, employees,

agents, and representatives; and their respective successors and assigns.

B. The *"Acquisition"* means the merger of ReLife, Inc. with HEALTHSOUTH, pursuant to their merger agreement dated September 18, 1994.

C. *"Rehabilitation hospital facility"* means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, that specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

D. To *"acquire"* a rehabilitation hospital facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire the whole or any part of the stock, share capital, equity, or other interest in a person who operates the rehabilitation hospital facility; acquire any assets of the rehabilitation hospital facility; enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of the rehabilitation hospital facility or any part thereof, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace the rehabilitation hospital facility with a new rehabilitation hospital facility to be operated by respondent; or acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility.

E. To *"operate"* a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

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

G. *"Relevant market area"* means each of the following areas:

1. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;

2. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and

3. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

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

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

J. *"Material confidential information"* means competitively sensitive or proprietary information not independently known to respondent from sources other than the rehabilitation hospital facility to which that information pertains, including but not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, all of its rights, title, and interests in and to all tangible and intangible assets, businesses, goodwill, properties, lands, licenses, and leases relating to Nashville Rehabilitation Hospital, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility ("assets to be divested"). Respondent shall divest the assets 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. Respondent may, but is not required to, divest to said acquirer(s) the management contract under which ReLife, Inc. operates the rehabilitation hospital facility at Sumner Memorial Hospital in Gallatin, Tennessee, or otherwise transfer operation of that facility to said acquirer(s), if Sumner Memorial consents to the transfer. The purpose of the divestiture is to ensure the continuation of the rehabilitation hospital facility of Nashville Rehabilitation Hospital as an ongoing, viable rehabilitation hospital facility, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Respondent shall unconditionally terminate, absolutely and in good faith, the following management contracts, and cease operating the rehabilitation hospital facilities to which those contracts pertain:

1. By no later than October 1, 1995, the Rehabilitation Unit Management Agreement between ReLife, Inc. and Roper Hospital,

dated December 6, 1991, under which ReLife operates the rehabilitation hospital facility at Roper Hospital in Charleston, South Carolina; and

2. Within ninety (90) days of the date this order becomes final, the Consulting Services Contract between HEALTHSOUTH Rehabilitation Corp. and Medical Center East, Inc. dated January 1, 1990, as amended, under which HEALTHSOUTH operates the rehabilitation hospital facility at Medical Center East in Birmingham, Alabama.

Provided, however, that respondent may contract with Medical Center East to provide to that hospital's rehabilitation hospital facility the services of licensed physical, occupational, or speech therapists, so long as the therapists provided by respondent do not perform managerial functions at the facility, or supervise personnel except other therapists provided by respondent.

C. By no later than the termination of each contract identified in paragraph II.B. above, respondent shall enter into an agreement with the hospital whose rehabilitation hospital facility was operated under such contract (the "managed hospital"), that:

1. Prohibits respondent from using, in connection with respondent's operation of any rehabilitation hospital or other health care facility in the relevant market area where the managed hospital is located, any material confidential information of the managed hospital's rehabilitation hospital facility; and

2. Confers upon the managed hospital a legal right to enforce the prohibition set forth above in paragraph II.C.1.

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

E. Pending the divestiture required by paragraph II.A. above, and the contract terminations required by paragraph II.B. above, respondent shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the assets to be divested and of the rehabilitation hospital facilities operated under the

contracts to be terminated, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of those assets, except for ordinary wear and tear.

F. A condition of approval by the Commission of the divestiture required by paragraph II.A. shall be a written agreement by the acquirer that it will not, for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, sell or otherwise transfer all or substantially all of the rehabilitation hospital facility of Nashville Rehabilitation Hospital to any person who operates, or will operate immediately following such sale or transfer, any other rehabilitation hospital facility in the Nashville metropolitan area as defined in paragraph I.G.3. above.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the assets to be divested identified in paragraph II.A. above, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest such assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointment of a trustee 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, 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 the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets identified in paragraph II.A. above.

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 approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets identified in paragraph II.A. above, or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is

submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to acquirer[s] as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the 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 set forth in paragraph II.A. above.

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 identified in paragraph II.A. above.

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

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any person who operates any rehabilitation hospital facility in any relevant market area;

B. Acquire any assets of any rehabilitation hospital facility in any relevant market area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any rehabilitation hospital facility or any part thereof in any relevant market area, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace a rehabilitation hospital facility operated by another person with a rehabilitation hospital facility to be operated by respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility in any relevant market area; or

E. Permit any rehabilitation hospital facility it operates in any relevant market area to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees, or otherwise) by any person who operates, or will operate immediately following such acquisition, any other rehabilitation hospital facility in that relevant market area.

Provided, however, that prior approval shall not be required by this paragraph IV for:

1. The establishment of a new rehabilitation hospital facility (other than as a replacement for a rehabilitation hospital facility, not

operated by respondent, in any relevant area, pursuant to an agreement or understanding between respondent and the person operating the replaced facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the rehabilitation hospital facility or part thereof to be acquired does not exceed five hundred thousand dollars ($500,000);

3. Any transaction otherwise subject to this paragraph IV of this order if the rehabilitation hospital facility in question is already operated by respondent (unless respondent is required by paragraph II of this order to cease operating the facility); or

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

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any rehabilitation hospital facility in any relevant market area not operated by respondent, for the joint establishment or operation of any new rehabilitation hospital service, facility, or part thereof in that relevant market area. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

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

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

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

A. The fair market value of the assets to be contributed to the joint venture or other arrangement, by rehabilitation hospital facilities not operated by respondent, does not exceed five hundred thousand dollars ($500,000);

B. The fair market value of the assets to be contributed to the joint venture or other arrangement by respondent does not exceed five hundred thousand dollars ($500,000);

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

D. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not sell or otherwise transfer to any other person all or substantially all of any rehabilitation hospital facility it operates in any relevant market area (except pursuant to a divestiture required by paragraph II of this order), unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order as applicable to the facility and the relevant market area in which the acquired facility is located, which

agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraphs II and III of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with 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 of the assets identified in paragraph II.A. above, the steps taken to terminate the contracts identified in paragraph II.B. above, and the identity of all parties contacted. Respondent shall also include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, the respondent shall permit any duly authorized representative of the Commission:

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

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between HEALTHSOUTH Rehabilitation Corporation ("respondent" or "HEALTHSOUTH"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at Two Perimeter Park South, Birmingham, Alabama; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about September 18, 1994, HEALTHSOUTH agreed to merge with ReLife, Inc. ("ReLife"), and thereby acquire, *inter alia*, a majority partnership interest in Nashville Rehabilitation Hospital in Nashville, Tennessee (the "Acquisition"); and,

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

Whereas, if the Commission accepts the Agreement Containing Consent Order in this matter ("consent order"), which would require the divestiture of ReLife's majority partnership interest in, and certain

other assets listed in paragraph II.A. of the consent order relating to, Nashville Rehabilitation Hospital (which assets, together with the Hospital, hereinafter are referred to as the "NRH Assets"), the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to compel the divestiture required by paragraphs II.A. and III of the consent order and the Commission's right to have the NRH Assets continue as a viable independent rehabilitation hospital facility; and

Whereas, the purpose of this agreement and the consent order is to:

(i) Preserve the NRH Assets as a viable independent inpatient rehabilitation hospital facility pending the divestiture required by paragraphs II.A. and III of the consent order, and

(ii) Remedy any anticompetitive effects of the Acquisition;

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

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

Now, therefore, the parties agree as follows, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from respondent with

respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the NRH Assets pursuant to the consent order:

1. Respondent agrees to execute the agreement containing consent order and be bound by the attached consent order.

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

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

b. The time that the divestiture required by the consent order has been completed.

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

a. The NRH Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, HEALTHSOUTH excluding the NRH Assets), except to the extent that respondent must exercise direction and control over the NRH Assets to assure compliance with this agreement or the consent order, and except as otherwise provided in this agreement.

b. HEALTHSOUTH shall appoint a Management Committee to manage and maintain the NRH Assets on a day-to-day basis while this agreement remains in effect. The Management Committee shall have exclusive management and control of the NRH Assets, and shall manage the NRH Assets independently of HEALTHSOUTH's other businesses.

c. The Management Committee, which shall be appointed by HEALTHSOUTH, shall consist of three or five members, including a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the NRH Assets; a person with experience in operating rehabilitation hospital

facilities; and a HEALTHSOUTH controller or other financial officer, whose responsibilities do not include any participation in HEALTHSOUTH's operations in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. No more than a minority of Management Committee members shall be directors, officers, employees, or agents of respondent ("respondent's Management Committee members"). Meetings of the Management Committee during the term of this agreement shall be audio recorded, and recordings shall be retained for two (2) years after the termination of this agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the NRH Assets, any associated operations or businesses, the Management Committee, or the independent chairman of the Management Committee; provided, however, that respondent may exercise only such direction and control over the Management Committee as is necessary to assure compliance with this agreement or the consent order.

e. Respondent shall maintain the viability, competitiveness, and marketability of the NRH Assets, and shall not sell, transfer, encumber (other than in the normal course of business, or to effect the divestitures contemplated by the consent order), or otherwise impair their viability, competitiveness, or marketability.

f. The NRH Assets shall be staffed with employees sufficient in numbers and skills to maintain the viability, competitiveness, and marketability of the Hospital and the NRH Assets, which employees shall be selected from the existing employee base of the NRH Assets, and may also be hired from other sources. To this end, respondent shall maintain at least the same ratios of full-time equivalent employees to inpatient days, for professional employee staff (such as nurses and therapists), and for other staff employees, as exist at the date of this agreement, and shall offer salaries and employee benefits sufficient to maintain such staffing levels and maintain quality of patient care at least substantially equivalent to that now provided by the employees of the NRH Assets.

g. With the exception of respondent's Management Committee members, respondent shall not change the composition of the Management Committee unless the independent chairman consents to such change. The independent chairman shall have power to remove members of the Management Committee for cause. Respondent shall not change the composition of the management of

the NRH Assets, except that the Management Committee shall have the power to remove management employees for cause.

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

i. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, negotiating agreements to divest assets, or complying with this agreement or the consent order, respondent shall not receive, have access to, use, or continue to use, any material confidential information (as that term is defined in the consent order) not in the public domain about the NRH Assets, or the activities of the Management Committee. Nor shall the NRH Assets or the Management Committee receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent that relates to rehabilitation hospital facilities operated by respondent in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. Respondent may receive on a regular basis aggregate financial information relating to the NRH Assets necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

j. Except as permitted by this agreement, respondent's Management Committee members shall not, in their capacity as Management Committee members, receive material confidential information of the NRH Assets, and shall not disclose any such information received under this agreement to respondent, or use it to obtain any advantage for respondent. Each of respondent's Management Committee members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. Respondent's Management Committee members shall participate in matters that come before the Management Committee only for the limited purposes of considering a capital investment or other transaction exceeding $100,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this agreement, the consent agreement, and the consent order. Except as permitted by this agreement, respondent's Management Committee

members shall not participate in any matter, or attempt to influence the votes of the other members of the Management Committee with respect to matters, that would involve a conflict of interest if respondent and the NRH Assets were separate and independent entities.

k. Any material transaction relating to the NRH Assets that is out of the ordinary course of business must be approved by a majority vote of the Management Committee; provided that the Management Committee shall approve no transaction, material or otherwise, that is precluded by this agreement.

l. All earnings and profits of the NRH Assets shall be retained separately. If necessary, respondent shall provide the NRH Assets with sufficient working capital to maintain the current rate of operation of the NRH Assets, and to carry out any capital improvement plans which have already been approved.

m. HEALTHSOUTH shall continue to provide the same support services to the NRH Assets, which are not provided by that hospital's employees, as are being provided by ReLife to the hospital as of the date this agreement is signed. HEALTHSOUTH may charge the NRH Assets the same fees, if any, charged by ReLife for such support services as of the date of this agreement. HEALTHSOUTH personnel providing such support services must retain and maintain all material confidential information of the NRH Assets on a confidential basis, and, except as is permitted by this agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses, including without limitation businesses in the Nashville metropolitan area. Such personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information of the NRH Assets.

n. HEALTHSOUTH shall cause the NRH Assets to continue to expend funds for marketing and advertising at a level not lower than that expended in fiscal year 1994 or budgeted in fiscal year 1995, and shall increase such spending as deemed reasonably necessary by the Management Committee in light of competitive conditions.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the NRH Assets as provided in the consent order, or to seek any other injunctive or equitable relief

for any failure to comply with the consent order or this agreement, or in any way relating to the Acquisition, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this agreement.

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

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

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

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

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

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 3152. Modified Consent Order, June 25, 1942 -- Set Aside Order, April 18, 1995

This order reopens a 1942 modified consent order -- which prohibited the respondent from coercing or intimidating its automobile retail dealers into purchasing accessories supplied by General Motors or from its designated source -- and sets aside the modified consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On February 6, 1995, General Motors Corporation ("GM"), as respondent and successor to General Motors Sales Corporation,[1] filed its Petition to Reopen and Vacate Modified Order ("Petition") in this matter. GM requests that the Commission set aside the 1942 modified consent order in this matter 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, GM affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in

[1] Since the Commission issued the order in this matter General Motors Sales Corporation, a named respondent in the order, was dissolved and its assets now reside within respondent General Motors Corporation.

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."[2] The Commission's modified consent order in Docket No. 3152 was issued on June 25, 1942, and has been in effect for more than fifty 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. 3152.

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. 3152 be, and it hereby is, set aside, as of the effective date of this order.

[2] *See* Sunset Policy Statement, 59 Fed. Reg. at 45,289.

IN THE MATTER OF

SENSORMATIC ELECTRONICS CORPORATION

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

Docket C-3572. Complaint, April 18, 1995--Decision, April 18, 1995

This consent order prohibits, among other things, Sensormatic Electronics Corporation, a Florida-based manufacturer of electronic-article surveillance systems from acquiring patents and other exclusive rights for manufacturer installed disposable anti-shoplifting labels from Knogo Corporation, as they pertain to the United States and Canada. Also, the consent order requires Sensormatic, for ten years, to obtain Commission approval before acquiring certain rights in connection with Knogo's SuperStrip, or any significant acquisitions of entities engaged in, or assets used for, the research, development or manufacture of disposable labels, or acquisitions of patents or other intellectual property for such purposes.

Appearances

For the Commission: *Ann Malester, Arthur M. Strong* and *Melissa K. Heydenreich.*

For the respondent: *Wm. Randolph Smith, Crowell & Moring,* Washington, D.C. and *Steven A. Newborn, Rogers & Wells,* 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 Sensormatic Electronics Corporation ("Sensormatic"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger certain assets of the Knogo Corporation in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Hard goods EAS systems"* means electronic article surveillance systems and components designed to protect against shoplifting of hard goods merchandise by means of electronic hardware capable of detecting disposable labels attached to such merchandise.

2. *"Disposable labels"* means labels affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

3. *"Source labelling"* means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

4. *"SuperStrip"* means a proprietary material developed and patented by Knogo Corporation and used or intended for use in disposable labels.

5. *"United States"* means the fifty states, the District of Columbia, and Puerto Rico.

II. RESPONDENT

6. Respondent Sensormatic 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 500 N.W. 12th Avenue, Deerfield Beach, Florida.

7. Respondent is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

8. Knogo Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Wireless Boulevard, Hauppauge, NY.

9. Knogo is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose

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

IV. ACQUISITION

10. On or about August 14, 1994, Sensormatic and Knogo entered into an agreement whereby Sensormatic agreed to acquire through a merger all of Knogo's assets outside of North America, along with patents related to SuperStrip ("Acquisition"). In addition, the agreement obligates Sensormatic and Knogo North America, Inc. ("Knogo/NA"), a successor corporation to Knogo's business and assets in the United States and Canada, to grant royalty-free cross licenses to one another for any improvements to patents or trade secrets related to SuperStrip.

V. TRADE AND COMMERCE

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the research and development of disposable labels developed or used for source labelling and the research and development of processes to manufacture disposable labels.

12. For purposes of this complaint, the relevant geographic area is the United States and Canada.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of the complaint because of patent protection for important technology and the time required to develop the requisite technical skills to compete in the relevant line of commerce.

15. Sensormatic and Knogo are actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition if consummated may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the

Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By reducing Knogo's incentives to research and develop disposable labels to be designed or used for source labelling;

b. By decreasing the number of research and development tracks for disposable labels to be designed or used for source labelling; and

c. By increasing Sensormatic's ability to unilaterally reduce research and development of disposable labels for source labelling.

17. 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.

VII. VIOLATIONS CHARGED

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

19. The acquisition described in paragraph ten, 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 certain assets and businesses of the Knogo Corporation, 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 Sensormatic Electronics Corporation ("Sensormatic") 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 500 N.W. 12th Avenue, Deerfield Beach, Florida.

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

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

C. *"KNA"* means Knogo North America, Inc., the successor corporation to Knogo Corporation's business and assets in the United States and Canada to be formed pursuant to the Contribution and Divestiture Agreement between Knogo Corporation and Knogo North America, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Knogo North America, Inc., their directors, officers, employees, agents, and representatives, and their successors and assigns.

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

E. *"Acquisition"* means the transaction described in the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994.

F. *"Hard goods EAS systems"* means electronic article surveillance systems and components designed principally to protect against shoplifting of hard goods merchandise (*e.g.*, books, audio recordings, health and beauty aids, groceries, and home center merchandise), by means of electronic hardware capable of detecting disposable labels attached to such merchandise, whether the systems or components generate, detect, or employ radio frequency, electromagnetic, microwave, acoustic magnetic, or other electronic signals. Such systems and components may include electronic signal transmitters and receivers, signal processing equipment, computer software, label activation equipment, label deactivators, automatic and manual label applicators, and other related devices.

G. *"Disposable labels"* means labels that can be affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

H. *"Source labelling"* means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

I. *"SuperStrip"* means:

1. The material, described in Exhibit A attached hereto and made a part hereof, used or intended for use in disposable labels; and

2. Disposable labels incorporating such material.

J. *"SuperStrip Technology"* means all existing patents, inventions, trade secrets, know-how, concepts, designs, technical information, processes, and intellectual property relating to the design, manufacture, or use of SuperStrip.

K. *"SuperStrip Improvements"* means all improvements, modifications, developments, revisions, or enhancements of SuperStrip or SuperStrip Technology, whether or not covered by a patent or otherwise protected against disclosure or unauthorized use by law.

L. *"Supply Agreement"* means Exhibit B to the Contribution and Divestiture Agreement, attached as Exhibit C to the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994, that requires Sensormatic to purchase products and materials for hard goods EAS systems from KNA upon the terms and conditions set forth therein.

M. *"United States"* means the fifty states, the District of Columbia, and Puerto Rico.

II.

It is further ordered, That:

A. As of the date this order becomes final, respondent shall not hold, possess, receive, or otherwise obtain, or have held, possessed, received, or otherwise obtained, the SuperStrip Technology from Knogo or KNA. Provided, however, that no provision of this order shall prohibit an acquisition by respondent from Knogo or KNA of: (1) a non-exclusive license of the SuperStrip Technology to practice and use SuperStrip and SuperStrip Technology in the United States and Canada; and (2) ownership of, or other exclusive or non-exclusive legal or equitable rights to practice and use, SuperStrip, SuperStrip Technology, and SuperStrip Improvements outside of the United States and Canada.

B. Respondent shall comply with the terms and conditions of the Supply Agreement.

III.

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 legal or equitable rights to practice and use SuperStrip, SuperStrip Technology, or SuperStrip Improvements in the United States and Canada other than: (1) rights to manufacture in the United States for export only; or (2) a non-exclusive license that is also offered to other manufacturers of hard goods EAS systems or disposable labels in connection with adoption of a retail segment standard;

B. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the research, development, or manufacture of disposable labels designed or used for source labelling; provided, however, that individual employees or directors of respondent and each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than one (1) percent of the stock or share capital of such person or concern; or

C. Acquire any patents, intellectual property, or other tangible or intangible assets, other than a non-exclusive license, used in or previously used in (and still suitable for use in) the research, development, or manufacture of disposable labels designed or used for source labelling.

Provided, however, that an acquisition pursuant to paragraph III.B. or III.C. shall be exempt from the prior approval requirements of this paragraph III if: (1) the stock, share capital, equity, or assets are acquired from a person or concern that had less than $2 million in annual sales in the United States of disposable labels in either of the two (2) most recent calendar years preceding such acquisition; (2) the acquisition is of assets relating solely to the manufacture of, improvements of, or accessories to Sensormatic products that are in existence as of the time of the acquisition; (3) the acquisition is of assets from or an interest in a joint venture in which respondent is one participant and in which no other joint venture participant was at the time of the commencement of the venture engaged in the research, development, or manufacture of disposable labels in the United States; (4) the acquisition is of rights or other assets to be used solely in commercial or industrial (*i.e.*, non-retail) applications; or (5) the acquisition is of rights or other assets (other than United States or Canadian marketing rights to patents, trade secrets and other

intellectual property) to be used solely for products sold outside the United States and Canada.

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final, one year (1) from the date this order becomes final, and annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, 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.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege and upon written request with reasonable notice, 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 it, to interview officers, directors, or employees of respondent, who may have counsel present regarding such matters.

EXHIBIT A

SUPERSTRIP MATERIAL

SuperStrip I: SuperStrip I is covered by Patent numbers 5,029,291 (docket number 85.151) and 5,304,987 (docket number 85.168) and one invention disclosure (as described in docket number 85.184). These patents and disclosure describe a new type of oxidized magnetic material with an asymmetrical hysteresis curve and the ability to become magnetically deactivated. SuperStrip I material is produced by a process, as described in Knogo's patent, that involves the cutting of amorphous magnetic material into short, tag-length segments and annealing these segments for several hours in the presence of a magnetic field.

SuperStrip II: SuperStrip II is a modified version of Knogo's standard magnetic tag. Short deactivation segments are electroplated onto the soft part of the magnetic strip in a continuous process instead of being mechanically cut and adhered to the strip. A U.S. patent application (docket number 85.180) filed by Knogo is pending with respect to this process.

SuperStrip III: SuperStrip III, which is the subject of a pending U.S. patent application (docket #85.191) filed by Knogo is a recent development involving the melt-spin casting of a specially formulated amorphous magnetic material in such a way as to produce a unique hysteresis curve in a manner similar to that of SuperStrip I, but without the use of any additional processing steps beyond casting the material.

STATEMENT OF MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today the Commission accepts a consent order that would settle allegations that Sensormatic Electronics Corporation's acquisition of Knogo Corporation's patents related to SuperStrip and the agreement to cross-license improvements to SuperStrip violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. I

find reason to believe the transaction violates the law and concur in accepting the order. I dissent, however, from the allegations in the complaint defining the relevant market and from paragraph II(B) of the order, which requires that Sensormatic adhere to a private supply contract.

Sensormatic and Knogo produce and sell electronic article surveillance ("EAS") systems and components, used by retailers to protect against shoplifting. EAS systems provide a warning when a special label attached to merchandise by the retailer triggers an electronic signal on hardware located at the store's exit, unless the label has been neutralized by store employees at the time of sale. Because Sensormatic proposes to acquire only those assets of Knogo located outside North America, the competitive analysis of the transaction does not focus on the production and sale of existing EAS systems and labels to retailers in the United States and Canada.

Sensormatic, Knogo, and other firms, however, are also engaged in research and development to perfect a new "source labelling" system. In such a system, manufacturers would apply the EAS label to the merchandise or its packaging, which would eliminate the need for retailers manually to affix a label to each protected item of merchandise. No source labelling system is currently in use, but Knogo has developed and patented SuperStrip technology for use in labels, potentially including source labels, and other firms are developing their own source labelling technologies.

I concur that the relevant market involves competition in research and development, but question the market definition in paragraph eleven of the complaint, which is narrowly limited to the research and development of "disposable labels developed or used for source labelling" and processes to make them. In a Section 7 case, the Commission has the burden of proving the relevant product market, and distinguishing research and development of source labelling from other improvements in EAS systems may be difficult or impossible. I would not limit the product market to research and development in source labelling but would define the market as research and development in EAS systems and components, including source labelling.

I also dissent from paragraph twelve of the complaint, which limits the geographic market to the United States and Canada. Successful research and development yields intellectual property that can move freely across international boundaries. A foreign firm can

license intellectual property without establishing a manufacturing or sales presence in the United States. Limiting the geographic market to the United States and Canada excludes from the market the potentially important research activity of at least one European firm. Even if domestic firms are familiar with particular technologies and have a sizable base of equipment already installed in retail stores, research and development may yield an improvement significant enough to overcome the advantages of current market leaders. The market should not be so narrowly defined as to presume that only North American firms could effect a significant breakthrough that might alter the current competitive balance.

Applying Section 7 analysis to the product and geographic markets as I would define them, I find reason to believe the transaction would violate the law. The proposed acquisition would significantly increase concentration in the already highly concentrated world market for EAS system research and development. The proposed transaction, the transfer or patents from Knogo to Sensormatic and the agreement to grant royalty-free cross licenses on any improvements to SuperStrip, likely would diminish competition in research and development of new EAS systems and components. Accordingly, I concur in paragraph II(A) of the order.

Finally, I dissent from paragraph II(B) of the order, which provides that Sensormatic "shall comply with the terms and conditions" of a supply agreement between Sensormatic and Knogo North America, Inc., the successor corporation to Knogo's North American business. The supply agreement is a long, highly detailed commercial contract that was negotiated as part of the acquisition in question. The complaint contains no allegations establishing a relationship between this contract and the state of competition in any antitrust market. Absent a demonstrable link between the contract and competition, the contract provides no basis for liability and compliance with the contract does not appear necessary to effect relief.

IN THE MATTER OF

B.A.T INDUSTRIES P.L.C., ET AL.

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

Docket 9271. Complaint, Nov. 28, 1994--Decision, April 19, 1995

This consent order permits, among other things, B.A.T Industries and Brown & Williamson Tobacco Corporation to consummate the acquisition of American Tobacco Company, but requires them to divest, within twelve months, six American Tobacco discount cigarette brands and to divest to the purchaser of these brands three American Tobacco full-revenue brands, as well as the American Tobacco manufacturing facility in Reidsville, N.C. If the required divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in a cigarette manufacturer or any assets used to manufacture or distribute cigarettes in the United States.

Appearances

For the Commission: *Joseph Krauss, Howard Morse* and *William Baer.*

For the respondents: *Ronald S. Rolfe, Cravath, Swaine & Moore*, New York, N.Y. *Daniel J. O'Neill, Chadbourne & Parker*, New York, N.Y. and *Mark Crane, Hopkins & Sutter*, Chicago, IL.

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 B.A.T Industries p.l.c., a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire the American Tobacco Company, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, 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 in that respect as follows:

I. RESPONDENTS

1. Respondent B.A.T Industries p.l.c. ("BAT") is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL. It is the second largest cigarette manufacturer in the world. BAT indirectly owns all of the common stock of Brown & Williamson Tobacco Corporation.

2. Respondent Brown & Williamson Tobacco Corporation ("B&W") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky. B&W is the third largest cigarette manufacturer in the United States.

3. Respondent American Brands, Inc. ("American Brands") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its headquarters and principal place of business located at 1700 East Putnam Avenue, P.O. Box 819, Old Greenwich, Connecticut.

4. Respondent American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at Six Stamford Forum, P.O. Box 1038, Stamford, Connecticut. ATC is the fifth largest cigarette manufacturer in the United States.

II. JURISDICTION

5. Employees and agents of BAT negotiated with employees and agents of American Brands, and entered into an agreement, in New York, New York, to acquire the stock of ATC. BAT, B&W, American Brands and ATC are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affect commerce as "commerce" is

defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

6. On or about April 26, 1994, BAT and American Brands entered into a stock purchase agreement whereby BAT agreed to purchase all of the outstanding common stock of ATC for $1 billion ("Acquisition"). BAT also agreed to assume all existing product liability claims against ATC.

IV. THE RELEVANT MARKETS

7. The relevant product market or line of commerce within which to assess the competitive effects of the proposed Acquisition is the manufacture and sale of cigarettes for U.S. consumption and any narrower market contained therein.

8. The relevant geographic market within which to assess the competitive effects of the proposed Acquisition is the United States.

V. MARKET STRUCTURE

9. The United States cigarette market is already highly concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios. B&W and ATC are, respectively, the third and fifth largest manufacturers of cigarettes in a market that consists of only six meaningful firms.

10. The United States cigarette market will become substantially more concentrated if the proposed Acquisition is consummated.

VI. ENTRY CONDITIONS

11. Entry into the United States cigarette market is difficult and therefore unlikely to undermine an anticompetitive price increase.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition in the manufacture and sale of cigarettes in the United States 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) Eliminating ATC as a substantial independent, disruptive and competitive force in the market;

(b) Substantially increasing concentration, and further heightening barriers to entry, thereby increasing the likelihood of successful anticompetitive coordinated interaction, nonrivalrous behavior, and actual or tacit collusion among firms; and

(c) Eliminating substantial actual head-to-head competition between B&W and ATC in the manufacture and sale of cigarettes in the United States.

VIII. VIOLATIONS CHARGED

13. The Acquisition agreement described in paragraph six constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. The Acquisition described in paragraph six, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Varney not participating.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, B.A.T Industries, p.l.c. and Brown & Williamson Tobacco Corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission, for the purposes only of that agreement and any proceedings arising out of, or to enforce that agreement, this order and the Preservation Agreement attached as Appendix I, by those respondents of all the jurisdictional facts set forth in the

complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by those 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent B.A.T Industries p.l.c. (BAT) is a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL.

2. Respondent Brown & Williamson Tobacco Corporation (B&W) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky.

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

ORDER

I.

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

A. *"BAT"* means B.A.T Industries p.l.c., its subsidiaries, divisions, and groups, including Brown & Williamson Tobacco

Corporation, its subsidiaries, divisions, and groups, and affiliates controlled by Brown & Williamson Tobacco Corporation ("B&W"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"American Brands"* means American Brands, Inc., its subsidiaries, divisions and groups, including The American Tobacco Company ("ATC"), their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

D. *"Acquisition"* means the acquisition of ATC from American Brands by BAT.

E. The *"Reidsville Assets"* means all real property, fixtures and equipment at ATC's location at North Scales Street, Reidsville, NC, including but not limited to, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. Inventory and storage capacity;

3. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

Provided however that the Reidsville Assets shall not include:

98.50/30 - (MISTY 100's) (3) Modules; Maker/Protos, Packer/Focke 350

120/32 - (MISTY 120's) (2) Modules; Maker/Protos, Packer/Focke 350

120/32 - (CARLTON 120's) (1) Module; Maker/Protos, Packer/Focke 350

Plus supporting equipment dedicated to the above identified brand styles including, but not limited to, plug makers, wrappers if separate, case packers, and routine maintenance parts and specific size parts.

F. *"ATC Value Brands"* means the following brands of cigarettes in the U.S.: Montclair, Riviera, Malibu, Bull Durham, Crowns, and Special Tens.

G. *"ATC Full Revenue Brands"* means the following brands of cigarettes in the U.S.: Tareyton, Silva Thins and Tall.

H. *"ATC Brands"* means the ATC Value Brands together with the ATC Full Revenue Brands.

I. *"B&W Brand"* means the following brand of cigarette in the U.S.: Belair.

J. The term *"Assets"* means the following tangible and intangible assets exclusively relating to the manufacture, distribution and sale of those of the ATC Value Brands, the ATC Full Revenue Brands (excluding any Reidsville Assets) or the B&W Brand actually being divested (collectively the "Brands") including, to the extent they exist, but not limited to:

1. The Brand profit and loss statements, Brand contribution statements, and Brand advertising, promotional and marketing spend records for each Brand since January 1, 1990;

2. All trademarks, trade dress, trade secrets, technical information, intellectual property, patents, technology, know-how, tobacco content formulae, designs, specifications, drawings, processes and quality control data exclusively related to any of the Brands;

3. A bill of materials for each of the Brands, consisting of full manufacturing standards and procedures, quality control specifications, specifications for raw materials and components, including lists of authorized sources for materials and components;

4. All dedicated molds and equipment currently in use for each of the Brands;

5. A list of all direct customers who have bought the Brands from ATC or B&W at any time from January 1, 1990, including names, addresses, and telephone numbers of the individual customer contacts, and the unit and dollar amounts of sales, by Brand, to each customer;

6. All current and projected advertising, promotional and marketing information, materials and programs specifically dedicated to the sale and distribution of each of the Brands;

7. All inventories of finished goods, packaging and raw materials uniquely relating to each of the Brands;

8. All names of manufacturers and suppliers under contract with ATC or B&W who produce for, or supply to, ATC or B&W in connection with the manufacture or sale of each of the Brands;

9. A copy of all product testing required by any regulatory authority specific to the Brands from January 1, 1990, including but not limited to tar and nicotine content testing as required by the FTC and all regulatory registrations and correspondence; and

10. All price lists for each of the Brands from January 1, 1990.

II.

It is further ordered, That:

A. BAT and B&W shall divest absolutely and in good faith, within 12 months of the date this order becomes final, the ATC Value Brands Assets. BAT and B&W shall also divest to the proposed acquirer of the ATC Value Brands Assets, the Reidsville Assets and the ATC Full Revenue Brands Assets. BAT and B&W shall also divest:

1. Such additional ancillary assets, formerly of ATC, and effect such arrangements in respect thereof, as are necessary to assure the marketability and the viability of the Reidsville Assets for the manufacture of cigarettes in the United States for sale and consumption in the United States; and

2. Such additional ancillary physical assets and legal rights, formerly of ATC, as are exclusive to those ATC Brands being divested and are necessary to assure the marketability and the viability of those ATC Brands;

Provided however, if the divestiture of only the ATC Value Brands Assets is approved by the Commission pursuant to paragraph II.B., and the divestiture does not include the Reidsville Assets and/or the ATC Full Revenue Brands Assets, the obligations of BAT and B&W to divest under this order shall be satisfied upon the divestiture of the ATC Value Brands Assets.

B. BAT and B&W shall divest hereunder 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 provided herein is to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint and, therefore, if the Reidsville Assets are divested, they shall be used only for the production of cigarettes in the U.S. principally for sale and consumption in the U.S.

C. Pending divestiture as provided in this paragraph II, BAT and B&W shall:

1. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

2. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

D. BAT and B&W shall comply with all terms of the Preservation Agreement, attached to this order and made a part hereof as Appendix I. The Preservation Agreement shall continue in effect until the date this order becomes final.

III.

It is further ordered, That:

A. If BAT and B&W have not divested, absolutely and in good faith and with the Commission's prior approval, as provided in paragraph II.A., the Commission may appoint a trustee to divest the ATC Value Brands Assets, the B&W Brand Assets and the Reidsville Assets. Upon divestiture under this paragraph III, the Reidsville Assets shall be used for the production of cigarettes in the U.S. principally for sale and consumption in the U.S. Provided, however, that if the Commission has not approved or disapproved a proposed divestiture within 120 days of the date the application for such divestiture has been placed on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, BAT and B&W 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 BAT and B&W 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, BAT and B&W 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 BAT and B&W, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If BAT and B&W have 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 BAT and B&W of the identity of any proposed trustee, BAT and B&W 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 Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

3. Within twenty (20) days after appointment of the trustee, BAT and B&W shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets or to any other relevant information, as the trustee may request, and shall take all reasonable steps to ensure that the confidentiality is maintained of matters and documents so designated by either of the

respondents. BAT and B&W shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. BAT and B&W shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by BAT and B&W 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 (which may include provision for the contract manufacture of cigarettes) that is submitted to the Commission, subject to BAT's and B&W's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer as set out in paragraph II.B. of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by BAT and B&W from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of BAT and B&W, 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 BAT and B&W, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the BAT and B&W, 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 Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

8. BAT and B&W 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. BAT and B&W shall be responsible for the defense of any and all claims against the trustee under this subsection and the trustee shall do and omit nothing which may prejudice such defense.

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 Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets.

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

13. The trustee shall note, in his or her recommendation to the Commission, whether the proposed acquirer, or any other entity controlling or commonly controlled by the proposed acquirer, has, directly or indirectly, in any jurisdiction in the world and at any time within the last five years, had goods that it manufactured or supplied seized, impounded or destroyed by any authority pursuant to a claim of infringement of any intellectual property or other right over or in respect to those goods.

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the

manufacture in the United States of cigarettes for consumption in the United States, or

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture, distribution, or sale in the United States of cigarettes.

Provided, however, that this paragraph IV shall not apply to transactions entered into in the ordinary course of business.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until BAT and B&W have fully complied with the provisions of paragraphs II and III of this order, BAT and B&W shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. BAT and B&W shall include in their 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. BAT and B&W shall include in their 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, BAT and B&W shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraph IV of this order.

VI.

It is further ordered, That BAT and B&W shall notify the Commission at least thirty (30) days prior to any proposed change in the corporations, such as dissolution, assignment, sale resulting in the

emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations, that in each case may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, BAT and B&W shall permit any duly authorized representative of the Commission:

A. Upon written notice to counsel, 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 BAT and B&W relating to any matters contained in this order; and

B. Upon five days' written notice to counsel and without restraint or interference from BAT and B&W, to interview officers, directors, or employees of BAT and B&W, who may have counsel present.

Commissioner Varney not participating.

APPENDIX I

PRESERVATION AGREEMENT

This Preservation Agreement is by and between B.A.T Industries p.l.c., a public limited company incorporated under the laws of England, with its headquarters and principal place of business located at Windsor House, 50 Victoria Street, London, England, SW1H 0NL ("BAT"), Brown & Williamson Tobacco Corporation, a corporation incorporated under the laws of the State of Delaware with its headquarters and principal place of business located at 1500 Brown & Williamson Tower, P.O. Box 35090, Louisville, Kentucky ("B&W"), and the Federal Trade 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.*

PREMISES FOR AGREEMENT

Whereas, BAT, pursuant to an agreement dated April 26, 1994, agreed to purchase substantially all of the outstanding stock of the American Tobacco Company ("ATC"), a wholly owned subsidiary of American Brands, Inc.; and

Whereas, the Commission has reason to believe that the agreement would violate Section 5 of the Federal Trade Commission Act, and that, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, statutes enforced by the Commission, and the Commission has issued its administrative complaint challenging the agreement; and

Whereas, if the parties accept the agreement containing consent order ("consent agreement"), 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 3.25(f) 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 Reidsville Assets and the ATC Brands Assets during the period prior to final acceptance of the order by the Commission (after the 60-day comment period), any divestiture resulting from any 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 if the acquisition is consummated, it will be necessary to preserve the continued viability and marketability of the Reidsville Assets and the ATC Brands Assets., as defined in the consent agreement; and

Whereas, the purpose of this Preservation Agreement and of the consent agreement is to preserve the Reidsville Assets and the ATC Brands Assets until the date this order becomes final, in order to remedy any anticompetitive effects of the acquisition; and

Whereas, BAT's and B&W's entering into this Preservation Agreement shall in no way be construed as an admission by BAT and B&W that the acquisition is anticompetitive or illegal; and

Whereas, BAT and B&W understand that no act or transaction contemplated by this Preservation 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 Preservation Agreement;

Now, therefore, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent agreement, 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 Preservation Agreement, and the consent agreement to which this Preservation Agreement, is annexed and made a part thereof, and the final order in this proceeding, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek the divestiture of the Reidsville Assets, the ATC Value Brands Assets and the B&W Brand Assets as provided in the consent agreement, the parties agree as follows:

TERMS OF AGREEMENT

1. BAT and B&W agree to execute, and upon its issuance, to be bound by the consent agreement.

2. BAT will be free to close the acquisition with American Brands immediately after the Commission's approval of the consent agreement for placement on the public record for comment.

3. BAT and B&W agree that from the date this Preservation Agreement is signed by BAT and B&W until the earliest of the dates listed in subparagraphs 3.a and 3.b they will comply with the provisions of this Preservation Agreement:

a. Three business days after the Commission withdraws its acceptance of the consent agreement pursuant to the provisions of Section 3.25(f) of the Commission's Rules; or

b. The day the order becomes final.

4. From the time BAT and B&W sign this Preservation Agreement until the date the order becomes final, BAT and B&W shall:

a. Take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

b. Take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the

destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

5. BAT and B&W also waive 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 counsel for BAT or B&W, BAT or B&W shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of BAT or B&W, 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 BAT or B&W relating to compliance with this agreement; and

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

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

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

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

Docket C-3573. Complaint, April 28, 1995--Decision, April 28, 1995

This consent order permits, among other things, Boston Scientific Corporation, a Massachusetts-based manufacturer and marketer of catheters, to proceed with the proposed acquisitions of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc., but requires the respondent to grant a non-exclusive license to a specified package of patents and technology related to the manufacture, production and sale of intravascular ultrasound (IVUS) imaging catheters to the Hewlett-Packard Company or another Commission-approved licensee. In addition, the consent order requires the respondent to obtain Commission approval, for ten years, before acquiring an interest greater than one percent in a company engaged in researching, developing or manufacturing IVUS catheters for sale in the United States.

Appearances

For the Commission: *Howard Morse* and *Robert S. Tovsky.*

For the respondent: *Bruce Montgomery, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Boston Scientific Corporation (Boston Scientific) has entered into agreements with Cardiovascular Imaging Systems, Inc. (CVIS), and with SCIMED Life Systems, Inc. (SCIMED), whereby Boston Scientific will acquire all of the outstanding shares of both CVIS and SCIMED, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisitions, 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 having reason to believe that Boston Scientific has entered into such agreements in restraint of trade in violation of

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 Boston Scientific is a corporation organized and existing under the laws of Delaware, with its principal place of business at 1 Boston Scientific Place, Natick, Massachusetts.

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

II. THE PROPOSED ACQUISITIONS

3. On or about August 31, 1994, Boston Scientific and CVIS executed an Agreement and Plan of Merger and Reorganization ("CVIS Agreement") wherein Boston Scientific agreed to acquire all of the voting securities of CVIS. The transaction is valued at approximately $88 million.

4. On or about November 8, 1994, Boston Scientific and SCIMED executed an Agreement and Plan of Merger ("SCIMED Agreement") wherein Boston Scientific agreed to acquire all the outstanding shares of SCIMED through a stock swap valued at approximately $870 million.

III. THE RELEVANT MARKETS

5. One relevant line of commerce within which to analyze the effects of the CVIS and SCIMED acquisitions is the research and development, manufacture, and sale of intravascular ultrasound ("IVUS") catheters, including imaging catheters, imaging cores and imaging guidewires.

6. IVUS catheters are medical devices used as an adjunct to angiography in conjunction with therapeutic procedures such as balloon angioplasty, atherectomy, and stent implantation, to diagnose

and treat cardiovascular disease. IVUS catheters generate an ultrasound image from the inside of arteries, providing detailed information that is not obtainable using other imaging techniques. Use of IVUS catheters may result in more effective use of therapeutic treatments and overall lower health care costs.

7. One relevant geographic area within which to analyze the likely effects of the CVIS and SCIMED acquisitions is the United States. Foreign producers are constrained from selling in the United States, by, among other things, patents and requirements for regulatory approvals.

IV. MARKET STRUCTURE

8. Boston Scientific and CVIS are the two leading competitors in the research and development, manufacture, and sale of IVUS catheters in the United States.

9. The U.S. IVUS catheter market is extremely concentrated as measured by the Herfindahl-Hirschmann Index (HHI). In 1994, CVIS accounted for approximately 50% and Boston Scientific accounted for approximately 40% of sales of IVUS catheters in the United States. Boston Scientific's acquisition of CVIS would increase the HHI by approximately 3850 points, to over 7900.

10. Only one other company, Endosonics Corporation, currently sells IVUS catheters in the United States. Endosonics' IVUS catheters utilize a phased array technology, unlike Boston Scientific's and CVIS' IVUS catheters, which use a mechanical rotating technology. Endosonics' share of the U.S. IVUS catheter market has fallen over recent years.

11. Boston Scientific and CVIS are continuing to compete vigorously while engaged in patent litigation in which CVIS asserts Boston Scientific infringes certain of its patents, and Boston Scientific asserts that certain of CVIS' patents are invalid and that CVIS infringes certain of its patents.

12. The IVUS catheter market has grown rapidly in recent years and is projected to grow substantially over the next several years. Boston Scientific projects that the IVUS catheter market will remain highly concentrated for at least the next several years, and that both its own and CVIS' shares of the market will remain high.

13. SCIMED has conducted substantial research and development with respect to IVUS catheters, and after several years of work, has

developed a prototype imaging guidewire. But for its acquisition by Boston Scientific, SCIMED, which has the capacity, incentives and economic interest for entry, is likely to enter the U.S. IVUS catheter market within two to three years. No other firm has an entry advantage similar to SCIMED. SCIMED was perceived by Boston Scientific and others to be a potential competitor in the manufacture and sale of IVUS catheters in the United States.

V. ENTRY CONDITIONS

14. Entry into the IVUS catheter market would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed acquisitions. Designing and manufacturing IVUS catheters requires substantial technological expertise, and would require several years for research and development, product and process design, and establishment of manufacturing facilities. The time required for entry could be extended significantly by the need to obtain regulatory approvals. Entry would require significant sunk investment with uncertain ultimate success because of the technological difficulty. The broad patent positions of CVIS, Boston Scientific, and SCIMED increases the risk of entry, and the combination of the patent portfolios of these three companies would further increase the difficulty of entry.

VI. COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITIONS

15. The acquisition of CVIS by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

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

b. It will eliminate substantial head-to-head competition between Boston Scientific and CVIS, who are each other's closest competitors in the research and development, manufacture, and sale of IVUS catheters;

c. It will allow Boston Scientific unilaterally to exercise market power;

d. It will make coordinated interaction between Boston Scientific and Endosonics, the only other remaining competitor, substantially more likely;

e. It will, by combining the patent portfolios of Boston Scientific and CVIS, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

16. The acquisition of SCIMED by Boston Scientific may substantially lessen competition and tend to create a monopoly in the IVUS catheter market in the United States because, among other things:

a. It will eliminate competition between Boston Scientific and SCIMED in the research and development of IVUS catheters;

b. It will eliminate the most likely potential entrant, with a substantial entry advantage over other potential entrants, into the highly concentrated IVUS catheter market;

c. It will eliminate an actual potential competitor whose entry would likely have ultimately produced deconcentration of the IVUS catheter market;

d. It will eliminate a perceived potential competitor into the IVUS catheter market;

e. It will, by combining the patent portfolios of Boston Scientific and SCIMED, make entry into the IVUS catheter market more difficult;

f. It will likely result in diminished product innovation in IVUS catheters; and

g. It will likely result in increased prices for IVUS catheters.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Boston Scientific and CVIS described in paragraph three violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The proposed acquisition of CVIS by Boston Scientific 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.

19. The agreement between Boston Scientific and SCIMED described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

20. The proposed acquisition of SCIMED by Boston Scientific 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.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisitions by Boston Scientific Corporation ("Boston Scientific") of Cardiovascular Imaging Systems, Inc., and SCIMED Life Systems, Inc. ("SCIMED"), which acquisitions are more fully described at paragraphs I.(E) and I.(F) below, and Boston Scientific having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Boston Scientific with violations of the Clayton Act and Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 thirty (30) days, makes the following jurisdictional findings and enters the following order:

1. Respondent Boston Scientific Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1 Boston Scientific Place, Natick, Massachusetts.

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 *"Boston Scientific"* means Boston Scientific Corporation, its predecessors, successors, assigns, subsidiaries, divisions, and groups and affiliates controlled by Boston Scientific, their successors and assigns, and the directors, officers, employees, agents, and representatives of each.

B. *"CVIS"* means Cardiovascular Imaging Systems, Inc.

C. *"SCIMED"* means SCIMED Life Systems, Inc.

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

E. *"CVIS Acquisition"* means the acquisition by respondent of CVIS voting securities that is the subject of an Agreement and Plan of Merger and Reorganization entered into on or about August 31, 1994.

F. *"SCIMED Acquisition"* means the acquisition of SCIMED voting securities that is the subject of an Agreement and Plan of Merger entered into on or about November 8, 1994.

G. *"IVUS Catheters"* means intravascular ultrasound catheters, intracardiac ultrasound catheters, removable imaging cores used in intravascular or intracardiac ultrasound imaging, and intravascular imaging guidewires.

H. *"IVUS Technology Portfolio"* means:

1. All rights of Boston Scientific, CVIS and SCIMED under United States and foreign patents and patent applications filed in any country relating to IVUS Catheters, including rights under patents issued in the future in any country based upon patent applications

filed, or inventor's certificates and invention disclosures made, on or before the License Date, and rights under all substitutions, continuations, continuations-in-part, divisions, renewals, reissues and extensions based on said patents and patent applications, including but not limited to the right to manufacture, use, sell, or offer for sale for any purpose or application any product suitable for use as an IVUS Catheter;

2. All trade secrets, technology and know-how of CVIS and SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by CVIS or SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters;

3. A copy of the IVUS Catheter customer lists of Boston Scientific and CVIS.

I. *"SCIMED IVUS Technology"* means all assets of SCIMED relating to IVUS Catheters, including but not limited to:

1. United States and foreign patents and patent applications filed in any country relating to IVUS Catheters;

2. All trade secrets, technology, and know-how of SCIMED relating to IVUS Catheters, including but not limited to, books and records, the results of research and development efforts, filings with the United States Food and Drug Administration, scientific and clinical reports, designs, manuals, drawings, and design, material and equipment specifications and any know-how used by SCIMED in conjunction with the research and development, manufacturing or marketing of IVUS Catheters; and

3. All IVUS Catheter prototypes.

J. *"License Date"* means the date on which the IVUS Technology Portfolio is licensed following Commission approval pursuant to paragraph II or paragraph V of this order.

K. *"Licensee"* means the person to whom the IVUS Technology Portfolio is licensed pursuant to paragraph II or paragraph V of this order.

L. *"IVUS Consoles"* means instruments used to deploy IVUS Catheters and to convert into display images signals transmitted by IVUS Catheters.

II.

It is further ordered, That:

A. Within six (6) months of the date this order becomes final, respondent shall, absolutely and in good faith, grant pursuant to paragraph II.b of this order, at no minimum price and with no continuing royalties, a perpetual, non-exclusive license of the IVUS Technology Portfolio, together with the right to grant exclusive sub-licenses to any part of such IVUS Technology Portfolio, the right to grant exclusive sub-licenses to manufacture or sell any product pursuant to such IVUS Technology Portfolio, and the right to have IVUS Catheters manufactured and sold on its behalf by any person.

B. Respondent shall license the IVUS Technology Portfolio

1. To Hewlett-Packard Company, within ten days after the date this order becomes final, pursuant to, and in accordance with, the February 21, 1995, agreement between respondent and Hewlett-Packard Company, which agreement is appended to this order in Appendix II; or

2. To a person 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 license is to create an independent competitor in the development, production and sale of IVUS Catheters and to remedy the lessening of competition resulting from the CVIS Acquisition and the SCIMED Acquisition as alleged in the Commission's complaint.

C. For a period of three (3) years after the date this order becomes final, upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall provide to the Licensee information, technical assistance and advice sufficient to effect the transfer to the Licensee of the IVUS Technology Portfolio, and to enable the Licensee to obtain all necessary United States Food and Drug Administration approvals or certifications obtained by CVIS or

Boston Scientific with respect to, and to enable the Licensee to manufacture, all IVUS Catheters manufactured by CVIS at any time during the period commencing twelve (12) months prior to the date this order becomes final and extending through the License Date. Upon reasonable notice and reasonable request from the Licensee, Boston Scientific shall also provide to the Licensee consultation with knowledgeable employees of Boston Scientific and training at the Licensee's facility for a period of time, not to exceed two (2) years, sufficient to satisfy the Licensee's management that its personnel are adequately trained in the design and manufacture of IVUS Catheters. Respondent may require reimbursement from the Licensee for all its direct out-of-pocket expenses incurred in providing the services required by this paragraph II.C of this order.

D. Respondent shall not restrict any person employed by CVIS or SCIMED prior to the date this order becomes final from accepting employment with the Licensee or, following employment of any such person by the Licensee, communicating to the Licensee any intellectual property included in the IVUS Technology Portfolio.

E. Pending the licensing of the IVUS Technology Portfolio, respondent shall take such actions as are necessary to maintain the viability and marketability of the IVUS Technology Portfolio and to prevent the destruction, removal, wasting, deterioration, or impairment of the IVUS Technology Portfolio.

F. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as specified in the Agreement to Hold Separate.

III.

It is further ordered, That respondent shall supply to the Licensee, for such period as the Licensee may request, up to three (3) years, on reasonable commercial terms and provisions, at Boston Scientific's cost or at such lower price as Boston Scientific and the Licensee may otherwise agree, for distribution and sale by the Licensee, such quantities and types of IVUS Catheters as may be requested by the Licensee, upon reasonable notice, from among the various types manufactured and sold by Boston Scientific during the period of such supply arrangement.

IV.

It is further ordered, That, for a period of five (5) years from the date this order becomes final, respondent shall not offer, renew, extend or enter into any exclusive contract or agreement, or enforce directly or indirectly any exclusivity provision thereof, with any manufacturer of IVUS Consoles, relating to the development, manufacture or distribution of such units or relating to compatibility between the IVUS Consoles produced by such manufacturer and IVUS Catheters produced by any person.

V.

It is further ordered, That:

A. If Boston Scientific has not licensed the IVUS Technology Portfolio as required by paragraph II of this order, the Commission may appoint a trustee to license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology. 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, Boston Scientific 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 V 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, divestitures, and licensing. If respondent has not opposed, in writing, including the reasons for opposing, the selection

of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to license the IVUS Technology Portfolio and to divest CVIS together with the SCIMED IVUS Technology.

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 licensing or divestiture required by this order.

4. The trustee shall have:

a. Six (6) months from the date the Commission approves the trust agreement described in paragraph V.B.3. to accomplish the licensing of the IVUS Technology Portfolio, which license shall be subject to the prior approval of the Commission. If, however, at the end of this six (6)-month period, the trustee has submitted a licensing candidate or believes that licensing can be achieved within a reasonable time, the licensing period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; and

b. If the trustee has not licensed the IVUS Technology Portfolio within the six (6)-month period described in paragraph V.B.4.a., above, the trustee shall have an additional twelve (12) months to accomplish the divestiture of CVIS together with the SCIMED IVUS Technology, which divestiture shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12)-month period, the trustee has submitted a divestiture candidate or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the IVUS Technology Portfolio, CVIS and the SCIMED IVUS Technology and

to any other relevant information, as the trustee may request. 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 licensing or divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to license or divest at no minimum price. The licensing or divestiture shall be made in the manner and to a Licensee or acquirer approved by the Commission; provided, however, if the trustee receives *bona fide* offers from more than one entity, and if the Commission determines to approve more than one such entity, the trustee shall license or divest, as applicable, to the entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of 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 licensing or divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 licensing the IVUS Technology Portfolio, or divesting CVIS and the SCIMED IVUS Technology.

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 V.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 licensing or divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the IVUS Technology Portfolio, CVIS or the SCIMED IVUS Technology.

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

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 one (1) percent of the stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in the research, development, or manufacture of IVUS Catheters for sale in the United States;

B. Acquire any assets used for or previously used for (and still suitable for use for) the manufacture of IVUS Catheters for sale in the United States; or

C. Acquire exclusive rights to any patent or other technology relating to the manufacture or sale of IVUS Catheters in the United States.

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 (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and V of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the licensing 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 licensing.

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

IX.

It is further ordered, That respondent, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five day's notice to respondent, shall permit any duly authorized representative(s) 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. Without restraint or interference from respondent, to interview respondent's officers, directors, or employees, who may have counsel present, regarding such matters.

X.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

Chairman Pitofsky recused, and Commissioner Azcuenaga concurring in part and dissenting in part.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Hold Separate") is by and among the Boston Scientific Corporation ("Boston Scientific"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal office and place of business at 1 Boston Scientific Place, Natick, Massachusetts, and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on August 31, 1994, Boston Scientific entered into an agreement with Cardiovascular Imaging Systems, Inc. ("CVIS") providing for the acquisition (hereinafter the "CVIS Acquisition") of the voting securities of CVIS; and

Whereas, CVIS, with its principal office and place of business at 595 North Pastoria Avenue, Sunnyvale, California, manufactures and sells intravascular ultrasound catheters and high frequency imaging units for use with such catheters; and

Whereas, on November 8, 1994, Boston Scientific entered into an agreement with SCIMED Life Systems, Inc. ("SCIMED") providing for the acquisition (hereinafter the "SCIMED Acquisition") of the voting securities of SCIMED; and

Whereas, SCIMED, with its principal office and place of business at One SCIMED Place, Maple Grove, Minnesota, is conducting research and development with respect to IVUS Catheters; and

Whereas, if the Commission accepts the agreement containing consent order ("consent order"), the Commission will place it on the public record for a period of at least thirty (30) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of CVIS, during the period prior to the final acceptance and issuance of the consent order by the Commission (after the thirty (30)-day public comment period), divestiture resulting from any proceeding challenging the legality of the CVIS Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the CVIS Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of CVIS and the Commission's right to seek a viable competitor to Boston Scientific; and

Whereas, the Commission has filed suit in the United States District Court for the District of Columbia (Civil Action No. 1:95 CV00198) seeking a preliminary injunction with respect to the CVIS Acquisition pending an administrative trial, and the Commission has authorized its staff to seek a preliminary injunction with respect to the SCIMED Acquisition pending an administrative trial; and

Whereas, the purpose of the Hold Separate is to:

(i) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending final acceptance or withdrawal of acceptance of the consent order by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules;

(ii) Preserve CVIS as a viable and competitive business, independent of Boston Scientific, and engaged in the research and development, manufacture and sale of IVUS Catheters and IVUS Consoles, pending licensing of the IVUS Technology Portfolio pursuant to paragraph II of the consent order or pending licensing of the IVUS Technology Portfolio or divestiture of CVIS and the SCIMED IVUS Technology pursuant to paragraph V of the consent order; and

(iii) Remedy any anticompetitive effects of the CVIS Acquisition; and

Whereas, Boston Scientific's entering into this Hold Separate shall in no way be construed as an admission by Boston Scientific that the CVIS Acquisition or the SCIMED Acquisition is illegal or would have any anticompetitive effects; and

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

Now, therefore, the Parties agree, and in consideration of the Commission's agreement that, unless it determines to reject the consent order, it will not seek further relief from Boston Scientific with respect to the CVIS Acquisition or the SCIMED Acquisition, except that the Commission may exercise any and all rights to enforce this Hold Separate and the consent order, once it becomes final, and in the event that the required licensing is not accomplished, to appoint a trustee to seek divestiture of CVIS and the SCIMED IVUS Technology, pursuant to the consent order, as follows:

1. Boston Scientific agrees to execute and be bound by the attached consent order.

2. If the Commission accepts the consent order for public comment, Boston Scientific and the Commission will move to stay the action for preliminary injunction pending in United States District Court with respect to the CVIS Acquisition until such time as the Commission withdraws such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules or finally accepts and issues the consent order; and, in the event the Commission finally accepts the consent order, the Commission will move to dismiss the preliminary injunction action.

3. The terms "IVUS Catheters," "IVUS Consoles," "IVUS Technology Portfolio," and "SCIMED IVUS Technology" have the same definitions as in the consent order;

4. Boston Scientific agrees that from the date this Hold Separate is accepted until the earliest of the dates listed in subparagraph 4.a, 4.b, 4.c or 4.d, it will comply with the provisions of paragraph 5 of this Hold Separate:

a. May 26, 1995, if the Commission has not made the consent order final or withdrawn its acceptance of the consent order by that date;

b. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

c. The date the licensing required under paragraph II or V of the consent order is completed;

d. The date the divestiture required under paragraph V of the consent order is completed.

5. Boston Scientific shall hold CVIS as it is constituted on the date the CVIS Acquisition is consummated, separate and apart on the following terms and conditions:

a. CVIS, as defined in paragraph I.B. of the consent order, shall be held separate and apart and shall be operated independently of Boston Scientific (meaning here and hereinafter, Boston Scientific excluding CVIS and excluding all personnel connected with CVIS as of the date this Hold Separate is signed) except to the extent that Boston Scientific must exercise direction and control over CVIS to assure compliance with this Hold Separate or with the consent order.

b. Boston Scientific shall not exercise direction or control over, or influence directly or indirectly, CVIS, the New Board (as defined in subparagraph 5.d), or any of its operations or businesses; provided, however, that Boston Scientific may exercise only such direction and control over CVIS as is necessary to assure compliance with this Hold Separate or with the consent order and provided further that Boston Scientific may (a) direct CVIS to consent that patent litigation between Boston Scientific and CVIS be stayed; (b) direct CVIS to consent to acceptance of SCIMED's position in the arbitration proceeding pending between CVIS and SCIMED; and (c) direct that Boston Scientific and CVIS enter into a non-exclusive, royalty-free cross-license of all their IVUS Catheter patents, provided however no such cross-license shall limit rights conferred to CVIS except to the extent it imposes identical limits on rights conferred to Boston Scientific, and provided further that no such cross-license shall exclude any Boston Scientific patents relating to IVUS Catheters; and following execution of such cross-license, direct that the patent litigation between Boston Scientific and CVIS be dismissed.

c. Boston Scientific shall maintain the marketability, viability and competitiveness of CVIS, and shall not take such action that will cause or permit the destruction, removal, wasting, deterioration or impairment of CVIS, except in the ordinary course of business and except for ordinary wear and tear, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of CVIS.

d. Boston Scientific shall elect a three-person Board of Directors for CVIS (the "New Board"). The New Board shall consist of two persons knowledgeable about IVUS Catheters, one of whom shall be named Chairman of the New Board, and who shall remain independent of Boston Scientific and competent to assure the continued viability and competitiveness of CVIS, and one New Board Member who is also an officer, agent or employee of Boston Scientific (the "Boston Scientific New Board Member"). Except for the Boston Scientific New Board Member, Boston Scientific shall not permit any director, officer, employee or agent of Boston Scientific also to be a director, officer, employee or agent of CVIS. Each New Board member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions of this Hold Separate.

e. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the CVIS Acquisition, defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Boston Scientific shall not receive or have access to, or the use of, any material confidential information of CVIS or the activities of the New Board, not in the public domain. Boston Scientific may receive on a regular basis from CVIS aggregate financial information necessary and essential to allow Boston Scientific to file financial reports, tax returns and personnel reports. Boston Scientific and CVIS may also exchange confidential information, subject to appropriate confidentiality agreements, pursuant to agreements between CVIS and Boston Scientific for joint research or contract manufacture, on arms-length commercial terms, to the extent such agreements would be permissible between competitors under the antitrust laws. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. ("Material confidential information," as used in this Hold Separate, means competitively sensitive or proprietary information not independently known to Boston Scientific from sources other than CVIS or the New Board, as applicable, and includes but is not limited to customer lists, customers, price lists, prices, individual transactions, marketing methods, patents, technologies, processes, or other trade secrets).

f. Except as permitted by this Hold Separate, the New Board member appointed by Boston Scientific ("Boston Scientific New Board Member") who is also an officer, agent, or employee of Boston Scientific shall not receive any CVIS material confidential information and shall not disclose any such information obtained through his or her involvement with CVIS to Boston Scientific or use it to obtain any advantage for Boston Scientific. The Boston Scientific New Board Member shall participate in matters that come before the New Board only for the limited purpose of considering any capital investment of over one million dollars ($1,000,000), approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing any material transactions described in paragraph 5.g, and carrying out Boston Scientific's responsibilities under the Hold Separate and the consent order. Except as permitted by the Hold Separate, the Boston Scientific New Board Member shall not participate in any other matter.

g. All material transactions, out of the ordinary course of business and not precluded by paragraph five hereof, shall be subject to a majority vote of the New Board (as defined in paragraph 5.d hereof).

h. Boston Scientific shall not change the composition of the New Board unless the Chairman of the New Board consents, or unless it is necessary to do so in order to assure compliance with this Hold Separate or with the consent order. The Chairman of the New Board shall have the power to remove members of the New Board for cause and to require Boston Scientific to appoint replacement members of the New Board. Boston Scientific shall not change the composition of the management of CVIS except that the New Board shall have the power to remove management employees for any legal reason. If the Chairman ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraph 5.d. Boston Scientific shall circulate to the management employees of CVIS and appropriately display a notice of the Hold Separate and the Consent Agreement at a conspicuous place at all CVIS offices and facilities.

i. All earnings and profits of CVIS shall be retained separately by CVIS. If necessary, Boston Scientific shall provide CVIS with sufficient working capital to operate at current rates of operation, upon commercially reasonable terms.

j. Should the Federal Trade Commission seek in any proceeding to compel Boston Scientific to divest itself of CVIS or SCIMED or to compel Boston Scientific to divest any assets or businesses of CVIS and SCIMED that it may hold, or to seek any other injunctive or equitable relief, Boston Scientific shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the CVIS Acquisition or the SCIMED Acquisition. Boston Scientific also waives all rights to contest the validity of this Hold Separate.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request and five day's notice to Boston Scientific, Boston Scientific shall permit any duly authorized representative(s) of the Commission:

a. Access during the office hours of Boston Scientific 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 Boston Scientific or CVIS relating to compliance with this Hold Separate;

b. Without restraint or interference from Boston Scientific, to interview Boston Scientific's or CVIS' officers, directors or employees, who may have counsel present, regarding any such matters.

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

APPENDIX II

February 21, 1995 Agreement Between Boston Scientific Corporation and Hewlett-Packard Company

AGREEMENT

Agreement this 21st day of February, 1995 between Boston Scientific Corporation ("BSC") and Hewlett-Packard Company ("HP"). This Agreement supersedes and replaces the Agreement of February 17th, 1995 which is of no further effect. The terms "HP" and "BSC" include all their subsidiaries and successors throughout the term of this Agreement.

1. The Parties desire to enter into this Agreement to establish their respective rights in IVUS (intravascular ultrasound)-related patents and technology upon the acquisition by BSC of Cardiovascular Imaging Systems, Inc. ("CVIS") and SCIMED Life Sciences, Inc. ("SCIMED"). BSC will promptly submit this Agreement to the Federal Trade Commission ("FTC") in conjunction with and as a confidential exhibit to BSC's submission of a proposed consent order in contemplated settlement of FTC proceedings relating to the CVIS and SCIMED acquisitions. Both parties hereto will be bound by this Agreement as of the date of its execution; provided, however, that the licenses granted herein below will be effective upon their approval by the FTC (the "Effective Date"). In the event the FTC does not provisionally accept said consent order for public comment, this

Agreement shall be null and void and of no further effect. In the event the FTC provisionally accepts said consent order for public comment, BSC will not solicit, entertain or negotiate with any other party concerning any other such agreement or proposal relating to said contemplated settlement at any time during the public comment period or prior to final FTC action upon said consent order. In the event the FTC does not finally accept said consent order, and thereupon approve said licenses, BSC agrees that it will negotiate in good faith exclusively with HP during the first [ ] days following such FTC action in an effort to arrive at license terms satisfactory to HP and the FTC.

2. BSC hereby grants to HP, as of the Effective Date, a license to certain patents and technology (the "Licensed Technology") for use in the manufacture and sale of Licensed Products, as defined below. The Licensed Technology shall include all issued patents of BSC, SCIMED and CVIS used for the development, manufacture and sale of Licensed Products, including but not limited to, those listed on Exhibit A and all existing know-how of SCIMED and CVIS that is used or intended for use in the development, manufacture and sale of Licensed Products. BSC further agrees that it will not in perpetuity assert any of its rights (including but not limited to patents derived from CVIS and SCIMED) under issued patents and patents which subsequently issue on presently pending applications and continuations thereof, or patent rights arising from inventions disclosed to BSC, CVIS or SCIMED prior to the Effective Date, in a way that would prevent HP from practicing any of the Licensed Technology to manufacture, use or sell Licensed Products. "Licensed Products" are ultrasound imaging catheters, imaging cores and imaging guidewires which are designed for diagnostic or therapeutic use, or both, in the human coronary and peripheral vascular system. This definition includes and is no narrower than the collective claims of the patents (for coronary and peripheral vascular applications) listed on Exhibit A.

3. (a) BSC hereby grants to HP as of the Effective Date a co-exclusive, irrevocable, worldwide license to the Licensed Technology to make, use and sell the Licensed Products, under the terms set forth in paragraph six, below. HP shall have the right to have Licensed Products made on its behalf by a third party, so long as for a period of [ ] HP does not directly or indirectly sell such Licensed Product back to such third party or its affiliates or use sales support services

of such third party or its affiliates with respect to such Licensed Product. Commencing on the [ ], HP may not directly or indirectly contract with the same third party for both the manufacture and sale of all or substantially all of the Licensed Products.

(b) HP hereby grants to BSC as of the Effective Date a non-exclusive, irrevocable, worldwide, royalty-free license to make, use and sell in any field of use under the SIVUS patents listed on Exhibit B.

4. Within [ ] after the Effective Date, BSC will deliver to HP originals or copies of such tangible IVUS and IVUS-related property of CVIS and/or SCIMED as HP may at its option, with reasonable notice to BSC, designate, including, but not limited to, invention disclosures, product specifications, design drawings, works in process, inventory, process sheets and IVUS customer lists of BSC and CVIS. BSC will provide to HP assistance in acquiring the capability to manufacture such Licensed Products as HP may at its option, with reasonable notice to BSC, designate, including manufacturing planning and start up, which will include reasonable access to CVIS's, BSC's and SCIMED's IVUS production facilities and personnel, during the [ ] period commencing with the Effective Date.

5. The provisions of this paragraph five shall become effective on the Effective Date. If HP markets a product which BSC considers to infringe BSC's patent rights (a "Questioned Product") based on patents relating to inventions made during the period beginning on the Effective Date and ending on the [ ] of the Effective Date (the "Patent Rights"), and BSC gives notice to HP to that effect, then HP shall have the right to elect in writing within [ ] of such notice to invoke this paragraph for such Questioned Product. For each Questioned Product for which such election has been made, HP shall have [ ] from the date of such election (the "Amnesty Period") to design around such patent rights. BSC agrees not to bring suit during the Amnesty Period for such alleged infringement. If HP discontinues the marketing of such Questioned Product within the Amnesty Period, BSC agrees to waive any claim for damages based on infringement of [ ] Patent Rights by such Questioned Product. At any time during said Amnesty Period for a Questioned Product, HP shall have the right to elect to negotiate with BSC for a license to permit manufacture, use and sale of such Questioned Product under the respective [ ] Patent Rights, and the parties agree to negotiate

forthwith in good faith with respect thereto. Such license shall be [ ] All Questioned Products so licensed which are manufactured, used or sold by HP, including those sold during the respective Amnesty Period, shall be subject to such royalty.

6. As and for its total compensation to BSC for the licenses and technology set forth herein, HP agrees:

(a) To pay to BSC a one-time license fee of [ ] within [ ] of the Effective Date; and
(b) To pay to BSC the sum of [ ] on [ ]
(c) To pay to BSC the sum of [ ] on [ ]; and
(d) To pay to BSC [ ] before the end of the month following the dates on which [ ] exceeds the following amounts: [ ] provided that none of the payments provided for by this subparagraph shall be due if the sales threshold requiring such payment has not been reached on or before the [ ]

7. The provisions of this paragraph seven shall become effective on the Effective Date. The parties agree that during a period commencing with FDA regulatory approval or product introduction of each device released, whichever first occurs, and ending on the [] each party will provide on all of its IVUS consoles offered to its customers open interfaces to the IVUS products of the other party, whether currently owned or acquired in the future, provided the native console for such device is compatible with the Licensed Technology. For products already in existence, each party shall cooperate as requested by the other party in furthering this open interface objective. Each party has the option of upgrading its own consoles. Each party will take all reasonable and appropriate steps to assure that in interfacing such party's devices to the other party's consoles, the other party suffers no delay times or other disadvantage. These time-to-market safeguards will mean that, in interfacing such party's devices to the other party's consoles, no later than [ ] prior to such party's commercial introduction of any new device, all necessary technical specifications, regulatory information and the like shall be provided to the other party for the purpose of interface. Each party agrees to restrict use of confidential information identified as such and provided by the other party pursuant to this paragraph for the purpose of enabling interface design. Nothing herein shall restrict the receiving party from employing information already in its possession,

information subsequently developed independently by the receiving party, information provided by third parties without violating a confidentiality obligation, or, for interface information, more than [] from disclosure and, for other information, as set forth at the time of disclosure.

8. The provisions of this paragraph eight shall become effective on the Effective Date.

(a) BSC agrees that, at HP's option, BSC shall make available to HP all BSC IVUS Catheters (as defined below) at a price which does not exceed [ ]

(b) BSC will supply to HP as demonstration units at [ ] of all BSC IVUS Catheters purchased by HP, and shall mark such demonstration units as samples.

(c) BSC shall begin accepting regular orders from HP within [ ] of the Effective Date [ ] provided in paragraph one. The parties shall define and prepare to implement an orderly transition from the relationship of the parties pursuant to the agreement dated June 22, 1992 between them to the relationship defined by this Agreement.

(d) No later than [ ] after the Effective Date, and [ ] to the beginning of each [ ] calendar year thereafter, HP shall provide BSC with a forecast of its expected requirements of BSC IVUS Catheters. Such forecasts shall be updated by HP on a [ ] basis. HP shall be obligated to purchase the quantity of BSC IVUS Catheters forecast as its projected requirements for the [ ] immediately following each such forecast, provided that in each forecast HP may [ ] BSC shall make all best efforts to meet HP's requirements [ ], and HP shall make all best efforts to purchase the forecasted volumes in each such year.

(e) After the [ ] anniversary of the Effective Date, HP's purchases of BSC IVUS Catheters in [ ] ending on an anniversary of such effective date shall be restricted in the [ ] to no more than [ ], and in to no more than [ ], in order to accommodate residual customer demand for such catheters.

(f) *"BSC IVUS Catheters"* means all IVUS catheters listed by BSC on any price list, and, to the extent otherwise marketed by BSC to the public, any intravascular ultrasound catheter; provided, however, that BSC IVUS Catheters does not include removable imaging cores or removable imaging guidewires, and does not include products acquired or licensed by BSC from a third party

subsequent to the Effective Date. Current BSC and CVIS IVUS catheters are listed on Exhibit C.

(g) [ ]

9. HP may, without the consent of BSC, grant exclusive sublicenses, assignments, sales or other [ ] transfers effective any time beginning [ ] after the Effective Date to the Licensed Technology for use in the manufacture and sale of Licensed Products; provided that HP shall not grant such sublicenses to a single person the effect of which grant would be to cause HP, together with other current or future HP sublicensees, to retain less than substantial rights to the Licensed Technology, except as part of a sale of all or substantially all of HP's IVUS console and IVUS catheter business. BSC agrees that in the event of such a transfer of rights by HP, the benefit of BSC's obligation not to assert its intellectual property rights pursuant to paragraph two above shall be transferable therewith and in the event of such a transfer of rights by BSC, such rights shall be transferred subject to such obligation.

EXHIBIT A
[Non-public information]

EXHIBIT B
[Non-public information]

EXHIBIT C
[Non-public information]

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA, CONCURRING IN PART AND DISSENTING IN PART

I have reason to believe that the proposed acquisitions by Boston Scientific of CVIS and SciMed would be unlawful, and the consent agreement appears likely to provide an appropriate remedy for the violations. I disagree with the willingness of the Commission, at the behest of the respondent, to bargain away its standard processes. In particular, although Boston Scientific proffered no justification, the Commission agreed to curtail the public comment period from 60 days, as provided in the Commission's Rules of Practice, to 30 days. It should go without saying that the requirements of the Commission's Rules of Practice are not a proper subject for negotiation.[1] To the extent that the Commission agreed to reduce the length of the period for public comment and no good cause for that departure from the Commission's rules having been shown, I dissent.

In addition, the Commission acceded to a date certain for expiration of the hold separate agreement, the effect of which is to ensure completion of the Commission's review by that time.[2] It is appropriate that the Commission conduct its review of proposed mergers, indeed, all its business, expeditiously, consistent with a careful review of the merits and, on a proper showing, the Commission also should grant expedited treatment for particular matters.[3] The Commission's interest in completing its review of this case expeditiously is commendable, but its agreement to the date certain, in my view, is not. On occasion during the public comment period, the Commission receives information or identifies issues that warrant further investigation. Any such investigation should be conducted expeditiously, but it may not be possible to complete it by the date certain to which the Commission originally agreed. A

[1] The Commission's Rules of Practice have the force and effect of law and should not be taken lightly. Departing from the rules without justification leads to inequality of treatment and leaves the Commission open to charges of arbitrary and capricious decision making. *Cf.* the Tunney Act, 15 U.S.C. 16 (60-day public comment period for Department of Justice antitrust consent orders not to be shortened except by the court on a showing of extraordinary circumstances and that such "shortening is not adverse to the public interest." 15 U.S.C. 16(d).

[2] A hold separate agreement preserves a viable and competitive business, independent of the acquirer, in part to ensure the Commission's ability to require a divestiture. When the hold separate agreement expires, the parties are free to combine their assets and businesses, making it more difficult for the Commission to obtain effective relief different from that provided in the proposed consent agreement.

[3] Expedited treatment for one respondent means moving that matter to the front of the queue. The Commission ordinarily has required a showing that such treatment is warranted.

willingness to act expeditiously is quite different from acquiescing in advance to a "drop dead date" that potentially leaves the Commission unable fully to consider new issues, conditions or information that may arise between the time it commits to the date certain and the time that date arrives.

IN THE MATTER OF

ORCHID TECHNOLOGY

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

Docket C-3574. Complaint, May 1, 1995--Decision, May 1, 1995

This consent order prohibits, among other things, a California-based company from falsely representing that any of its computer peripheral products had been rated, reviewed or endorsed by any person or publication, and from misrepresenting the results of any test, study or evaluation in connection with marketing its computer peripheral equipment. The consent order also requires the respondent to possess competent and reliable evidence to substantiate performance claims.

Appearances

For the Commission: *Matthew D. Gold* and *Jeffrey A. Klurfeld.*

For the respondent: *Timothy Roake, Fenwick & West*, Palo Alto, CA.

COMPLAINT

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

PARAGRAPH 1. Respondent Orchid Technology is a California corporation, with its principal office or place of business at 45365 Northport Loop West, Fremont, California.

PAR. 2. Respondent has manufactured, labelled, advertised, offered for sale, sold, and distributed peripheral products for personal computers. Among respondent's products is the "Celsius/VLB Windows accelerator" ("Celsius"), which is a graphics accelerator board. A graphics accelerator board increases the speed at which a personal computer displays complex graphical images and improves the quality of the graphics. The Celsius is powered by the AGX015 graphics accelerator chip, which respondent does not manufacture.

Several competitors of Orchid also use the AGX015 graphics accelerator chip to power graphics accelerator boards that they market.

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 and promotional materials for the Celsius, including but not necessarily limited to the attached Exhibits A-C. These advertisements and promotional materials contain the following statements:

(a) "THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."
Windows Magazine (U.K. Version), August 1993
(Exhibits A-C)
(b) "OUTPERFORMS MANY ACCELERATORS TWICE ITS PRICE."
Windows Magazine (U.K. Version), August 1993
(Exhibits A-C)

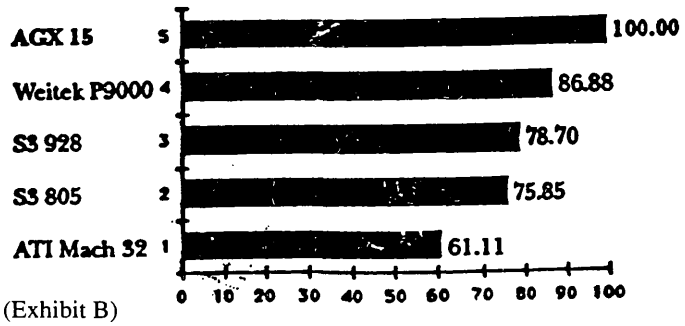
PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that the cited magazine described the Celsius in the manner represented.

PAR. 6. In truth and in fact, the cited magazine did not describe the Celsius in the manner represented. The statement set out in paragraph four (a) did not appear in the cited magazine or elsewhere in reference to the Celsius. The statement set out in paragraph four (b) appeared in the cited magazine but referred to a graphics accelerator board manufactured by one of Orchid's competitors. The Celsius was not even one of the products reviewed in the cited magazine. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. The advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the attached Exhibits B and C, contain the following statements and depictions:

(a) WINDOWS: Enjoy the speed of the Celsius (AGX 15) with it's 32-bit GUI accelerator chip and VRAM for peak acceleration.

PERFORMANCE: VidMark Scores (Higher number indicates better performance.) VidMark consists of five real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.



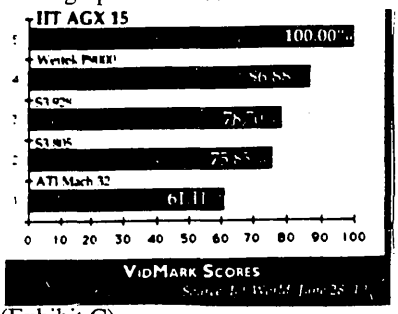
(Exhibit B)

(b) PERFORMANCE

In a recent VidMark performance test, Celsius' chip, the AGX 15, sped to victory in VidMark's latest comparison. VidMark is a benchmark that uses four real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

BOARD

The Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and high performance VRAM.



(Exhibit C)

PAR. 8. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph seven, including but not necessarily limited to the attached Exhibits B and C, respondent has represented, directly or by implication, that the Celsius achieved the top score of "100.00" in an objective test comparing several graphics accelerator boards.

PAR. 9. In truth and in fact, the Celsius did not achieve the top score of "100.00" in an objective test comparing several graphics accelerator boards. A competitor's product, which uses the same graphics accelerator chip that is in the Celsius, achieved that score.

Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. In providing the advertisements and promotional materials referred to in paragraph four to computer dealers, respondent has furnished the means and instrumentalities to those dealers to engage in the acts and practices alleged in paragraphs four through nine.

PAR. 11. The acts or practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

ORCHID

Celsius/VLB

GRAPHICS ACCELERATOR

WINDOWS
Enjoy the speed of the Celsius with its 32-bit GUI accelerator chip and VRAM for peak acceleration.

100Hz REFRESH
Create your work on a non-flickering screen in a Windows or AutoCAD environment—the Celsius' refresh rate exceeds VESA standards.

MASTERCAD
Quick and powerful, MasterCAD drivers provide speed, bird's-eye view, 24-bit rendering and more.

16 MILLION COLORS
Enjoy the colors and speed of our 24-bit driver. It's so fast and realistic, it looks like a picture.

MULTIMEDIA
With Orchid's bi-directional feature connector, hardware and drivers, the Celsius provides top notch support for multimedia environments.

PERFORMANCE
In a recent VidMark performance test Celsius sped to victory. VidMark is a benchmark that uses four real world Windows applications which include WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

"FASTEST DRIVER TESTED TO DATE ... IN THE CADalyst GRAPHICS BENCHMARK"

"THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."

"ORCHID PERFORMS MANY ACCELERATORS TWICE ITS PRICE."

EXHIBIT 5A
ORCHID

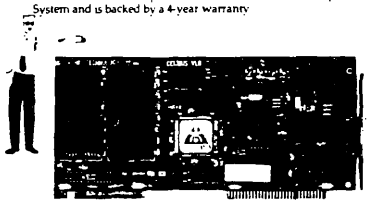
EXHIBIT A

Celsius/VLB

FASTEST WINDOWS ACCELERATOR FOR REAL WORLD APPLICATIONS

BOARD

Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and *high performance* VRAM. It ships standard with 1MB of memory and is upgradeable to 2MB. Celsius/VLB requires a 486 VL-Bus System and is backed by a 4-year warranty.



SPECIFICATIONS

Enhanced Windows Drivers
With a maximum of 1600 x 1200 resolution and a color depth of 800 x 600 x 16 million colors, the Celsius/VLB is the choice for the casual and professional user alike.

Multimedia Ready
Celsius/VLB's bi-directional feature connector, hardware and drivers gives you *top-of-the-line* support for *multimedia* environments like digital video.

Advanced Graphics Instructions
The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible.

Our *Line Draw, BitBlt* and *Polygon Fill with reference pattern* features are the engines powering this card. At 4 operands per instruction the Celsius/VLB displays true color, photo-realistic quality images.

Full Driver Support
The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

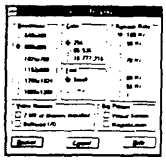
- ▲ AutoCAD
- ▲ AutoShade
- ▲ Windows 3.x
- ▲ OS/2 2.1
- ▲ WordPerfect
- ▲ 3D Studio
- ▲ MicroStation

AutoCAD Drivers
Orchid's MasterCAD Driver, a customized version of the "Aquila Plus," was recently rated by *CADalyst*, as the "fastest driver tested to date with the *CADalyst* Graphics Benchmark." Your benefit is increased speed as well as advanced features such as bird's-eye view, real-time panning and zooming, and 24-bit rendering.

Compatible Monitors
The Celsius/VLB is compatible with multi-frequency analog monitors, the IBM 8513, the IBM 8514 Display and compatibles.

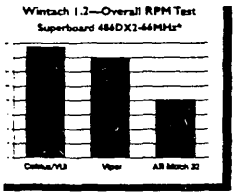
FEATURES

Custom Orchid Display Setup
Orchid's custom display setup allows you to configure your video drivers on the fly. Simply click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!



Technical Support
We offer free technical phone support Mon - Fri, from 7 a.m. - 5 p.m. PST at (510) 683-0325. Additional software drivers and upgrades can be obtained through the Orchid 24-hour Bulletin Board Service at (510) 683-0327 (1200/2400 BPS), or (510) 683-0555 (9600 BPS).

Extras
- ▲ Our Automatic Network Installer allows a *single installation to the server* which updates all Orchid card drivers *without affecting other cards*.
- ▲ VESA BIOS 1.2 compliant
- ▲ Requires 386/486 VL-Bus system or Pentium



Resolution, Colors and Vertical Refresh Rate Support

Resolution	Minimum Memory Configuration	Maximum Colors	Vertical Refresh
1280 x 1024	1 MB	16	45, 56, 70*
1152 x 900	1 MB	16	45, 56, 90*
1024 x 768	1 MB	256	45, 60, 70, 76
800 x 600	1 MB	256	56, 60, 70, 90, 100*
800 x 600	1 MB	65,536	56, 60, 65, 90*
640 x 480	1 MB	256	60, 70, 90, 100*
640 x 480	1 MB	65,536	60, 70, 90, 100*
640 x 480	1 MB	16.8 million	60, 70, 100*
1600 x 1200*	2 MB	16	45, 70
1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	2 MB	16.8 million	60, 70*

* Interl. Feature

HEADQUARTERS
Orchid Technology
45365 Northport Loop West
Fremont, CA 94538
Tel: (510) 683-0300
800-7-ORCHID

Orchid France S.A.R.L.
Colombes, France
Tél: (33-1-47 80 70 50

Orchid Technology GmbH
Meerbusch, Germany
Tel. 49 2132 80071

Orchid (Europe) Ltd.
Basingstoke, UK
Tel: (0256) 478898

A-2

EXHIBIT B

CELSIUS/VLB

WINDOWS: Enjoy the speed of the Celsius (AGX 15) with it's 32-bit GUI accelerator chip and VRAM for peak acceleration.

90Hz REFRESH: View a non-flickering screen in Windows or AutoCAD, higher than VESA standards. It's incredible!

MASTERCAD: Quick and powerful, MasterCAD drivers will give you speed, bird's eye view, 24-bit regen and more.

16 MILLION COLORS: Enjoy the colors and the speed of our 24 bit driver. It's fast and so realistic, it looks like a picture.

MULTIMEDIA: Our bi-directional feature connector, hardware engine and drivers are compatible with Video for Windows and other multimedia products.

PERFORMANCE: VidMark Scores (Higher number indicates better performance.) VidMark consists of five real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

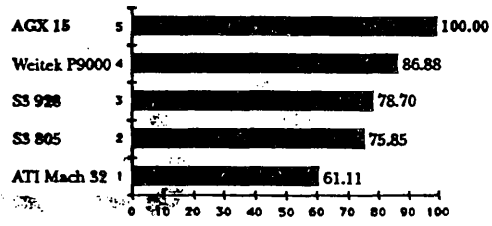


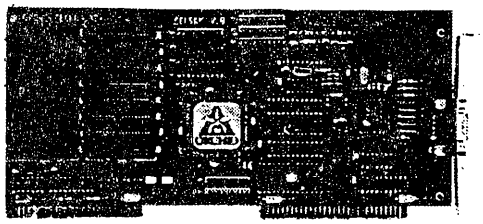
EXHIBIT B

EXHIBIT B

Celsius/VLB Technical Specifications

"The Best Price/Performance VRAM based board in the World."

The Celsius/VLB uses the IIT AGX015 graphics processor and high performance VRAM. It ships standard with 1MB of memory and is upgradeable to 2MB.



Enhanced Graphics Instructions

The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible

▸ Line Draw, BitBlt and Polygon Fill with reference pattern is what makes this card so fast. Also, with an incredible 4 operands per instruction, our Celsius displays fast true color photo-realistic quality images.

Full Driver Support

The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

- ▸ AutoCAD
- ▸ AutoShade
- ▸ Windows 3.x
- ▸ WordPerfect
- ▸ 3D Studio
- ▸ MicroStation

Enhanced Windows Drivers

▸ With a maximum of 1600x1200 resolution and a color depth of 800x600x16 million colors, the Celsius is the choice for the casual and professional alike.

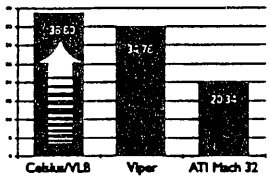
▸ Automatic Network Installation

Multimedia Ready

The Celsius has a bi-directional Feature Connector that is compatible with Video For Windows and many other popular multimedia products.

Wintach 1.2—Overall RPM Test

*Superboard 486DX2-66MHz**



AutoCAD Drivers

▸ Orchid's MasterCAD Driver delivers incredible speed plus advanced features such as bird's eye view, real-time zooming, 24-bit regen and more!

Additional Information

▸ Compatible with multi-frequency analog monitors, single-frequency analog (e.g. IBM 8513), IBM 8514 Display or compatibles.

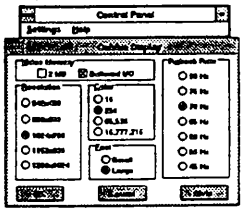
▸ Four year warranty

▸ VESA BIOS 1.2

▸ Requires 486 VL-Bus system

Custom Orchid Display Setup

▸ Orchid's custom display setup allows you to configure your video drivers "on the fly." Just click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!



Technical Support

Free technical phone support is available Monday - Friday from 7 a.m. - 5 p.m. Pacific Standard Time. Additional software drivers and upgrades can be obtained through the Orchid 24-hour Bulletin Board Service at (510) 683-0327 (1200/2400 BPS), or (510) 683-0555 (9600 BPS).

Resolution, Colors and Vertical Refresh Rate Support

Resolution	Minimum Memory Configuration	Maximum Colors	Vertical Refresh
1280 x 1024	1 MB	16	45, 56
1152 x 900	1 MB	16	45, 56
1024 x 768	1 MB	256	45, 60, 70, 76
800 x 600	1 MB	256	56, 60, 70, 90*
800 x 600	1 MB	65,536	56, 60, 65
640 x 480	1 MB	65,536	60,70, 90*
640 x 480	1 MB	16.8 million	60, 70
1600 x 1200*	2 MB	16	45
1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	2 MB	16.8 million	60

* New Features

ORCHID

MICROSOFT WINDOWS COMPATIBLE

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Fax: 49 2132 80074

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Fax: (33)-1-47 82 51 79

Orchid (Europe) Ltd.
Unit 5, Cartel Industrial Centre
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Hants RG24 0UG, UK
Tel: (0256) 479888
Fax: (0256) 64222

EXHIBIT C

ORCHID

Celsius

WINDOWS ACCELERATOR

WINDOWS
Enjoy the speed of the Celsius (AGX 15) with its 32-bit GUI accelerator chip and VRAM for peak acceleration.

90Hz REFRESH
Create your work on a non-flickering screen in a Windows or AutoCAD environment–the Celsius' refresh rate exceeds VESA standards.

MASTERCAD
Quick and powerful, MasterCAD drivers provide speed, bird's-eye view, 24-bit rendering and more.

16 MILLION COLORS
Enjoy the colors and speed of our 24-bit driver. It's so fast and realistic, it looks like a picture.

MULTIMEDIA
With Orchid's bi-directional feature connector, hardware and drivers, the Celsius provides top notch support for multimedia environments.

PERFORMANCE
In a recent VidMark performance test, Celsius' chip, the AGX 15, sped to victory in VidMark's latest comparison. VidMark is a benchmark that uses four real world Windows applications including WordPerfect 5.2, Excel 4.0, CorelDraw 3.0, and Freelance 2.0.

"FASTEST DRIVER TESTED TO DATE WITH THE CADALYST GRAPHICS BENCHMARK"

"THE FASTEST WINDOWS ACCELERATOR IN REAL WORLD APPLICATIONS."

"OUTPERFORMS MANY ACCELERATORS TWICE ITS PRICE."

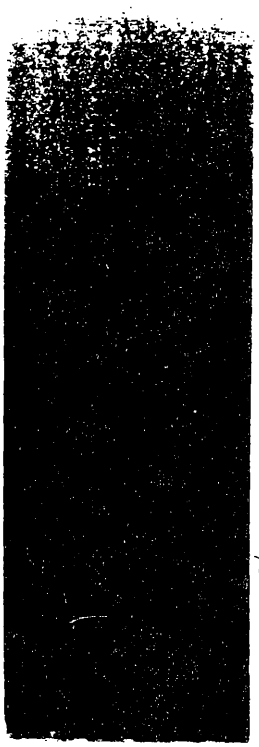


EXHIBIT C

EXHIBIT C

Celsius/VLB
WINDOWS ACCELERATOR

BOARD

The Celsius/VLB uses the IIT AGX015 graphics processor (see graph below) and high performance VRAM. It ships standard with 1MB of memory and is upgradeable to 2MB. Celsius requires a 486 VL-Bus System and is backed by a 4-year warranty

SPECIFICATIONS

Enhanced Windows Drivers
With a maximum of 1600 x 1200 resolution and a color depth of 800 x 600 x 16 million colors, the Celsius is the choice for the casual and professional user alike.

Multimedia Ready
Celsius' bi-directional feature connector, hardware and drivers gives you top-of-the-line support for multimedia environments like digital video.

Advanced Graphics Instructions
The Celsius/VLB implements hardware-based graphics instructions for the highest performance possible.

Our *Line Draw, BitBlt* and *Polygon Fill with reference pattern* features are the engines powering this card. At 4 operands per instruction the Celsius displays true color, photo-realistic quality images—*FAST.*

Full Driver Support
The Celsius/VLB is supported by hundreds of applications right out of the box using VESA, VGA and other high quality drivers, such as the following:

- ▲ AutoCAD
- ▲ AutoShade
- ▲ Windows 3.x
- ▲ WordPerfect
- ▲ 3D Studio
- ▲ MicroStation

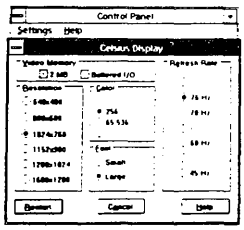
AutoCAD Drivers
Orchid's MasterCAD Driver, also known as the Aquila Extra, was recently rated by *CADalyst*, as the "fastest driver tested to date with the *CADalyst* Graphics Benchmark."

Your benefit is increased speed as well as advanced features such as bird's-eye view, real-time panning and zooming, and 24-bit rendering.

Compatible Monitors
The Celsius is compatible with multi-frequency analog monitors, the IBM 8513, the IBM 8514 Display and compatibles.

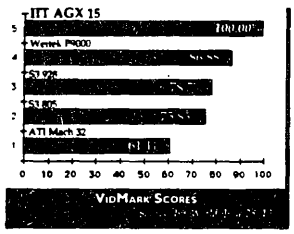
FEATURES

Custom Orchid Display Setup
Orchid's custom display setup allows you to configure your video drivers "on the fly." Simply click on the Orchid icon, choose the resolution, colors, font size or refresh rate and you're ready to go!



Technical Support
We offer free technical phone support Mon. - Fri. from 7 a.m. - 5 p.m. PST at (510) 683-0323. Additional software drivers and upgrades can be obtained through the Orchid 24-hour Bulletin Board Service at (510) 683-0327 (1200/2400 BPS), or (510) 683-0555 (9600 BPS).

Extras
- ▲ Our Automatic Network Installation puts you on the network in no time
- ▲ VESA BIOS 1.2
- ▲ Requires 486 VL-Bus system



Resolution, Colors and Vertical Refresh Rate Support

Resolution	Minimum Memory Configuration	Maximum Colors	Vertical Refresh
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800 x 600	1 MB	65,536	56, 60, 65
640 x 480	1 MB	65,536	60,70, 90*
640 x 480	1 MB	16.8 million	60, 70
1600 x 1200*	**2 MB**	**16**	**45**
1280 x 1024	2 MB	256	45, 56
1024 x 768	2 MB	65,536	45
800 x 600*	2 MB	16.8 million	60

* New Features

C-2

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Tel: (0256) 479898
Fax: (0256) 64222

ORCHID

MICROSOFT WINDOWS COMPATIBLE

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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. Respondent Orchid Technology is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located in the City of Fremont, State of California.

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

DEFINITION

For purposes of this order, the term *"computer peripheral equipment"* shall mean graphics cards, sound cards, adaptor cards, memory expansion cards, or other hardware products that enhance the capability and performance of personal computers.

I.

It is ordered, That respondent Orchid Technology, 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, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, 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 product has been rated, endorsed, recommended, reviewed or evaluated by any person or publication, unless such is the case.

II.

It is further ordered, That respondent Orchid Technology, 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, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, interpretations or purpose of any test or study.

III.

It is further ordered, That respondent Orchid Technology, 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, labelling, advertising, promotion, offering for sale, sale, or distribution of the Celsius Windows Accelerator, or other computer peripheral equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the performance or attributes of any such product, unless such representation is true and, 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. For purposes of this provision, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

IV.

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

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

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

V.

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 corporation which may affect compliance obligations arising under this order.

VI.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its officers, agents, licensees, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, or who is in communication with customers or prospective customers, or who has any responsibilities with respect to the subject matter of this order.

VII.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon them, 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.

IN THE MATTER OF

TELE-COMMUNICATIONS, 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-3575. Complaint, May 3, 1995--Decision, May 3, 1995

This consent order permits, among other things, Tele-Communications, Inc. ("TCI") to complete its acquisition of TeleCable, on the condition that it divest either its own Columbus cable TV assets, or those of TeleCable, within twelve months. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete a sale of one of the systems. In addition, TCI, for ten years, is required to obtain Commission approval before acquiring any cable TV system in the Columbus, GA., area.

Appearances

For the Commission: *Ronald B. Rowe* and *Jill M. Frumin.*

For the respondent: *Joe Sims, Jones, Day, Reavis & Pogue*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Tele-Communications, Inc. ("TCI"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire TeleCable Corporation ("TeleCable") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. TCI

PARAGRAPH 1. Respondent TCI is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of Delaware, with its principal executive offices located at 5619 DTC Parkway, Englewood, Colorado.

PAR. 2. Respondent TCI is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. TELECABLE

PAR.3. TeleCable is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal executive offices located at Dominion Tower, Suite 900, 999 Waterside Drive, Norfolk, Virginia.

PAR. 4. TeleCable is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED MERGER

PAR. 5. Respondent TCI entered into a merger agreement with TeleCable in which TCI and TeleCable will exchange voting securities and TeleCable shareholders will receive TCI common and preferred stock worth approximately one billion dollars ("the merger").

IV. THE RELEVANT MARKETS

PAR. 6. The relevant line of commerce in which to analyze the effects of the merger is the distribution of multichannel video programming by cable television.

PAR. 7. The relevant geographic area in which to analyze the effects of the merger is the Columbus, Georgia, area.

PAR. 8. The relevant line of commerce is highly concentrated with only three cable television providers in the relevant geographic area. TCI and TeleCable are the two largest cable television providers in the relevant geographic area in terms of the number of subscribers and the number of homes passed.

PAR. 9. Respondent TCI is an actual and potential competitor of TeleCable in the relevant line of commerce in the relevant geographic area.

PAR. 10. Timely and effective entry in the relevant line of commerce in the relevant geographic area is unlikely.

V. EFFECTS OF THE MERGER

PAR. 11. The effects of the merger may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual competition between TCI and TeleCable to serve existing residential neighborhoods, hotels, and apartment complexes will be eliminated;

b. Actual competition between TCI and TeleCable to serve new residential neighborhoods, hotels, and apartment developments will be eliminated; and

c. Actual and potential competition between TCI and TeleCable to extend their cable systems throughout the relevant geographic area will be eliminated.

VI. VIOLATIONS CHARGED

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

PAR. 13. The merger described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the common stock of TeleCable Corporation by Tele-Communications, Inc., and the proposed merger of TeleCable Corporation into TCI Communications, Inc., an entity within Tele-Communications, Inc., hereinafter sometimes referred to as "respondent," and 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, 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 Tele-Communications, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado.

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 *"TCI"* means (1) Tele-Communications, Inc. and its predecessors, successors and assigns, subsidiaries, and

divisions, and their respective directors, officers, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that Tele-Communications, Inc. controls, directly or indirectly, and their successors and assigns, and their respective directors, officers, agents, and representatives.

B. *"Control"* means (i) the ability or right, contractual or otherwise, to direct the management decisions of an entity, or (ii) an ownership interest of 50% or greater unless a person or entity other than respondent has the right to direct the management decisions of such entity.

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

D. *"Columbus Cable Television System Assets"* means either TCI's Cable Television System or TeleCable's Cable Television System now operating in Muscogee and Harris Counties, Georgia, including all properties, privileges, rights, interests and claims, real and personal, tangible and intangible, of every type and description that are owned, leased, held or used principally in the provision of Cable Television Service in Muscogee and Harris Counties, including the governmental permits, franchises, intangibles, equipment and real property.

E. *"Designated Columbus Cable Television System"* means the Cable Television System chosen by TCI pursuant to paragraph III B. 2. or if TCI fails to designate a Cable Television System pursuant to, and within the time limits of, paragraph III B. 2., the Columbus Cable Television System Assets.

F. *"Cable Television Service"* means the delivery of various video entertainment and informational programming via a cable television system.

G. *"Cable Television System"* means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community.

H. *"The Relevant Geographic Area"* means the counties of Muscogee and Harris in the State of Georgia.

I. *"Competitiveness, viability and marketability"* of the Columbus Cable Television System Assets means the respondent shall continue the operation of TCI's and TeleCable's Cable Television Systems in the ordinary course of business without material change or alteration that would adversely affect the value or goodwill of such Cable

Television Systems and the Columbus Cable Television System Assets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, one of the Cable Television Systems constituting the Columbus Cable Television System Assets. Respondent shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the competitiveness, viability and marketability of the Columbus Cable Television System Assets. Respondent shall undertake its best efforts to facilitate any governmental approvals required to effect divestiture of the Columbus Cable Television System Assets and their continued use in Cable Television Service in the Relevant Geographic Area. To ensure the availability of programming to the divested Columbus Cable Television System Assets, respondent shall waive any exclusive rights to distribute programming by means of Cable Television Systems in the Relevant Geographic Area.

B. Respondent shall divest the Columbus Cable Television System Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Columbus Cable Television System Assets is to ensure the continued use of the Columbus Cable Television System Assets as an ongoing, viable deliverer of Cable Television Service in the Relevant Geographic Area, and to remedy the lessening of competition resulting from the proposed acquisition of TeleCable Corporation by TCI as alleged in the Commission's complaint.

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

III.

It is further ordered, That:

A. If TCI has not divested, absolutely and in good faith and with the Commission's prior approval, the Columbus Cable Television System Assets within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Columbus Cable Television System Assets, provided, however, that if the Commission has not approved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. 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, TCI 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 in the cable television industry. 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 appointment of the trustee, respondent shall (1) execute a trust agreement that, subject to the

prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order; and (2) notify the trustee in writing whether TCI chooses to divest the TCI Columbus Cable Television System or the TeleCable Columbus Cable Television System; provided that if TCI fails to make this designation within the specified time period, the trustee is authorized to divest either the TCI or TeleCable Columbus Cable Television System.

3. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Designated Columbus Cable Television System Assets.

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Designated Columbus Cable Television System Assets or to any other relevant information as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the 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 divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one

such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 Designated Columbus Cable Television System Assets.

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

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

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

11. The trustee shall have no obligation or authority to operate or maintain the Designated Columbus Cable Television System Assets.

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 respondent shall comply with all terms of the Hold Separate Agreement, attached to this order and made a part hereof as Appendix I. The Hold Separate Agreement shall continue in effect until such time as the Columbus Cable Television System Assets shall have been divested as required by this order.

V.

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

A. Acquire any 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 Cable Television Service within the Relevant Geographic Area; or

B. Acquire any assets used for or previously used for (and still suitable for use for) Cable Television Service within the Relevant Geographic Area.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services in the ordinary course of business; and provided further, that this paragraph V shall not apply to the acquisition of any interest in a concern that is not at the time of the acquisition engaged in Cable Television Service within the Relevant Geographic Area due to the sale within the preceding two years of all assets used for Cable Television Service within the Relevant Geographic Area to another party who intended to operate said assets for Cable Television Service within the Relevant Geographic Area.

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 and III of this order,

respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with 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 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.

VII.

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, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change 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, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, relating to any matters contained in this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement To Hold Separate ("Agreement") is by and between Tele-Communications, Inc. ("respondent" or "TCI"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, respondent entered into an agreement with TeleCable Corporation ("TeleCable"), a Virginia corporation, whereby respondent will acquire the stock of TeleCable and merge TeleCable into TCI Communications, Inc., an entity within TCI (hereinafter the "Acquisition"); and

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), which would require the divestiture of either the TCI or TeleCable Cable Television System Assets in Columbus, Georgia, the Commission must place the Consent Agreement on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the TeleCable Columbus Cable Television System Assets during the period prior to the final acceptance and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the

Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the assets described in paragraph II of the Consent Agreement and the Commission's right to have the TeleCable Columbus Cable Television System Assets continue as a viable independent entity; and

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

(i) Preserve the TeleCable Columbus Cable Television System Assets as a viable independent cable television system pending possible divestiture, and

(ii) Remedy any anticompetitive effects of the acquisition; and

Whereas, respondent's entering into this agreement shall in no way be construed as an admission by respondent that the acquisition is illegal; and

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

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

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

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a -

2.b, it will comply with the provisions of paragraph three of this agreement:

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

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

3. To ensure the independence and viability of the TeleCable Columbus Cable Television System Assets and to assure that no competitive information is exchanged between the TeleCable Columbus Cable Television System and the TCI Columbus Cable Television System, TCI shall operate the TeleCable Columbus Cable Television System separate and apart on the following terms and conditions:

a. To the maximum extent possible, TCI will retain current TeleCable Columbus Cable Television System management and employees ("the management team") to manage and maintain the TeleCable Columbus Cable Television System. The individuals on the management team shall manage the TeleCable Columbus Cable Television System independently of the management of TCI's other businesses, including the TCI Columbus Cable Television System. The individuals on the management team shall not be involved in any way in the operation or management of any other TCI Cable Television System. If any member of the management team is unable or unwilling to continue to serve in his or her current position (or becomes unable to do so during the term of this Agreement) that position will be filled by an individual not involved in any way in the operation or management or any other TCI Cable Television System.

b. The management team, in its capacity as such, shall report directly and exclusively to an individual to be designated by TCI who has no direct responsibilities for Cable Television System operations and who is competent to assure the continued viability and competitiveness of the TeleCable Columbus Cable Television System ("TCI Contact").

c. TCI shall not exercise direction or control over, or influence directly or indirectly the management team or any of its activities relating to the operations of the TeleCable Columbus Cable

Television System; provided, however, that TCI may exercise such direction and control over the management team and the TeleCable Columbus Cable Television System Assets as is necessary to ensure compliance with this Agreement and with the Consent Agreement and with all applicable laws.

d. TCI shall maintain the marketability, viability, and competitiveness of the TeleCable Columbus Cable Television System assets and shall not sell, transfer, encumber (other than in the ordinary course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the TCI Contact and the management team, TCI shall not permit any other TCI employee, officer, or director to be involved in the management of the TeleCable Columbus Cable Television System; provided, however, that TCI employees involved in engineering, construction, customer service, data processing, training, human resources, finance, legal services, tax, accounting, insurance, internal audit, payroll, programming, purchasing, real estate, risk management, telephony, compliance with FCC regulations, contract administration, and similar services ("support service employees") may provide such services to the TeleCable Columbus Cable Television System.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to divest, TCI, other than the TCI Contact, the management team and support service employees involved in the TeleCable Columbus Cable Television System business, shall not receive or have access to, or the use of any material confidential information about the TeleCable Columbus Cable Television System. ("Material Confidential information," as used herein, means competitively sensitive or proprietary information not otherwise known to TCI from sources other than the TCI Contact, the management team involved in the TeleCable Columbus Cable Television System, or the support service employees.)

g. The management team shall serve at the cost and expense of TCI. TCI shall indemnify the management team against any losses or claims of any kind that might arise out of his or her involvement under this Agreement, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team.

h. If any member of the management team ceases to act or fails to act diligently, a substitute member shall be appointed.

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

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

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

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

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

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

IN THE MATTER OF

THE AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

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

Docket C-2856. Consent Order, Dec. 14, 1976 -- Set Aside Order, May 4, 1995

This order reopens a 1976 consent order, that was modified in 1985, -- which prohibited the respondent from initiating, publishing or circulating relative value scales for medical or surgical procedures -- and sets aside the modified consent order based on changed conditions of facts, such as, the decision by Congress to base reimbursement for medical services provided under Medicare on resource based relative value scales.

ORDER SETTING ASIDE ORDER

On November 23, 1994, the American Academy of Orthopaedic Surgeons ("AAOS") filed a Petition To Reopen and Rescind or Modify Consent Order ("Petition") in Docket C-2856 ("order"), 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, 16 CFR 2.51. In its Petition, AAOS requests that the Commission reopen the order and rescind it or, in the alternative, modify provisions of the order that restrict the ability of AAOS to develop and distribute a relative value scale ("RVS"), as defined in the order.

AAOS asserts in its Petition that changed conditions of law or fact and the public interest warrant reopening the order and rescinding or modifying it. A redacted version of the Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by AAOS of comparative numerical values for services performed by orthopaedic surgeons had the effect of establishing or maintaining fees charged by orthopaedic surgeons for their services, in violation of Section 5 of the FTC Act. The

complaint also alleged that the numerical values were convertible into a monetary fee by application of a dollar conversion factor. The order, in relevant part, requires AAOS to cease initiating, publishing or circulating, in whole or in part, any relative value scale, as defined.[1] *The American Academy of Orthopaedic Surgeons*, 88 FTC 968 (1976).

The order does not prevent AAOS from exercising rights under the First Amendment to the Constitution to petition state or federal government agencies and to participate in federal or state administrative or judicial proceedings or from providing information or views to third party payers concerning any issue, including reimbursement. *The American Academy of Orthopaedic Surgeons*, 105 FTC 248 (1985) (modifying order).

II. THE PETITION

AAOS requests that the Commission reopen the order and rescind or modify it to permit the AAOS to provide information concerning Medicare resource based relative value scales ("RBRVS") to third party payers, managed care organizations, other physician organizations and others in the private sector, including its members. AAOS states that the information will facilitate the development and adoption of RBRVS that accurately reflect the values of orthopaedic procedures, resulting in the efficient allocation of resources. AAOS already has provided information to government entities involved in medical reimbursement issues; it wants to provide the information to nongovernment entities and to its members.

In particular, AAOS wants to be able to circulate the Abt Restudy, a physician work value scale commissioned by AAOS.[2] AAOS also wants to be able to sponsor and disseminate future research projects that analyze other components of the Medicare RBRVS.

AAOS cites as changed conditions the adoption and implementation by the federal government of resource based relative value scales for purposes of physician reimbursement under

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[1] "Relative value scale" is defined in the order as any list or compilation of surgical or medical procedures that states comparative numerical values for those procedures or services. Order paragraph I.A.

[2] Noether & Sheehy, The Abt Restudy of Physician Work Values for Orthopaedic Surgery (Sept. 23, 1992), attached as Exhibit 8 to the AAOS Petition (hereafter "Abt Restudy").

Medicare. In 1986, Congress created the Physician Payment Review Commission ("PPRC") to make recommendations regarding physician reimbursement under Medicare. At that time, physician reimbursement was determined by the "customary, prevailing and reasonable" ("CPR") method, which relied on historical fees. The PPRC concluded that the CPR method increased costs under Medicare and recommended adopting instead a relative value scale based on resource costs.[3] In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989, which, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare.[4] The Act provides for consultations with "organizations representing physicians" to develop relative values for medical services.[5]

According to AAOS, the Abt Restudy was commissioned to respond to perceived shortcomings in Medicare RBRVS for orthopaedic services. *See* Petition at 13-15; Abt Restudy at 1. Providing the Abt Restudy to government entities is consistent with the proviso to the order,[6] which permits AAOS to petition government agencies and legislatures. AAOS would like to distribute the Abt Restudy to third party payers and other nongovernment entities, such as other medical societies, and to individual members of AAOS, at least for the limited purpose of preparing AAOS representatives to lobby state government bodies regarding physician reimbursement practices. AAOS also would like to sponsor future research projects analyzing other components of Medicare RBRVS. According to AAOS, to the extent that it is precluded by the order from providing information concerning reimbursement levels, the efficiency of RBRVS-based systems is lessened, "payers who would benefit from more efficient payment mechanisms are hindered in their ability to compete, and physicians and patients are given

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[3] *See* Physician Payment Review Commission, Annual Report to Congress (1988); Physician Payment Review Commission, Medicare Physician Payment: An Agenda for Reform (1987).

[4] Section 6102 of the Omnibus Budget Reconciliation Act of 1989, 42 U.S.C. 1395w-4. Medicare RBRVS bases physician reimbursement on (1) a relative value unit for the medical service, which is based on physician work, practice costs and professional liability costs; (2) a geographic adjustment factor; and (3) a conversion factor. Components of the RBRVS are to be updated periodically. Payment is based on the lesser of the RBRVS amount and the physician's actual fee. Petition at 12-13.

[5] 42 U.S.C. 1395w-4(c)(2)(B)(iii).

[6] 105 FTC at 249; *see* letter from Roberta S. Baruch, Deputy Assistant Director, Bureau of Competition, FTC, to Richard N. Peterson, General Counsel, American Academy of Orthopaedic Surgeons (May 12, 1993) ("staff advisory opinion"), Petition Exhibit 16.

distorted incentives and market signals for production and consumption of resources."[7]

III. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[8]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

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[7] Petition at 25-26.

[8] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV. THE ORDER SHOULD BE REOPENED

AAOS has shown changed conditions of fact that require the order to be reopened to consider modification.[9] The decision by Congress to base reimbursement for medical services provided under Medicare on resource based relative value scales, with the participation of physicians and medical professional societies in identifying and modifying RBRVS for Medicare purposes, is a changed condition that makes application of the order inequitable.

The order bars AAOS from "directly or indirectly initiating, originating, developing, publishing, or circulating, the whole or any part of any proposed or existing relative value scales," while the Omnibus Budget Reconciliation Act of 1989, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare and contemplates

[9] AAOS also cited changed conditions of law and the public interest. Because the order is set aside on the ground of changed conditions of fact, the Commission need not and does not consider the additional alleged grounds.

professional participation in the development of RBRVS. The Act requires the Department of Health and Human Services ("HHS") to consult with physician organizations in developing and modifying Medicare RBRVS. The order addressed conduct that allegedly contributed to the unlawful maintenance of fees by orthopaedic surgeons. It now appears that the order may inhibit participation by AAOS in the development and revision of RBRVS systems of reimbursement and thus may harm competition. Accordingly, the order should be reopened to consider modification.

V. THE ORDER SHOULD BE SET ASIDE

AAOS requests that the order be set aside or modified to permit AAOS to distribute the Abt Restudy and similar information to third party payers, other medical societies and its members.

The order, as modified in 1985, permits AAOS to "discuss[ ] relative value scales with governmental entities and third-party payers." 105 FTC at 248. The Commission, in modifying the order in 1985, concluded that the order's "restriction on [AAOS]'s ability to discuss relative value scales with third-party payers and governmental entities . . . caused injury to [AAOS] and the public that outweighed any benefit that might be derived from the restriction." *Id.* The Commission also observed that the modification was consistent with its opinion in *Michigan State Medical Society*, 105 FTC 191 (1983) ("MSMS"). Also consistent with MSMS, AAOS is not limited under the order to responding to requests from government and third party payers.[10] AAOS "may have a useful role to play in offering suggestions and advice to third payers on a wide variety of issues, including reimbursement. . . . [T]he potential value of this role is not limited to responsive communications but extends . . . to similar communications initiated by" AAOS. 105 FTC at 308.[11]

As the Commission recognized in MSMS, "there is some inherent danger in allowing any collective dialogue with third party payers on

[10] The order, as modified in 1985, permits AAOS to discuss relative value guides with third party payers, but the staff of the Commission construed the order as barring AAOS from providing relative value guides to third party payers. *See* Staff advisory opinion at 3 ("[B]ased on the information we now have, we cannot conclude that it would be consistent with the order for AAOS to publish or circulate the Abt Restudy to the AAOS membership or to any non-governmental entity.").

[11] *See also* Advisory Opinion in American Society of Internal Medicine, 105 FTC 505, 510-11 (1985).

questions directly related to reimbursement amounts or policies."[12] Similarly, in modifying the order in AAOS, the Commission cautioned that "serious antitrust concerns would arise were AAOS to negotiate or attempt to negotiate an agreement with any such party or engage in any type of coercive activity to effect such an agreement."[13] Such actions concerning terms of reimbursement could be examined under Section 5 of the Federal Trade Commission Act.[14]

AAOS also would like to provide copies of the Abt Restudy to other medical professional societies. The process of establishing and refining Medicare RBRVS involves consideration of recommendations from the AMA/Specialty Society RVS Update Committee ("RUC"),[15] which is composed of representatives of major medical societies, including AAOS. The Abt Restudy could be useful to the RUC and ultimately to the Health Care Financing Administration ("HCFA"), which administers the Medicare program, in the review and refinement of Medicare RBRVS.[16] The inability of AAOS under the order to disseminate the Abt Restudy to members of the RUC appears likely to hinder participation in the process sponsored by HCFA for identifying information relevant to revising Medicare RBRVS and could increase the costs to HCFA in obtaining such information. Such inhibitions resulting from the order would be inconsistent with federal policy as expressed in the Omnibus Budget Reconciliation Act of 1989 and the implementing regulations. The order should be modified to permit AAOS to disseminate the Abt Restudy to other medical professional societies.

Finally, AAOS would like to provide copies of the Abt Restudy to its members, at least for the "limited purpose of furthering the Academy's efforts to persuade government bodies to modify their own physician payment practices." For example, according to AAOS, "in virtually all states, the Academy has no members who have ever seen the [Abt] Restudy, and therefore no one to meet with

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[12] The order in MSMS permitted the dialogue and addressed the risk by barring the medical society from entering into unlawful agreements with third party payers regarding reimbursement. 101 FTC at 308.

[13] 105 FTC at 249.

[14] *See, e.g.*, Department of Justice and FTC Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Statements 5 & 6, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152, at 20,782-785 (1994) ("Health Care Policy Statements").

[15] Petition at 13, citing 59 Fed. Reg. 32,754 & 32,760 (1994).

[16] *See* Petition at 18-19.

interested state officials responsible for compensation issues in Medicaid, workers' compensation or other medical programs."[17]

The prohibition on distribution by AAOS of relative value scales to its members is at the core of the order, because of the alleged effect of maintaining the prices charged by its members.[18] Given the federal policy to rely on RBRVS for Medicare reimbursement and the increasing interest on the part of state governments and third party payers in relative value guides as a basis for physician reimbursement, however, the prohibition in the order on dissemination by AAOS may inhibit the contributions of its members to the development of RBRVS and increase the costs of disseminating the information.[19] Allowing AAOS to distribute the Abt Restudy to its members would allow them to participate in an informed manner in lobbying activities before state government agencies. Accordingly, AAOS should be permitted to distribute the Abt Restudy to its members.

The danger that AAOS members will use the Abt Restudy or other relative value guides as a basis for an unlawful agreement to fix the prices for their services has not been eliminated. Although the federal policy to use RBRVS for Medicare reimbursement counsels in favor of setting aside the restriction of the order on distribution of relative values to AAOS members, AAOS and its members remain subject to the laws against price fixing. Setting aside the restrictions of the order should not be construed as approval for use by AAOS or its members of a relative value guide as a basis for an unlawful agreement on price.

In some circumstances, preparation and circulation by a medical society of a relative value scale may have anticompetitive consequences. For example, in *American Society of Internal Medicine*, 105 FTC 505 (1985) (advisory opinion), the Commission declined to approve a proposal to circulate a relative guide because of the "substantial danger that ASIM's proposed conduct would involve an agreement in restraint of trade among ASIM and

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[17] Petition at 26.

[18] *See also Advisory Opinion in American Society of Internal Medicine*, 105 FTC 505, 510 (1985) ("[A]lthough the Commission cannot . . . predict that widespread concerted conformance to the RVG would necessarily result from its dissemination . . . the available information on this specific RVG proposal indicates that this type of agreement in restraint of trade is a substantial danger.").

[19] As a practical matter, material submitted to the Health Care Financing Administration on the public record presumably is available to members of AAOS on request.

physicians to concertedly adhere to the RVG."[20] The Joint Health Care Policy Statements also caution that "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices."[21]

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened, and that the modified order in Docket C-2856 be, and it hereby is, set aside, as of the effective date of this order.

Commissioner Starek concurring in the result only.

[20] *Id.* at 511.

[21] Health Care Policy Statements at 20,784.

IN THE MATTER OF

LOCKHEED CORPORATION, ET AL.

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

Docket C-3576. Complaint, May 9, 1995--Decision, May 9, 1995

This consent order allows, among other things, the completion of the merger between Lockheed Corporation and Martin Marietta Corporation, and requires the merged firm to open up the teaming arrangements that each individual firm has with infrared sensor producers in order to restore competition for certain types of military satellites. The consent order also prohibits certain divisions of the merged firm from gaining access through other divisions to competitively sensitive information about competitors' satellite launch vehicles or military aircraft.

Appearances

For the Commission: *Ann B. Malester* and *Laura A. Wilkinson.*

For the respondents: *Richard Parker* and *David Beddon*, *O'Melveny & Meyers*, Washington, D.C. *Raymond Jacobson*, *Howrey & Simon*, 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 Lockheed Corporation ("Lockheed"), a corporation subject to the jurisdiction of the Commission, has agreed to merge with respondent Martin Marietta Corporation ("Martin Marietta"), a corporation subject to the jurisdiction of the Commission, forming a newly created entity respondent Lockheed Martin Corporation ("Lockheed Martin"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Space Based Early Warning System"* means any satellite system designed to be used for tactical warning and attack assessment, theater and strategic missile defense, and related military purposes by the United States Department of Defense, including but not limited to the Space Based InfraRed ("SBIR") system and successor systems considered by the United States Department of Defense to follow SBIR programmatically.

2. *"Sensors"* means electro-optical sensors for use in any Space Based Early Warning System.

3. *"Lockheed/Hughes Teaming Agreement"* means the teaming agreement entered into on January 15, 1985, between Lockheed and the Electro-Optical and Data Systems Group of the Hughes Aircraft Company for the purpose of submitting a proposal to the United States Department of Defense for the Demonstration/Validation phase of the Follow-On Early Warning System, and all subsequent amendments or other modifications thereto.

4. *"Martin Marietta/Grumman Teaming Agreement"* means the teaming agreement entered into on June 20, 1994, between Martin Marietta and Grumman for the purpose of bidding on or otherwise competing for the United States Department of Defense's Alert, Locate and Report Missiles program, and all subsequent amendments or other modifications thereto.

5. *"Military Aircraft"* means aircraft manufactured for sale to the United States Department of Defense, whether for use by the United States Department of Defense or for transfer to a foreign military sale purchaser.

6. *"LANTIRN Systems"* means dual pod, externally mounted, Low-Altitude Navigation and Targeting Infrared for Night Systems manufactured by Martin Marietta for use on Military Aircraft.

7. *"Expendable Launch Vehicle"* means a vehicle that launches a Satellite(s) from the Earth's surface and is consumed during the process of launching a Satellite(s) and therefore cannot be launched more than one time.

8. *"Satellite"* means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth

and which is designed either to orbit the Earth or travel away from the Earth.

9. *"Respondents"* means Lockheed, Martin Marietta and Lockheed Martin.

II. RESPONDENTS

10. Respondent Lockheed Corporation 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 4500 Park Granada Boulevard, Calabasas, California.

11. Respondent Lockheed Corporation is engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; and Military Aircraft.

12. Respondent Martin Marietta Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

13. Respondent Martin Marietta Corporation is engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; and LANTIRN Systems.

14. Respondent Lockheed Martin Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

15. Respondent Lockheed Martin Corporation, through the proposed merger of Lockheed and Martin Marietta, would be engaged in among other things the research, development, manufacture and sale of: Satellites, including Satellites for use in Space Based Early Warning Systems; Expendable Launch Vehicles; LANTIRN Systems; and Military Aircraft.

III. JURISDICTION

16. Respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in

Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE MERGER

17. On or about August 29, 1994, respondents entered into an agreement and Plan of Reorganization whereby respondents would engage in a series of related transactions resulting in a newly created corporation, Lockheed Martin. The value of the transaction is in excess of $9 billion ("Merger").

V. THE RELEVANT MARKETS

18. The relevant lines of commerce are:

a. The research, development, manufacture and sale of Satellites, including but not limited to Satellites for use in Space Based Early Warning Systems;

b. The research, development, manufacture and sale of Sensors;

c. The research, development, manufacture and sale of Military Aircraft;

d. The research, development, manufacture and sale of LANTIRN Systems; and

e. The research, development, manufacture and sale of Expendable Launch Vehicles.

19. The United States is the relevant geographic area in which to analyze the effects of the Merger in all the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

20. Because of the exclusive nature of the Lockheed/Hughes Teaming Agreement and the Martin Marietta/Grumman Teaming Agreement, the market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios").

21. Respondents are actual competitors in the relevant market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems.

22. The market for the research, development, manufacture and sale of Sensors is highly concentrated as measured by the HHI or concentration ratios.

23. The market for the research, development, manufacture and sale of LANTIRN Systems is highly concentrated as measured by the HHI or concentration ratios.

24. Respondents, through the proposed Merger, would be engaged in the research, development, manufacture and sale of both Military Aircraft and LANTIRN Systems, which are used in Military Aircraft.

25. Respondents, through the proposed Merger, would be engaged in the research, development, manufacture and sale of a wide range of Expendable Launch Vehicles and Satellites, which are launched from the Earth's surface by Expendable Launch Vehicles.

VII. BARRIERS TO ENTRY

26. Because of the exclusive nature of the Lockheed/Hughes Teaming Agreement and the Martin Marietta/Grumman Teaming Agreement, entry into the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems is difficult and unlikely.

27. Entry into the market for the research, development, manufacture and sale of Sensors is difficult and unlikely.

28. Entry into the research, development, manufacture and sale of LANTIRN Systems is difficult and unlikely.

VIII. EFFECTS OF THE MERGER

29. The effects of the Merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the markets for research, development, manufacture and sale of: Satellites for use in Space Based Early Warning Systems; Military Aircraft; and Expendable Launch Vehicles in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Actual, direct and substantial competition between respondents in the market for the research, development, manufacture and sale of Satellites for use in Space Based Early Warning Systems will be eliminated;

b. Respondents may disadvantage Military Aircraft competitors by modifying LANTIRN Systems in a manner that raises the costs of competing Military Aircraft;

c. Respondents may gain access to competitively sensitive non-public information concerning other Military Aircraft manufacturers, whereby:

(1) Actual competition between respondents and Military Aircraft manufacturers will be reduced; and

(2) Advancements in Military Aircraft research, development, innovation and quality will be reduced; and

d. Respondents may gain access to competitively sensitive non-public information concerning other Expendable Launch Vehicle manufacturers, whereby:

(1) Actual competition between respondents and Expendable Launch Vehicle manufacturers will be reduced; and

(2) Advancements in Expendable Launch Vehicle research, development, innovation and quality will be reduced.

IX. VIOLATIONS CHARGED

30. The Merger described in paragraph seventeen, 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.

31. The Merger agreement described in paragraph seventeen constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of respondent Lockheed Corporation ("Lockheed") and respondent Martin Marietta

Corporation ("Martin Marietta"), forming respondent Lockheed Martin Corporation ("Lockheed Martin"), and it now appearing that Lockheed, Martin Marietta and Lockheed Martin, hereinafter sometimes referred to as "respondents," having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and Interim Agreement and placed such agreements 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 Lockheed 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 4500 Park Granada Boulevard, Calabasas, California.

2. Respondent Martin Marietta is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

3. Respondent Lockheed Martin is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 6801 Rockledge Drive, Bethesda, Maryland.

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

ORDER

I.

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

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

B. *"Missile Systems"* means the Missile Systems Division of Lockheed Missiles & Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, which is engaged in, among other things, the research, development, manufacture and sale of Expendable Launch Vehicles, and its subsidiaries, divisions, groups and affiliates controlled by Missile Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. *"Commercial Space"* means Lockheed Commercial Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, and Lockheed-Khrunichev-Energia International ("LKEI"), a joint venture between Lockheed Commercial Space Company, Inc., Khrunichev Enterprise and Energia Scientific-Productive Entity with its principal place of business at 2099 Gateway Place, Suite 220, San Jose, California, which are engaged in, among other things, the research, development, manufacture, marketing and sale of Expendable Launch Vehicles, and its subsidiaries, divisions, joint venture partners, groups and affiliates controlled by Commercial Space, and their respective

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

D. *"Space Systems"* means the Space Systems Division of Lockheed Missiles & Space Company, Inc., an entity with its principal place of business at 1111 Lockheed Way, Sunnyvale, California, which is engaged in, among other things, the research, development, manufacture and sale of Satellites, and its subsidiaries, divisions, groups and affiliates controlled by Space Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

E. *"Aeronautical Systems"* means Lockheed Aeronautical Systems Group, an entity with its principal place of business at 2859 Paces Ferry, Suite 1800, Atlanta, Georgia, which is engaged in, among other things, the research, development, manufacture and sale of Military Aircraft, and its subsidiaries, divisions, groups and affiliates controlled by Aeronautical Systems, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

F. *"Martin Marietta"* means Martin Marietta Corporation and its predecessors, successors, subsidiaries, divisions, groups and affiliates controlled by Martin Marietta, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

G. *"Astronautics"* means Martin Marietta's Astronautics Company, an entity with its principal place of business at P.O. Box 179, Denver, Colorado, which is engaged in, among other things, the research, development, manufacture and sale of Satellites and Expendable Launch Vehicles, and its subsidiaries, divisions, groups and affiliates controlled by Astronautics, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

H. *"Astro Space"* means Martin Marietta's Astro Space Company, an entity with its principal place of business at P.O. Box 800, Princeton, New Jersey, which is engaged in, among other things, the research, development, manufacture and sale of Satellites, and its subsidiaries, divisions, groups and affiliates controlled by Astro Space, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

I. *"Electronics and Missiles"* means Martin Marietta's Electronics and Missiles Company, an entity with its principal place of business

at 5600 Sand Lake Road, Orlando, Florida, which is engaged in, among other things, the manufacture and sale of LANTIRN Systems, and its subsidiaries, divisions, groups and affiliates controlled by Electronics and Missiles, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

J. *"Lockheed Martin"* means Lockheed Martin Corporation and its predecessors, successors, subsidiaries, divisions, groups and affiliates controlled by Lockheed Martin, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

K. *"Respondents"* means Lockheed, Martin Marietta and Lockheed Martin.

L. *"Hughes"* means GM Hughes Electronics Corporation, 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 7200 Hughes Terrace, Los Angeles, California.

M. *"Grumman"* means Northrop Grumman Corporation, 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 1840 Century Park East, Los Angeles, California.

N. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, government entity, trust or other business or legal entity.

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

P. *"Lockheed/Hughes Teaming Agreement"* means the teaming agreement entered into on January 15, 1985, between Lockheed and the Electro-Optical and Data Systems Group of the Hughes Aircraft Company for the purpose of submitting a proposal to the United States Department of Defense for the Demonstration/Validation phase of the Follow-On Early Warning System, and all subsequent amendments or other modifications thereto.

Q. *"Martin Marietta/Grumman Teaming Agreement"* means the teaming agreement entered into on June 20, 1994, between Martin Marietta and Grumman for the purpose of bidding on or otherwise competing for the United States Department of Defense's Alert, Locate and Report Missiles program, and all subsequent amendments or other modifications thereto.

R. *"Space Based Early Warning System"* means any Satellite system designed to be used for tactical warning and attack assessment, theater and strategic missile defense, and related military purposes by the United States Department of Defense, including but not limited to the Space Based InfraRed ("SBIR") system and successor systems considered by the United States Department of Defense to follow SBIR programmatically.

S. *"Military Aircraft"* means aircraft manufactured for sale to the United States Department of Defense, whether for use by the United States Department of Defense or for transfer to a foreign military sale purchaser.

T. *"LANTIRN Systems"* means dual pod, externally mounted, Low-Altitude Navigation and Targeting Infrared for Night Systems manufactured by Martin Marietta for use on Military Aircraft.

U. *"Expendable Launch Vehicle"* means a vehicle that launches a Satellite(s) from the Earth's surface that is consumed during the process of launching a Satellite(s) and therefore cannot be launched more than one time.

V. *"Satellite"* means an unmanned machine that is launched from the Earth's surface for the purpose of transmitting data back to Earth and which is designed either to orbit the Earth or travel away from the Earth.

W. *"Non-Public LANTIRN Information"* means any information not in the public domain furnished by any Military Aircraft manufacturer to Electronics and Missiles in its capacity as the provider of LANTIRN Systems, and (1) if written information, designated in writing by the Military Aircraft manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the Military Aircraft manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public LANTIRN Information shall not include: (i) information already known to respondents, (ii) information which subsequently falls within the public domain through no violation of this order by respondents, (iii) information which subsequently becomes known to respondents from a third party not in breach of a confidential disclosure agreement, or (iv) information after six (6) years from the date of disclosure of such Non-Public LANTIRN Information to respondents, or such other

period as agreed to in writing by respondents and the provider of the information.

X. *"Non-Public ELV Information"* means any information not in the public domain furnished by an Expendable Launch Vehicle manufacturer to Space Systems, Astro Space or Astronautics in their capacities as providers of Satellites, and (1) if written information, designated in writing by the Expendable Launch Vehicle manufacturer as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof, or (2) if oral, visual or other information, identified as proprietary information in writing by the Expendable Launch Vehicle manufacturer prior to the disclosure or within thirty (30) days after such disclosure. Non-Public ELV Information shall not include: (i) information already known to respondents, (ii) information which subsequently falls within the public domain through no violation of this order by respondents, (iii) information which subsequently becomes known to respondents from a third party not in breach of a confidential disclosure agreement, or (iv) information after six (6) years from the date of disclosure of such Non-Public ELV Information to respondents, or such other period as agreed to in writing by respondents and the provider of the information.

Y. *"Merger"* means the merger of Martin Marietta and Lockheed.

II.

It is further ordered, That respondents shall not enforce or attempt to enforce any provision contained in the Lockheed/Hughes Teaming Agreement that prohibits in any way Hughes from (1) competing against Lockheed for any part of any Space Based Early Warning System, or (2) teaming or otherwise contracting with any other person for the purpose of bidding on, developing, manufacturing, or supplying any part of any Space Based Early Warning System. Respondents shall not enforce or attempt to enforce any proprietary rights in the electro-optical sensors developed by Hughes in connection with or by virtue of the Lockheed/Hughes Teaming Agreement in a manner that would inhibit Hughes from competing with respondents for any part of any Space Based Early Warning System.

III.

It is further ordered, That respondents shall not enforce or attempt to enforce any provision contained in the Martin Marietta/Grumman Teaming Agreement that prohibits in any way Grumman from (1) competing against Martin Marietta for any part of any Space Based Early Warning System, or (2) teaming or otherwise contracting with any other person for the purpose of bidding on, developing, manufacturing, or supplying any part of any Space Based Early Warning System. Respondents shall not enforce or attempt to enforce any proprietary rights in the electro-optical sensors developed by Grumman in connection with or by virtue of the Martin Marietta/Grumman Teaming Agreement in a manner that would inhibit Grumman from competing with respondents for any part of any Space Based Early Warning System.

IV.

It is further ordered, That:

A. Respondents shall not, absent the prior written consent of the proprietor of Non-Public LANTIRN Information, provide, disclose, or otherwise make available to Aeronautical Systems any Non-Public LANTIRN Information; and

B. Respondents shall use any Non-Public LANTIRN Information obtained by Electronics and Missiles only in Electronics and Missiles' capacity as the provider of LANTIRN Systems, absent the prior written consent of the proprietor of Non-Public LANTIRN Information.

V.

It is further ordered, That respondents shall deliver a copy of this order to any United States Military Aircraft manufacturer prior to obtaining any Non-Public LANTIRN Information relating to the manufacturer's Military Aircraft either from the Military Aircraft's manufacturer or through the Merger; provided that for Non-Public LANTIRN Information described in paragraph I.W.(2) of this order, respondents shall deliver a copy of this order within ten (10) days of the written identification by the Military Aircraft manufacturer.

VI.

It is further ordered, That respondents shall not make any modifications, upgrades, or other changes to LANTIRN Systems or any component or subcomponent thereof that discriminate against any other Military Aircraft manufacturer with regard to the performance of the Military Aircraft or the time or cost required to integrate LANTIRN Systems into the Military Aircraft. Provided, however, that nothing in this paragraph shall prohibit respondents from making any such modifications, upgrades, or other changes that are: (1) necessary to meet competition from (a) foreign military aircraft, or (b) other products designed to provide targeting, terrain following, or night navigation functions comparable in performance to LANTIRN Systems; or (2) approved in writing by the Secretary of Defense or his or her designee.

VII.

It is further ordered, That:

A. Respondents shall not, absent the prior written consent of the proprietor of Non-Public ELV Information, provide, disclose, or otherwise make available to Astronautics, Missile Systems or Commercial Space any Non-Public ELV Information obtained by Astro Space or Space Systems; and

B. Respondents shall use any Non-Public ELV Information obtained by Astronautics, Astro Space or Space Systems only in Astronautics's, Astro Space's and Space System's capacities as providers of Satellites, absent the prior written consent of the proprietor of Non-Public ELV Information.

VIII.

It is further ordered, That respondents shall deliver a copy of this order to any United States Expendable Launch Vehicle manufacturer prior to obtaining any Non-Public ELV Information relating to the manufacturer's Expendable Launch Vehicle(s) either from the Expendable Launch Vehicle manufacturer or through the Merger; provided that for Non-Public ELV Information described in paragraph I.X.(2) of this order, respondents shall deliver a copy of

this order within ten (10) days of the written identification by the Expendable Launch Vehicle manufacturer.

IX.

It is further ordered, That respondents shall comply with all terms of the Interim Agreement, attached to this order and made a part hereof as Appendix I. Said Interim Agreement shall continue in effect until the provisions in paragraphs II, III, IV, V, VI, VII and VIII are complied with or until such other time as is stated in said Interim Agreement.

X.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually for the next ten (10) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order. To the extent not prohibited by United States Government national security requirements, respondents shall include in their reports information sufficient to identify (a) all modifications, upgrades, or other changes to LANTIRN Systems for which respondents have requested and/or received written approval from the Secretary of Defense or his or her designee pursuant to paragraph VI of this order, (b) all United States Military Aircraft manufacturers with whom respondents have entered into an agreement for the research, development, manufacture or sale of LANTIRN Systems, and (c) all United States Expendable Launch Vehicle manufacturers with whom respondents have entered into an agreement for the research, development, manufacture or sale of Satellites.

XI.

It is further ordered, That respondents shall notify the Commission at least thirty days prior to any proposed change in respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution

of subsidiaries or any other change in respondents that may affect compliance obligations arising out of this order.

XII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege and applicable United States Government national security requirements, upon written request, and on reasonable notice, any respondent shall permit any duly authorized representative of the Commission:

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

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

XIII.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Lockheed Corporation ("Lockheed"), a corporation organized and existing under the laws of the State of Delaware, Martin Marietta Corporation ("Martin Marietta"), a corporation organized and existing under the laws of the State of Maryland, Lockheed Martin Corporation ("Lockheed Martin"), a corporation organized and existing under the laws of the State of Maryland (collectively referred to as "proposed respondents"), and the Federal Trade Commission (the "Commission"), an independent agency of the United States

Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, Martin Marietta and Lockheed have proposed the merger of their businesses by the formation of a new corporation, Lockheed Martin; and

Whereas, the Commission is now investigating the proposed Merger to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving competition during the period prior to the final acceptance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm and divestiture or other relief resulting from a proceeding challenging the legality of the proposed Merger might not be possible, or might be less than an effective remedy; and

Whereas, proposed respondents entering into this Interim Agreement shall in no way be construed as an admission by proposed respondents that the proposed Merger constitutes a violation of any statute; and

Whereas, proposed respondents understand that no act or transaction contemplated by this Interim 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 Interim Agreement.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the proposed Merger will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Agreement, it will not seek further relief from proposed respondents with respect to the proposed Merger, except that the Commission may exercise any and all rights to enforce this Interim

Agreement, the Consent Agreement, and the final order in this matter, and, in the event that proposed respondents do not comply with the terms of this Interim Agreement, to seek further relief pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, as follows:

1. Proposed respondents agree to execute and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date the Consent Agreement is accepted for public comment by the Commission.

2. Proposed respondents agree to deliver within three (3) days of the date the Consent Agreement is accepted for public comment by the Commission, a copy of the Consent Agreement and a copy of this Interim Agreement to the United States Department of Defense, GM Hughes Electronics Corporation, Loral Corporation, Northrop Grumman Corporation, Rockwell International Corporation and TRW Incorporated.

3. Proposed respondents agree to submit within thirty (30) days of the date the Consent Agreement is signed by the proposed respondents, an initial report, pursuant to Section 2.33 of the Commission's Rules, signed by the proposed respondents setting forth in detail the manner in which the proposed respondents will comply with paragraphs II, III, IV, V, VI, VII and VIII of the Consent Agreement.

4. Proposed respondents agree that, from the date the Consent Agreement is accepted for public comment by the Commission until the first of the dates listed in subparagraphs 4.a and 4.b, they will comply with the provisions of this Interim Agreement:

a. Ten business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. The date the Commission finally accepts the Consent Agreement and issues its Decision and Order.

5. Proposed respondents waive all rights to contest the validity of this Interim Agreement.

6. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege and applicable United States Government national security

requirements, and upon written request, and on reasonable notice, to any proposed respondent made to its principal office, that proposed respondent shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

THE PENN TRAFFIC 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-3577. Complaint, May 15, 1995--Decision, May 15, 1995

This consent order permits, among other things, the Penn Traffic Company to acquire a number of Acme supermarkets from American Stores Company, but requires it to divest, to a Commission approved acquirer or acquirers within twelve months, one supermarket in each of the three Pennsylvania areas designated (Towanda, Mount Carmel, and Pittston). If the divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondent, for ten years, to obtain Commission approval before acquiring any interest in any entity that owns or operates a supermarket in any of the three areas designated.

Appearances

For the Commission: *Ronald Rowe, Marimichael Skubel* and *William Baer.*

For the respondent: *Ken Hart, Donovan, Leisure, Newton & Irvine*, New York, N.Y. *Chris MacAvoy, 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 The Penn Traffic Company ("Penn Traffic"), a corporation, subject to the jurisdiction of the Commission, has acquired certain assets of American Stores Company ("American"), 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 definition shall apply:

"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.

THE PENN TRAFFIC COMPANY

2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1200 State Fair Boulevard, Syracuse, New York.

3. Respondent Penn Traffic is, and at all times relevant herein has been, engaged in the operation of supermarkets in Pennsylvania.

4. Respondent Penn Traffic 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 September 30, 1994, Penn Traffic entered into an agreement with American whereby Penn Traffic is to purchase 45 supermarkets, which operate under the trade name "Acme," from American's subsidiary, Acme Markets, Inc.

TRADE AND COMMERCE

6. Relevant line of commerce in which to analyze the effects of the acquisition described herein is the retail sale of food and grocery products in supermarkets.

7. Relevant sections of the country in which to analyze the acquisition described herein are the following locations:

a) The Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton;

b) The Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel and the Township of Mount Carmel; and

c) The Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

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, Penn Traffic and American were actual competitors in the relevant line 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 Penn Traffic and supermarkets owned or controlled by American;

b. By increasing the likelihood that Penn Traffic 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 Penn Traffic of assets of American 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 having initiated an investigation of the acquisition by The Penn Traffic Company ("respondent") of certain assets of American Stores Company and 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; 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that 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 The Penn Traffic Company is a Delaware corporation, with its office and principal place of business at 1200 State Fair Boulevard, Syracuse, New York.

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

ORDER

I.

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

A. *"Respondent"* or *"Penn Traffic"* means The Penn Traffic Company, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by The Penn Traffic Company, their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. *"Assets to be divested"* means the 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.

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 "Acme" supermarket located at River and Park Streets, Borough of Towanda, Pennsylvania;
2. The "Acme" supermarket located on Kennedy Boulevard in Pittston, Pennsylvania; and
3. An "Acme" or a Penn Traffic supermarket located in the Township of Mount Carmel, Pennsylvania.

The assets to be divested shall include the grocery business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the locations that are divested.

B. Respondent shall divest the assets to be divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture 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 as alleged in the Commission's complaint.

C. Pending divestiture of such assets to be divested, respondent shall take such actions as are necessary to maintain the viability and marketability of such assets to be divested and to prevent the

destruction, removal, wasting, deterioration, or impairment of such 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 respondent has divested all of the assets to be divested.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, such 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 remaining 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 any of the remaining 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 two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to any of the remaining 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 in any of the areas specified in this order for a supermarket to be divested from more than one

acquiring entity, and if the Commission determines to approve more than one acquiring entity, the trustee shall divest 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.

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 stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket, including any facility that has operated as a supermarket within six (6) months of the date of the proposed acquisition, located in a) the Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton; b) the Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel and the Township of Mount Carmel; and c) the Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

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 the date of the proposed acquisition in a) the Towanda, Pennsylvania area, which includes the Borough of Towanda and the townships of Wysox, North Towanda, and Monroeton; b) the Mount Carmel, Pennsylvania area, which includes the Borough of Mount Carmel, and the Township of Mount Carmel; and c) the Pittston, Pennsylvania area, which includes the city of Pittston, the townships of Pittston and Jenkins, and the boroughs of Dupont, Avoca, Hughestown, Duryea, Yatesville, and Laflin, Pennsylvania.

Provided, however, that these prohibitions shall not apply to the construction of new facilities or the leasing of facilities that have not operated as supermarkets within six months of the date of the offer to lease.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. 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.

VI.

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.

VII.

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

A. Upon reasonable 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 reasonable 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.

VIII.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between The Penn Traffic Company ("Penn Traffic"), a corporation organized under the laws of the State of Delaware, with its principal offices located at 1200 State Fair Boulevard, Syracuse, New York, 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, Penn Traffic, pursuant to an agreement dated September 30, 1994, agreed to purchase certain assets of American Stores Company (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 attached agreement containing consent order ("Assets") during the period prior to their divestiture, when those Assets will be in the hands of Penn Traffic, 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, Penn Traffic entering into this Agreement shall in no way be construed as an admission by Penn Traffic that the Acquisition is illegal; and

Whereas, Penn Traffic 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. Penn Traffic 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, Penn Traffic will be free to close the Acquisition after 11:59 p.m., January 17, 1995.

3. Penn Traffic agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs III.A - III.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 Penn Traffic acquires the Assets until the divestiture set out in the consent order has been completed, Penn Traffic 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 Penn Traffic to divest itself of the Assets or to seek any other injunctive or equitable relief, Penn Traffic 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. Penn Traffic 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 Penn Traffic to its principal offices, Penn Traffic shall permit any duly authorized representative or representatives of the Commission:

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

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

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

IN THE MATTER OF

FELSON BUILDERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT, REGULATION Z AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3578. Complaint, May 15, 1995--Decision, May 15, 1995

This consent order requires, among other things, three California firms and an officer to comply with the full disclosure requirements of the Truth in Lending Act and Regulation Z, its implementing regulation, in advertising credit terms, and requires the respondents to make full written disclosure of the true costs and terms of the financing prior to consummation of credit agreements.

Appearances

For the Commission: *Jeffrey A. Klurfeld* and *Harold G. Sodergren.*

For the respondents: *Kenneth A. Cheitlin, McShane & Felson*, Walnut Creek, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Felson Builders, Inc., a corporation; Diamond Crossing Associates, L.P., a limited partnership, dba D.C. Funding; Elmhurst Partners, L.P., a limited partnership, dba Elmhurst Funding; and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., hereinafter sometimes referred to as respondents, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667e, as amended, and its implementing Regulation Z, 12 CFR 226, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41-58., as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. (a) Felson Builders, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

(b) Diamond Crossing Associates, L.P., dba D.C. Funding, is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of California.

(c) Elmhurst Partners, L.P., dba Elmhurst Funding, is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of California.

(d) Each of the above entities has its principal place of business at 1290 B Street, Suite 210, Hayward, California.

(e) Joseph L. Felson is an officer of Felson Builders, Inc. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondent Felson Builders, Inc. has been and is now engaged in the construction, advertising, and offering for sale of homes to the public. In the course and conduct of its business, respondent Felson Builders, Inc. has, on numerous occasions, disseminated, or caused to be disseminated, advertisements in Chinese-language and in English, which offer "consumer credit," as that term is defined in the TILA and Regulation Z, to prospective purchasers of its homes.

PAR. 3. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P. have been and are now engaged in the selling of said homes, and in the advertising, offering and extending of "consumer credit" to the public for the purchase of said homes, and are "creditors," as those terms are defined in the TILA and Regulation Z.

PAR. 4. The acts and practices of respondents alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

PAR. 5. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., in the course and conduct of their business, have failed to furnish consumers the disclosures as required by Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18.

PAR. 6. The aforesaid practice of respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., violates Section 128 of the TILA, 15 U.S.C. 1638, and Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18, and constitutes an unfair

and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 7. Respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., in the course and conduct of their business, have failed to furnish consumers prior to the consummation of a consumer credit transaction the disclosures as required by Sections 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18.

PAR. 8. The aforesaid practice of respondents Diamond Crossing Associates, L.P., and Elmhurst Partners, L.P., violates Section 128 of the TILA, 15 U.S.C. 1638, and Sections 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 9. At all times material to this complaint, Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), required that if any of the following terms is set forth in an advertisement:

(i) The amount or percentage of any downpayment;
(ii) The number of payments or period of repayment;
(iii) The amount of any payment;
(iv) The amount of any finance charge;

then it shall state the following terms, as applicable:

(i) The amount or percentage of the downpayment;
(ii) The terms of repayment;
(iii) The "annual percentage rate," using that term or the abbreviation "APR," and if the rate may be increased after consummation, that fact.

PAR. 10. Respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., in the course and conduct of their business, in connection with the advertising of consumer credit, have, on numerous occasions, disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, but fail to state all of the terms required by Section

226.24(c) of Regulation Z, 12 CFR 226.24(c), including the amount of any balloon payment.

PAR. 11. The aforesaid practice of respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 12. At all times material to this complaint, Section 226.24(b) of Regulation Z, 12 CFR 226.24(b), required that if an advertisement states a rate of a finance charge, it shall state the rate as an "annual percentage rate," using that term or the abbreviation "APR."

PAR. 13. Respondents Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., in the course and conduct of their business, in connection with the advertising of consumer credit, have, on numerous occasions, disseminated, or caused to be disseminated, advertisements that failed to state the rate of a finance charge as an "annual percentage rate," using that term or the abbreviation "APR."

PAR. 14. The aforesaid practice of Felson Builders, Inc., Diamond Crossing Associates, L.P., Elmhurst Partners, L.P., and Joseph L. Felson, individually and as an officer of Felson Builders, Inc., violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b).

Chairman Pitofsky not participating.

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 San Francisco 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 Truth in Lending Act, as amended, and its

implementing Regulation Z, and the Federal Trade Commission Act, as amended; 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. (a) Respondent Felson Builders, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

(b) Respondent Diamond Crossing Associates, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California.

(c) Respondent Elmhurst Partners, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California.

(d) Each of the above respondents has its principal place of business in the City of Hayward, State of California.

(e) Respondent Joseph L. Felson is an officer of respondent Felson Builders, Inc. He formulates, directs and controls the acts and practices of said respondent, and his principal 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

I.

It is ordered, That respondents Felson Builders, Inc., a corporation, its successors and assigns, and its officers; Diamond Crossing Associates, L.P., a limited partnership, dba D.C. Funding, its successors and assigns, and its officers; Elmhurst Partners, L.P., a limited partnership, dba Elmhurst Funding, its successors and assigns, and its officers; and Joseph L. Felson, individually and as an officer of Felson Builders, Inc.; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension of consumer credit, or in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act ("TILA") (15 U.S.C. 1601-1667e, as amended) do forthwith cease and desist from:

1. Failing to furnish consumers with the disclosures, as required by Section 128 of the TILA, 15 U.S.C. 1638, and by Sections 226.17(a) and 226.18 of Regulation Z, 12 CFR 226.17(a) and 226.18.

2. Failing to furnish consumers prior to the consummation of a consumer credit transaction with the disclosures, as required by Section 128 of the TILA, 15 U.S.C. 1638, and by Section 226.17(b) and 226.18 of Regulation Z, 12 CFR 226.17(b) and 226.18.

3. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the downpayment,

(2) The terms of repayment, including the amount of any balloon payment, and

(3) The "annual percentage rate," using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c))

4. Stating a rate of finance charge without stating the rate as an "annual percentage rate," using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.
(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b))

5. Failing to comply in any other respect with the Truth in Lending Act, 15 U.S.C. 1601-1667e, as amended, or its implementing regulation, Regulation Z, 12 CFR 226, as amended.

II.

It is further ordered, That respondents distribute a copy of this order to all their operating divisions, if any, and to all present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

III.

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

IV.

It is further ordered, That, for a period of five (5) years following service upon him of this order, the individual respondent named herein shall notify the Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment involved in the advertising and/or extension of "consumer credit," as that term is defined in the Truth in Lending Act and its implementing Regulation Z, no later than thirty (30) days after such discontinuance and affiliation has occurred. Such notice shall include the respondent's current business address and telephone number and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities and financial interest in the business.

V.

It is further ordered, That for five (5) years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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-3579. Complaint, May 16, 1995--Decision, May 16, 1995

This consent order requires, among other things, the Texas corporation to divest, to a Commission-approved acquirer, the Uniservice Corporation assets and businesses in Medford, Oregon, within twelve months or transfer responsibility for the divestiture to a trustee appointed by the Commission, and to obtain prior Commission approval, for a period of ten years, before acquiring any interest in funeral establishments or cemeteries in Jackson County, Oregon.

Appearances

For the Commission: *K. Shane Woods* and *Charles A. Harwood.*

For the respondent: *Michael H. Byowitx, Wachtell, Lipton, Rosen & Katz*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Service Corporation International ("SCI"), a corporation, through its wholly-owned subsidiaries SCI Oregon Funeral Services, Inc., a corporation, and UC Acquisition Corp., a corporation, have entered into an agreement with Uniservice Corporation ("Uniservice"), a corporation, that violates 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 as follows:

I. DEFINITIONS

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

a. *"SCI"* means Service Corporation International, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Service Corporation International, their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

c. *"Funerals"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

d. *"Perpetual care cemetery services"* means the provision of plots of land for, and the services associated with, including cemetery maintenance and upkeep, the final disposition of human remains by burial.

e. *"Medford area"* means Medford, Oregon, and its immediate environs.

II. THE RESPONDENT

1. Respondent SCI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

2. Uniservice is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 415 N. Killingsworth Street, Portland, Oregon.

3. SCI and Uniservice are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUISITION

1. On or about October 5, 1994, SCI entered into an Agreement and Plan of Merger with Uniservice, in which SCI would acquire 100% of the voting securities of Uniservice.

IV. THE RELEVANT MARKETS

1. The relevant lines of commerce in which to evaluate the effects of the acquisition are the provision of funerals and the provision of perpetual care cemetery services.

2. The relevant section of the country in which to evaluate the effects of the acquisition is the Medford area.

3. SCI and Uniservice both own funeral establishments and own or operate perpetual care cemeteries in the Medford area, and compete in the provision of funerals and perpetual care cemetery services.

4. The markets for funerals and perpetual care cemetery services in the Medford area are highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm or four-firm concentration ratios.

5. Entry into the relevant markets is difficult.

V. EFFECTS OF THE ACQUISITION

1. The effects of the acquisition may be to substantially lessen competition in each of the relevant markets in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual competition between SCI and Uniservice; and

b. By tending to create a dominant firm in the relevant markets.

VI. VIOLATION CHARGED

1. The agreement described above violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and the acquisition described above, if consummated, would violate Section 7 of the

Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition of the voting securities of Uniservice Corporation by respondent and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with 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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

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

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

C. *"Funerals"* means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony concerning the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

D. *"Funeral establishment"* means the Assets and Businesses of a facility that provides funerals.

E. *"Cemetery services"* means the provision of plots of land for, and the services associated with, the final disposition of human remains by burial.

F. *"Cemetery"* means the Assets and Businesses of a facility that provides cemetery services.

G. *"Cremation"* means the incineration of human remains.

H. *"Crematory"* means the Assets and Businesses of a facility that performs cremations.

I. *"Assets and Businesses"* include all assets, properties, business and goodwill, tangible and intangible, utilized by a funeral establishment, cemetery or crematory, including, but not limited to, the following:

1. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

2. All right to serve as directors on the Board of the Siskiyou Memorial Park;

3. All vendor lists, management information systems and software used on-site, and all catalogs, sales promotion literature and advertising materials, except that SCI may delete from such materials the Uniservice name, trademark or other identification;

4. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

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

6. All right, title and interest in the trade name of each funeral establishment, cemetery or crematory;

7. All right, title and interest in the books, records and files pertinent to any of the Properties to be Divested; and

8. A license to use the trade name "Carillon" in connection with the final disposition of cremains, a license to use the trademark "Life Centered Funeral Services" in connection with the sale of funerals, and a license to use the trademark "Life Trust" in connection with the sale of pre-need contracts, but in each case only in Medford and its environs.

J. *"Properties to be Divested"* means all of the Assets and Businesses of the following funeral establishments, cemeteries and crematories:

1. Perl Funeral Home
   426 W. 6th Street
   Medford, OR
2. Perl With Siskiyou Funeral Service
   2100 Siskiyou Boulevard
   Medford, OR
3. Siskiyou Memorial Park (cemetery)
   2100 Siskiyou Boulevard
   Medford, OR
4. Siskiyou Memorial Park (crematory)
   2100 Siskiyou Boulevard
   Medford, OR

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, the Properties to be Divested, including resigning as directors of the Siskiyou Memorial Park and appointing individuals specified by the acquirer or acquirers to fill the vacancies created by those resignations; provided, however, that if the acquirer or acquirers choose not to acquire the Assets and Businesses of the crematory at 2100 Siskiyou Boulevard, because the acquirer or acquirers do not need such assets to engage in the business of providing funerals and cemetery services, respondent shall not be required to divest such assets; and provided further that if the acquirer or acquirers choose not to acquire any of the licenses described in paragraph I.I.8 of this order, respondent shall not be required to divest such asset or assets.

B. Respondent shall divest the Properties to be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Properties to be Divested is to ensure the continued use of the Properties to be Divested in the same business in which the Properties to be Divested are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

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

D. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all the Properties to be Divested as required by this order.

III.

It is further ordered, That:

A. If SCI has not divested, absolutely and in good faith and with the Commission's prior approval, the Properties to be Divested within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Properties 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, SCI 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 notice by the staff of the Commission to respondent and its counsel 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 Properties to be Divested.

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

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

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Properties 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 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 divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 Properties to be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, 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 Properties 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 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,

the sale of funerals or cemetery services in Jackson County, Oregon; or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) the sale of funerals or cemetery services in Jackson County, Oregon. Provided, however, that this paragraph IV shall not apply to new facilities constructed or developed by respondent.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with 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 as required by this order.

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 a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV of this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution

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

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to their principal offices, respondent shall permit any duly authorized representative or representatives of the Commission:

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

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

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Service Corporation International ("SCI"), a corporation organized and existing under the laws of the State of Texas, with its principal executive offices located at 1929 Allen Parkway, Houston, Texas, 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, "Parties").

PREMISES

Whereas, on or about October 5, 1994, SCI entered into an Agreement and Plan of Merger with Uniservice Corporation ("Uniservice"), in which (1) UC Acquisition Corp., a wholly-owned

subsidiary of SCI, would be merged into Uniservice, and (2) Uniservice shareholders would receive cash ("Acquisition"); and

Whereas, both SCI and Uniservice own interests in funeral establishments that provide funerals, cemeteries that provide cemetery services and crematories that provide cremations to consumers; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("SCI/Uniservice Consent Agreement"), the Commission must place the SCI/Uniservice Consent Agreement on the public record for public comment for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached preserving the status *quo ante* and holding separate the assets and businesses of certain Uniservice funeral establishments, a cemetery and a crematory ("Hold Separate Assets") listed in Exhibit A attached hereto and made a part hereof until the divestitures contemplated by the SCI/Uniservice Consent Agreement have been made, divestitures resulting from any proceeding challenging the legality of the Acquisition might not be possible or might be less than an effective remedy; and

Whereas, the purposes of this Agreement are to: (1) preserve the Hold Separate Assets as viable independent businesses pending the divestitures described in the SCI/Uniservice Consent Agreement; (2) preserve the Commission's ability to require the divestitures of the funeral establishments, a cemetery and a crematory as specified in the SCI/Uniservice Consent Agreement; and (3) remedy any anticompetitive aspects of the Acquisition; and

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

Whereas, SCI 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, the Parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that at the time it accepts for public comment the proposed order in the SCI/Uniservice Consent Agreement it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission

determines to reject the SCI/Uniservice Consent Agreement, it will not seek further relief from SCI with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement, the SCI/Uniservice Consent Agreement to which it is annexed and made a part, and the order, once it becomes final, and in the event that the required divestitures are not accomplished, to appoint a trustee to seek divestiture of the Hold Separate Assets pursuant to the SCI/Uniservice Consent Agreement, as follows:

1. SCI agrees to execute and be bound by the SCI/Uniservice Consent Agreement.

2. SCI shall hold the Hold Separate Assets separate and apart from the date this Agreement is accepted until the first to occur of (a) ten business days after the Commission withdraws its acceptance of the SCI/Uniservice Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules or (b) the date the divestitures required by the order contained in the SCI/Uniservice Consent Agreement are accomplished. SCI's obligation to hold the Hold Separate Assets separate and apart shall be on the following terms and conditions:

a. SCI shall hold separate and apart the Hold Separate Assets.

b. Except as provided herein and as is necessary to assure compliance with this Agreement and the consent order, SCI shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Assets or any of their operations or businesses.

c. SCI shall cause the Hold Separate Assets to continue using their present names and trade names, and shall maintain and preserve the viability and marketability of each of the Hold Separate Assets and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair their marketability or viability. During the term of this Agreement, SCI shall provide the Hold Separate Assets with the same or better quality of support services, including without limitation, payroll processing, accounting, management information systems, and computer support, as Uniservice provided to the Hold Separate Assets prior to the acquisition.

d. SCI shall refrain from taking any actions that may cause any material adverse change in the business or financial conditions of the Hold Separate Assets.

e. SCI shall not change the composition of the management of the Hold Separate Assets, except that SCI may fill vacancies and remove management for cause.

f. SCI shall maintain separate financial and operating records and shall prepare separate quarterly and annual financial statements for the Hold Separate Assets and shall provide the Commission with such statements for each funeral establishment, cemetery and crematory within ten days of their availability.

g. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, SCI shall not receive or have access to, or the use of, any of the Hold Separate Assets' material confidential information not in the public domain, except as such information would be available to SCI in the normal course of business if the Acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to SCI from sources other than Uniservice, and includes but is not limited to pre-need customer lists, prices quoted by suppliers, or trade secrets.)

h. All earning and profits of the Hold Separate Assets shall be held separate. If necessary, SCI shall provide any or all of the Hold Separate Assets with sufficient working capital to operate at their current levels.

i. SCI shall refrain from, directly or indirectly, encumbering, selling, disposing of, or causing to be transferred any assets, property, or business of the Hold Separate Assets, except that the Hold Separate Assets may advertise, purchase merchandise and sell or otherwise dispose of merchandise in the ordinary course of business.

3. Should the Federal Trade Commission seek in any proceeding to compel SCI to divest itself of the shares of Uniservice stock that SCI may acquire, or to compel SCI to divest any assets or businesses of Uniservice that it may hold, or seek any other injunctive or equitable relief, SCI shall not raise any objection based upon the

early termination of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. SCI also waives all right to contest the validity of this Agreement.

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

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

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

This agreement shall not be binding until approved by the Commission.

EXHIBIT A

Hold Separate Assets

1. Perl Funeral Home
   426 W. 6th Street
   Medford, OR
2. Perl With Siskiyou Funeral Service
   2100 Siskiyou Boulevard
   Medford, OR
3. Siskiyou Memorial Park (cemetery)
   2100 Siskiyou Boulevard
   Medford, OR
4. Siskiyou Memorial Par (crematory)
   2100 Siskiyou Boulevard
   Medford, OR

IN THE MATTER OF

MONTEDISON S.P.A., ET AL.

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

Docket C-3580. Complaint, May 25, 1995--Decision, May 25, 1995

This consent order requires, among other things, the Royal Dutch Petroleum Company and the Shell Group of Companies to divest all of Shell Oil's polypropylene assets to Union Carbide Corporation, or to another Commission approved acquirer, within six months, requires Montedison to relinquish revenues under the profit sharing agreement from future U.S. licenses by Mitsui Petrochemical Industries Ltd., and requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in such a company or before entering into similar agreements.

Appearances

For the Commission: *Howard Morse, Rhett Krulla and William Baer.*

For the respondents: *Robert Joffe, Cravath, Swaine & Moore,* New York, N.Y. *Kevin Arquit, Rogers & Wells*, Washington, D.C. *William Pelster, Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y. and *Allen Lackey* and *Charles Corddry*, in-house counsel for Shell Oil Co., Houston, TX.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Montedison S.p.A. and HIMONT Incorporated (collectively "Montedison") and Shell Petroleum N.V., a holding company of the Royal Dutch/Shell Group of Companies ("the Shell Group") controlled by N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company) ("Royal Dutch") and The "Shell" Transport and Trading Company, p.l.c. ("Shell T&T"), (collectively "Shell") have agreed to form and acquire interests in a joint venture that would merge certain assets and

businesses of Montedison and of companies of the Shell Group, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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 having reason to believe that Montedison has entered into agreements in restraint of trade in violation of 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. RESPONDENTS

1. Respondent Montedison S.p.A. is a corporation organized, existing and doing business under and by virtue of the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy.

2. Respondent HIMONT Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware. HIMONT Incorporated is a wholly-owned, indirect subsidiary of Montedison S.p.A.

3. Respondent Royal Dutch Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands.

4. Respondent The "Shell" Transport and Trading Company, p.l.c., is a corporation organized, existing and doing business under and by virtue of the laws of England with its principal executive offices located at Shell Centre, London SE1 7NA, England.

5. Respondent Shell Oil Company ("Shell Oil") is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas. Shell Oil is a member company of the Royal Dutch/Shell Group of Companies, and all of its shares are directly or indirectly owned by Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c.

6. At all times relevant herein, each of the respondents or their predecessors, have been engaged in commerce, as "commerce" is

defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations 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.

II. THE PROPOSED JOINT VENTURE

7. On or about December 30, 1993, Montedison and Shell entered into an agreement to form and acquire equal interests in a joint venture that would merge the majority of Shell's and Montedison's worldwide polyolefins businesses. The proposed joint venture, designated by Montedison and Shell as "Montell," combines assets valued at over six billion dollars.

8. Under the terms of the agreement between Montedison and Shell, Shell would retain outside the proposed joint venture polypropylene assets of Shell Oil, including Shell Oil's polypropylene catalyst and polypropylene resin production facilities, Shell Oil's rights and obligations under a 1983 Cooperative Undertaking Agreement with Union Carbide Corporation ("Union Carbide"), pursuant to which Shell Oil and Union Carbide research, develop and license polypropylene technology and polypropylene catalyst worldwide, and Shell Oil's interest in the Seadrift Polypropylene Company, a partnership with Union Carbide which produces polypropylene resin. Nonetheless, Shell would control Shell Oil as well as Montell, and the proposed joint venture would create a common interest between Shell and Montedison.

III. THE RELEVANT MARKETS

9. One relevant line of commerce within which to analyze the likely effects of the proposed joint venture is licensing of polypropylene technology, which involves licensing a combination of current generation, advanced process technology, plant design, polypropylene catalyst technology and rights to purchase and use polypropylene catalysts.

10. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is polypropylene technology, including polypropylene process technology, plant design, and polypropylene catalyst technology, whether licensed to others or consumed internally. Innovation through competition in

research and development in the polypropylene technology market leads to reductions in cost, improved product properties and performance, and expansion of applications and use of polypropylene resins.

11. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the licensing, production and sale of high-yield/high-specificity polypropylene catalysts and catalyst technology. Polypropylene catalysts initiate the polymerization of propylene and control the characteristics of the polypropylene resin produced as well as the cost of production. There is no economic substitute for such catalysts in the production of polypropylene resin.

12. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the production and sale of polypropylene resin. Polypropylene resin has distinct performance characteristics and superior physical properties, including high temperature resistance and stiffness, compared to other commodity thermoplastics. Polypropylene is the lowest cost thermoplastic per pound, and because of its relatively low density, it has a substantial cost advantage on a volume basis. There is no economic substitute for polypropylene resin in the vast majority of applications where it is used.

13. Another relevant line of commerce within which to analyze the likely effects of the proposed joint venture is the production and sale of polypropylene impact copolymer resin, a type of polypropylene resin produced through copolymerization, in a second reactor, of polypropylene and ethylene or other olefin monomers and characterized by high impact strength. Polypropylene impact copolymer resin has distinct performance characteristics and superior physical properties in low temperature applications and applications requiring high impact strength. There is no economic substitute for polypropylene impact copolymer resin in the vast majority of applications where it is used.

14. The relevant geographic area within which to analyze the likely effects of the proposed joint venture in polypropylene technology; in licensing of polypropylene technology; and in the licensing, production and sale of polypropylene catalysts is the world. Polypropylene technology can be transferred easily and is disseminated throughout the world through licensing. Polypropylene catalysts are also distributed throughout the world.

15. The relevant geographic area within which to analyze the likely effects of the proposed joint venture in the production and sale of polypropylene resin, and in the production and sale of polypropylene impact copolymer resin, includes the United States and Canada. Sustained imports are unlikely because of the relatively high cost of transporting polypropylene resin, import duties, long lead times required for shipping polypropylene resin from overseas, and the need for after-sales technical support.

IV. MARKET STRUCTURE

16. Montedison, through HIMONT, is the leading competitor in each of the relevant markets. Montedison's strong market position in the polypropylene resin markets and its extensive licensing network provide a flow of information and support its research and development program. Montedison accounts for approximately 20 percent of polypropylene resin capacity and production, and approximately 30 percent of capacity and 35 percent of production of polypropylene impact copolymer resin, in the United States and Canada.

17. Montedison has coordinated with Mitsui Petrochemical Industries Ltd. ("Mitsui") in licensing of polypropylene technology and in the sale of polypropylene catalysts. Montedison and Mitsui share royalties from licensing of polypropylene technology and licensing of catalyst technology and share profits from the sale of polypropylene catalysts manufactured in the United States for sale to licensees of Montedison and Mitsui in the Western Hemisphere. Montedison and Mitsui polypropylene technology accounts for approximately 45% of all polypropylene capacity built or projected to be built in the world since 1990, and over 50% of capacity built or projected to be built under technology licenses. Montedison and Mitsui catalysts account for over 55% of world production of polypropylene catalysts.

18. Shell is the second largest producer of polypropylene catalyst, polypropylene resin and impact copolymer polypropylene resin in the world and is a leader in catalyst technology. Shell's strong global position in polypropylene resin supports, and provides a flow of market information for, its research and development activities in polypropylene technology.

19. Shell Oil and Union Carbide engage in research and development and license polypropylene technology throughout the world, combining pursuant to a December 1983 Cooperative Undertaking Agreement, Shell's "SHAC" polypropylene catalyst with Union Carbide's "Unipol" process technology. In addition, Shell, Shell Oil, and Union Carbide cooperate in research and development of polypropylene catalysts pursuant to a Polypropylene Catalyst Research and Development Agreement. Unipol/SHAC is the second leading polypropylene technology in the world. The Shell Group and Unipol/SHAC licenses account for over 25% of all polypropylene capacity built or projected to be built in the world since 1990, and over 30% of capacity built or projected to be built pursuant to technology licenses.

20. Shell Oil produces polypropylene catalysts in the United States which it uses for production of polypropylene resin and sells to Unipol/SHAC licensees. In addition, Shell sells polypropylene catalysts manufactured under contract exclusively for Shell. Overall, Shell accounts for approximately 20% of world production of polypropylene catalyst.

21. Shell produces and sells polypropylene resin in the United States and Canada and markets polypropylene impact copolymer resin and other polypropylene resin manufactured in the Seadrift joint venture plant jointly owned by Shell and Union Carbide. Shell, including Seadrift, accounts for over 8% of capacity and over 9% of production of polypropylene resin, and over 11% of capacity and over 7% of production of polypropylene impact copolymer resin, in the United States and Canada.

22. The technology licensing market is very highly concentrated, as measured by the Herfindahl-Hirschmann Index ("HHI") and other measures of concentration. The proposed joint venture would create a common interest between Montedison and Shell, increasing concentration as measured by the HHI by over 3000 points to over 7000. The Montedison/Mitsui and Unipol/SHAC technologies collectively account for over 80 % of completed and projected additions to capacity pursuant to technology licenses since 1990. Other technologies are not a significant competitive constraint.

23. The polypropylene technology market is also very highly concentrated. The HHI for completed and projected additions to capacity based on technology employed, including both licensed and captive technology, would increase by over 2300 points to over 5100

as a result of the proposed joint venture. The Montedison/Mitsui and Unipol/SHAC technologies collectively account for over 70% of all polypropylene capacity built or projected to be built worldwide since 1990.

24. The polypropylene catalyst market is also very highly concentrated. The proposed joint venture would put under common control over 75% of the world's production of polypropylene catalyst. The proposed joint venture would increase concentration as measured by the HHI in polypropylene catalyst production by over 2400 points to over 6000.

25. The U.S. and Canada polypropylene market is moderately concentrated. The proposed joint venture would increase concentration as measured by the HHI by over 350 points to over 1400 for both capacity and production.

26. The U.S. and Canada polypropylene impact copolymer market would become highly concentrated as a result of the proposed joint venture. The joint venture would increase concentration as measured by the HHI by approximately 700 points for capacity and approximately 500 points for production to approximately 2100 and 2300, respectively.

27. Entry into the relevant markets would not be timely, likely or sufficient to deter or offset reductions in competition resulting from the proposed joint venture. Invention of a current generation polypropylene catalyst and process technology requires substantial technological expertise, takes several years of research and development, and involves large sunk costs with no guarantee of success. Patent obstacles, and uncertainties of patent litigation, further increase the risk of entry. Once a current generation polypropylene catalyst and process technology has been invented additional time and sunk costs are required to commercialize the technology. Entry into licensing of polypropylene technology requires, in addition to the time and requirements for entry into polypropylene technology, matching process technology, plant design and a polypropylene catalyst so that they function efficiently together to produce a range of grades of polypropylene resin; customer acceptance of the resin offered by the technology and assurance that the technology is free of potential patent liability; and a track record of commercial success in manufacturing and selling polypropylene resin using the process technology, plant design and polypropylene catalyst.

28. Barriers to entry into the polypropylene catalyst, polypropylene resin and polypropylene impact copolymer resin markets include patents, environmental permitting, extensive sunk costs and time consumed in research and development, design and construction of a plant, and customer qualification. Effluent and solvent recovery make design, siting and permitting of a polypropylene catalyst plant particularly difficult. Even after catalyst plant construction is completed, substantial additional time is required before suitable catalysts can be produced and customer qualification requirements met.

29. The polypropylene resin and polypropylene impact copolymer resin markets are characterized by industry practices that facilitate coordinated interaction, including but not limited to:

a. Licensing agreements that allow technology providers to monitor sales and capacity expansions of licensee competitors;

b. Supply arrangements that allow suppliers of polypropylene catalysts to monitor the level of production and sales of polypropylene resin competitors;

c. The existence of industry-wide surveys that communicate among competitors, on a monthly basis, information concerning price, capacity utilization rates, and inventory;

d. Advance notification of price increases and signaling of price increases through the trade press;

e. Advance announcements of capacity expansion; and

f. Long-term relationships between customers and suppliers, difficult qualification requirements, and high costs to customers in switching suppliers, that facilitate customer allocation.

V. EFFECTS OF THE PROPOSED JOINT VENTURE

30. The effect of the proposed joint venture may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

a. It will eliminate actual, direct and substantial competition between Montedison and Shell in the relevant markets;

b. It will create a shared interest between Montedison and Shell and result in spill-over effects on competition outside the joint venture;

c. It will reduce Montedison's and Shell's incentives to license polypropylene technology and to license or sell polypropylene-catalysts to polypropylene resin manufacturers that compete with the joint venture;

d. It will substantially increase the level of concentration in the relevant markets;

e. It will increase Montedison and Shell's ability unilaterally to exercise market power in polypropylene technology; in the licensing of polypropylene technology; and in the production, sale and licensing of polypropylene catalysts;

f. It will increase the price of polypropylene technology licenses and polypropylene catalysts and reduce innovation in polypropylene technology, increasing the cost of polypropylene resin production and the price of polypropylene resin;

g. It will significantly enhance the likelihood of coordinated interaction among competitors in the production and sale of polypropylene resin and polypropylene impact copolymer resin;

h. It will increase barriers to entry into the relevant markets; and

i. It will allow Shell to limit the ability of Union Carbide and Shell Oil to compete in the licensing of polypropylene technology pursuant to the Cooperative Undertaking Agreement and the Polypropylene Catalyst Research and Development Agreement.

31. The proposed joint venture may impair the ability of Union Carbide and Shell Oil to engage in export sales through licensing of polypropylene technology in export markets, resulting in the loss of substantial economic opportunities in the United States. Shell's acquisition of an interest in the joint venture likely would cause Shell to reduce its investment in support of Unipol/SHAC, reducing the export of goods and services, including catalyst and licensing, engineering and technical support services, from the United States. The proposed joint venture has a direct, substantial, and reasonably foreseeable adverse effect on export trade or export commerce of persons engaged in such trade or commerce in the United States.

VI. OTHER ANTICOMPETITIVE CONDUCT

32. Montedison's royalty and profit sharing agreement with Mitsui constitutes an unfair method of competition in the licensing of polypropylene technology and in the licensing of polypropylene

catalyst. The purpose and effect of Montedison's agreement with Mitsui is to limit competition and to allocate or divide territories or markets for the licensing of polypropylene technology and in the licensing of polypropylene catalyst, including the United States. Although earlier technology licensing agreements between Montedison and Mitsui may have been justified as reasonable agreements to exchange and transfer technology, Montedison entered into subsequent and current agreements with Mitsui upon expiration of the earlier agreements with the purpose and effect of allocating or dividing territories or markets for the licensing of polypropylene technology and licensing of catalyst technology and restricting competition, including price competition, between Montedison and Mitsui in the United States.

VII. VIOLATIONS CHARGED

33. The agreement between Montedison and Shell described in paragraph seven violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed joint venture between Montedison and Shell, 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.

35. The proposed joint venture would have an adverse effect on U.S. export trade in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

36. The agreement between Montedison and Mitsui described in paragraphs seventeen and thirty-two violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed formation of a joint venture between Montedison S.p.A. and HIMONT Incorporated (collectively "Montedison") and Shell Petroleum N.V., a holding company of the Royal Dutch/Shell Group of Companies ("the Shell Group") controlled by N.V. Koninklijke Nederlandsche Petroleum Maatachappij (Royal Dutch Petroleum Company) ("Royal Dutch") and The "Shell" Transport and Trading Company, p.l.c. ("Shell

T&T"), that would merger certain assets and businesses of Montedison and of companies of the Shell Group; and Royal Dutch, Shell T&T, and Shell Oil Company ("Shell Oil"), a company of the Shell Group, (collectively "Shell") and Montedison, all collectively hereinafter sometimes referred to as "respondents," having been furnished with it copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Shell and Montedison with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Montedison S.p.A. is a corporation organized, existing and doing business under and by virtue of the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy.

2. Respondent HIMONT Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware.

HIMONT Incorporated is a wholly-owned, indirect subsidiary of Montedison S.p.A.

3. Respondent Royal Dutch is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands. Royal Dutch is a holding company which, together with Shell T&T, controls the Shell Group.

4. Respondent Shell T&T is a corporation organized, existing and doing business under and by virtue of the laws of England with its principal executive offices located at Shell Centre, London SE1 7NA, England. Shell T&T is a holding company which, together with Royal Dutch, controls the Shell Group.

5. Respondent Shell Oil is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas. Shell Oil is a member company of the Shell Group, and all of its shares are directly or indirectly owned by Royal Dutch and Shell T&T.

6. 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. The following terms shall mean the following entities:

1. *"Montedison"* means Montedison S.p.A. and its wholly owned subsidiary Montedison (Nederland) N.V., a holding company that owns Montecatini Nederland B.V., which in turn owns, directly or indirectly, through its subsidiaries HIMONT Incorporated, Spherilene S.r.l., Moplefan S.p.A. and Montepolmieri Sud, S.p.A., all of the polyolefins interests of Montedison S.p.A. "Montedison" includes all subsidiaries, divisions, and groups and affiliates controlled by Montedison S.p.A., their respective successors and assigns, and their

respective directors, officers, employees, agents and representatives. Unless otherwise indicated, "Montedison" does not include Montell.

2. *"HIMONT"* means HIMONT Incorporated. "HIMONT" includes all subsidiaries, divisions, and groups and affiliates controlled by HIMONT, their respective successors and assigns, and their respective directors, officers, employees, agents and representatives.

3. *"Shell"* means N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company) ("Royal Dutch"), The "Shell" Transport and Trading Company, p.l.c. ("Shell T&T"), and the Shell Group.

4. *"The Shell Group"* means all companies controlled by Royal Dutch and/or Shell T&T, including Shell Oil and Shell Petroleum N.V. "The Shell Group" includes all subsidiaries, divisions, and groups and affiliates controlled by companies of the Shell Group, Royal Dutch or Shell T&T, their respective successors and assigns, and their respective directors, officers, agents and representatives. Unless otherwise indicated, "the Shell Group" does not include Montell.

5. *"Shell Oil"* means Shell Oil Company. "Shell Oil" includes all subsidiaries, divisions, and groups controlled by Shell Oil, their respective successors and assigns, and their respective directors, officers, agents and representatives. Unless otherwise indicated, "Shell Oil" does not include Polyco.

6. *"Montell"* means Montell Polyolefins, the corporation to be formed, pursuant to the Agreement to Merge Polyolefins Businesses, to hold the majority of the polyolefins businesses of Montedison and of Shell and to be owned, directly or indirectly, by Montedison and companies of the Shell Group. "Montell" includes all subsidiaries, divisions, and groups controlled by Montell, their respective successors and assigns, and their respective directors, officers, agents and representatives.

7. *"Montell Affiliates"* means companies that Montell controls as that term is defined in 16 CFR 801.1(b), except that this term shall also include (i) any entity other than Montell in which Shell or Montedison has an ownership interest of 25% or more as of December 1, 1994 and which interest is contributed to Montell, and (ii) companies in which Montell has an ownership interest of 35% or more and would have control as defined in 16 CFR 801.1(b) if

ownership interests held directly or indirectly by a government were excluded.

8. *"Technipol"* means a company to be formed and held separate by Montedison under the terms and conditions of the attached Agreement to Hold Separate. "Technipol" includes all subsidiaries, divisions, and groups controlled by Technipol, their respective successors and assigns, and their respective directors, officers, agents and representatives.

9. *"Polyco"* means a company to be formed by Shell Oil to succeed to and conduct, under the terms and conditions of this order, the Properties to Be Divested. "Polyco" includes all subsidiaries, divisions, and groups controlled by Polyco, their respective successors and assigns, and their respective directors, officers, agents and representatives.

10. *"Akzo Nobel"* means Akzo Nobel N.V., Akzo Nobel Inc., Akzo Chemicals BV and Akzo Chemicals Inc.

11. *"Mitsui"* means Mitsui Petrochemical Industries Ltd.

12. *"Union Carbide"* or "UCC" mean Union Carbide Corporation.

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

C. *"Agreement to Merge Polyolefins Businesses"* means the agreement between Montedison and Shell Petroleum N.V. (a company of the Shell Group) dated December 30, 1993, and amendments thereto, to merge the majority of the worldwide polyolefins businesses of Montedison and of Shell into a new entity to be owned by Montedison and companies of the Shell Group.

D. *"Propylene Polymers"* or *"PP"* mean homopolymers of propylene and copolymers or polyolefinic alloys of propylene with less than 50% by mol of other monoolefins and having a flexural modulus (measured according to ASTM D 790-71) higher than 4,000 Kg/cm^2.

E. *"PP Catalyst"* means supported catalyst components including compounds of transition metals of Groups IV-VIII of the Periodic Table, at least in part supported on a carrier, the essential component of which is a halogen-containing compound of magnesium, for use in production of Propylene Polymers.

F. *"Catalyst Support"* means preformed catalyst supports or support carriers which may be titanated, *i.e.*, combined with titanium or with a titanium containing compound, to produce PP Catalyst.

G. *"Catalyst Systems"* means specified combinations of PP Catalyst and other components designed, developed, used, or suitable for use for the production of Propylene Polymers.

H. *"PP Technology"* means technology relating to Propylene Polymers and the production thereof, and to the preparation and use of Catalyst Systems.

I. *"Catalyst Technology"* means technology relating to PP Catalyst and to the production, preparation and use of PP Catalyst, Catalyst Support and Catalyst Systems.

J. *"Shell Catalyst Technology"* means Catalyst Technology, including Know-How and patent rights, developed, under development, used, offered for license or licensed to any person by companies of the Shell Group at any time prior to the date of transfer to Polyco of the Properties to Be Divested.

K. *"Shell Oil Catalyst Technology"* means Catalyst Technology, including Know-How and patent rights, developed, under development, used, offered for license or licensed to any person by Union Carbide or Shell Oil at any time prior to the date of transfer to Polyco of the Properties to Be Divested.

L. *"Unipol PP Technology"* means PP Technology and Catalyst Technology, including Know-How and patent rights, developed, under development, offered for license, or licensed to any person by UCC and/or Shell Oil in accordance with their Cooperative Undertaking Agreement dated December 22, 1983, or used by UCC and Shell Oil in their partnership PP facility at Seadrift, Texas at any time prior to the date this order becomes final.

M. *"Unipol/SHAC Technology Business"* means the research and development, promotion, and licensing of Unipol PP Technology and Shell Oil Catalyst Technology; the research and development of PP Catalyst, Catalyst Support and Catalyst Systems utilizing Unipol PP Technology and Shell Oil Catalyst Technology; rights and obligations under, and activities conducted pursuant to, the Cooperative Undertaking Agreement between UCC and Shell Oil dated December 22, 1983, and the Polypropylene Catalyst Research and Development Agreement among Shell Oil, UCC and Shell Internationale Research Maatschappij B.V. ("The Tripartite Catalyst Research Agreement"); and the research and development, production and sale of Propylene Polymers, and the demonstration of Unipol PP Technology and Shell Oil Catalyst Technology, pursuant

to the Seadrift Polypropylene Company partnership agreement between UCC and Shell Oil.

N. *"LIPP Process"* means PP Technology developed and used by Shell for the production of Propylene Polymers through a bulk liquid polymerization process.

O. *"Know-How"* means all relevant information, including knowledge, experience and specifications.

P. *"Material Confidential Information"* means competitively sensitive or proprietary information, not in the public domain, concerning the PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support, or Propylene Polymers businesses.

Q. *"Properties to Be Divested"* means

1. All assets, tangible and intangible, of Shell Oil relating to PP Technology, Catalyst Technology, Propylene Polymers and PP Catalyst, including without limitation:

a. Shell Oil's Propylene Polymers plant and assets at Norco, Louisiana, and Shell Oil's associated facilities at Norco, Louisiana for splitting and separating polymer-grade propylene and propane from chemical-grade propylene;

b. Shell Oil's PP Catalyst plant and assets at Norco, Louisiana;

c. Shell Oil's interest in the Seadrift Polypropylene Company and the Propylene Polymers plant at Seadrift, Texas;

d. Shell Oil's PP Catalyst pilot plant;

e. Shell Oil's facilities and equipment (other than real property and general, chemical analytical equipment) at the Westhollow Technology Center at Houston, Texas, primarily utilized during the year prior to the transfer to Polyco of the Properties to Be Divested in research, development and technical support with respect to Shell Oil's Propylene Polymers, PP Catalyst and Catalyst Technology businesses;

f. A rent-free lease, until five years from the date of divestiture of the Properties to Be Divested or until such earlier date as the acquirer may elect, to offices and research and development space at the Westhollow Technology Center at Houston, Texas, associated with the Properties to Be Divested;

g. All owned or leased distribution facilities, rail cars and other assets used in sales or technical service of Propylene Polymers or PP

Catalyst, other than real property at the headquarters offices, general sales offices, and research center of Shell Oil;

h. All intellectual property, including patent rights, trade secrets, technology and Know-How, relating to Catalyst Technology, PP Catalyst, Catalyst Systems, and Propylene Polymers;

i. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes and quality control data;

j. All interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, including without limitation agreements with Shell Canada and Pecten, and rights under warranties and guarantees, express or implied;

k. All books, records, and files;

l. Shell Oil's interest in owned or leased real property associated with the Norco, Louisiana, and Seadrift, Texas, Propylene Polymers plants, together with appurtenances, licenses and permits;

m. Shell Oil's interest in owned or leased improvements to real property associated with the Norco, Louisiana, PP Catalyst plant, together with appurtenances, licenses and permits, and a rent-free lease to the land associated with the PP Catalyst plant for the life of the plant;

n. Shell Oil's interest in the Unipol/SHAC Technology Business and in the Cooperative Undertaking Agreement dated December 22, 1983, including but not limited to all future revenue of Shell Oil from Unipol PP Technology and Shell Catalyst Technology developed, under development, offered for license, or licensed to any person by UCC or Shell Oil at any time prior to the date of transfer to Polyco;

o. Exclusive world-wide rights to all Shell Oil trademarks and trade names relating to Propylene Polymers other than Shell Oil trademarks used by Shell Oil for its products generally, such an the "SHELL" mark and the Pecten emblem;

p. All licenses relating to the manufacture and sale of Propylene Polymers and PP Catalyst or the licensing of PP Technology or Catalyst Technology, including but not limited to Shell Oil's rights under the following patents:

(1) All applicable patents of Shell;

(2) All patents of Montedison and Mitsui covered by the July 30, 1985 Agreement of Himont Incorporated, Mitsui, Union Carbide Corporation, and Shell Chemical Company; any patent license agreements between Montedison and Shell; and any patent license agreements between Mitsui and Shell;

(3) Phillips U.S. Patent 4,376,851 "crystalline polypropylene";

(4) Studiengesellschaft Kohle U.S. Patent 4,125,698 covering production of PP with a titanium chloride/DEAC catalyst; and

(5) Amoco Chemical Company patents covering "PP Catalyst" identified in the patent license agreement between Amoco and Shell Oil, including Amoco U.S. Patent 4,540,679; Japan Patent Application 59350/85 and European Patent Application 159,150; and

q. Shell Oil's rights under The Tripartite Catalyst Research Agreement; the Polypropylene Agreement between Shell Research Limited and Shell Oil Company; the PP Catalyst Patent Settlement Agreement between Shell Internationale Research Maatschappij B.V. and Shell Oil Company; and the July 30, 1985 Agreement of Himont Incorporated, Mitsui, Union Carbide Corporation, and Shell Chemical Company, subject to any necessary approval of parties not subject to this order; and

2. All Shell's worldwide rights to the "SHAC" trademark; all customer lists, records and files, all catalogs, and all sales promotion literature relating to sales by Shell outside the United States of PP Catalyst and Propylene Polymers manufactured by Shell Oil; and all interest in and to contracts entered into by Shell in the ordinary course of business with customers, sales representatives, distributors and agents relating to the sale, outside the United States, of PP Catalyst or Propylene Polymers manufactured by Shell oil (together with associated bid and performance bonds).

R. *"Viability and Competitiveness"* means having the capability and incentive to operate independently at annual levels of research and development, licensing, production, and sales of PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support and Propylene Polymers at least equal to levels experienced during each of the two (2) calendar years immediately preceding the date of transfer to Polyco of the Properties to Be Divested, and capable through its own

resources of functioning independently and competitively in the PP Technology, Catalyst Technology, PP Catalyst, and Propylene Polymers businesses.

II.

It is further ordered, That:

A. Shell and Shell Oil, as applicable, shall divest the Properties to Be Divested, absolutely and in good faith, within six (6) months of the date this order becomes final, and shall also divest such additional, ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the Viability and Competitiveness of the Properties to Be Divested.

B. The period of six (6) months as specified in paragraph II.A shall be extended to March 31, 1997, if either of the following conditions is satisfied:

1. Union Carbide declines, within thirty (30) days following receipt by Union Carbide of the report of the independent appraiser, to acquire the Properties to Be Divested for the fair market value of the Properties to Be Divested as an operating business as determined by an independent appraisal prepared in accordance with the following procedure, or as otherwise agreed, or at such price as agreed, by Shell Oil and Union Carbide:

a. Prior to the expiration of fifteen (15) days from the date this order becomes final Shell Oil will notify Union Carbide of Shell Oil's selection of an independent appraiser;

b. The independent appraiser selected by Shell Oil will perform the appraisal unless within fifteen (15) days from notification of Shell Oil's selected independent appraiser, Union Carbide objects to Shell Oil's selected independent appraiser and notifies Shell Oil of its selection of an independent appraiser;

c. Within fifteen (15) days from the date the name of Union Carbide's selected independent appraiser is received by Shell Oil, Shell Oil will either agree to Union Carbide's selected independent appraiser or request that the two selected independent appraisers jointly select, within ten (10) days of such request, another independent appraiser;

d. The compensation paid to the independent appraiser shall be paid by Shell Oil or as otherwise agreed by Shell Oil and Union Carbide, and the amount of compensation shall be independent of the amount of the fair market value of the Properties to Be Divested as determined by the appraisal;

e. The independent appraiser shall be authorized by Shell to question personnel and examine all relevant books and records, including personnel and books and records of the Unipol/SHAC Technology Business, in connection with the appraisal under appropriate confidentiality provisions;

f. The independent appraisal shall be completed and presented by the appraiser to Union Carbide and Shell Oil within forty-five (45) days of the selection of the appraiser as set forth in this paragraph II.B.1 of this order; or

2. Union Carbide, within (30) days of receiving notice from Shell Oil that Shell proposes to divest Polyco to a named acquirer approved by the Commission, does not consent to the transfer of Polyco's interest in the Cooperative Undertaking Agreement dated December 22, 1983, to such Commission approved acquirer.

C. In the event that, prior to the expiration of the six (6) months specified in paragraph II.A of this order, the Commission has neither approved nor disapproved, within sixty (60) days of receipt of the application, an application for approval of a divestiture to a proposed acquirer submitted in accordance with paragraphs II.A and II.F of this order, the time period specified in paragraph II.A of this order may be extended by the Commission by the number of days in excess of sixty (60) required by the Commission to rule on the divestiture application and, if the Commission approves divestiture to a person other than Union Carbide, the Commission may further extend such period, if necessary, by thirty (30) days in order to provide Shell Oil time to comply with the requirements of paragraph II.B.2 of this order.

D. Provided further, if at the instance of Union Carbide over the opposition of Shell, Shell is enjoined or otherwise prohibited by court order from divesting the Properties to Be Divested, Shell shall promptly give written notice of such order to the Commission, whereupon the period within which Shell shall divest the Properties to Be Divested under paragraphs II.A, II.B or II.C of this order shall

be extended to the earlier of (1) one year from the expiration of the time specified in paragraph II.A of this order and such additional time as may be allowed in paragraphs II.B or II.C of this order; or (2) ninety (90) days after the injunction or other order expires.

E. Respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as Shell and Shell Oil, as applicable, have divested all the Properties to Be Divested or until such other time as the Agreement to Hold Separate provides. Profits accumulated by Technipol during the period the Agreement to Hold Separate is in effect shall be retained by Montedison upon expiration of the Agreement to Hold Separate and shall in no event be transferred to Montell or Shell.

F. Shell and Shell Oil, as applicable, shall divest the Properties to Be Divested as an incorporated, ongoing business, identified herein as "Polycom and established in accordance with the attached Agreement to Hold Separate, and shall divest the Properties to Be Divested only to Union Carbide or to another acquirer or acquirer s 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 Polyco as an ongoing and viable business engaged in the research, development, manufacture and sale of PP Catalyst and Propylene-Polymers and in the research, development, and, licensing of PP Technology and Catalyst Technology, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

G. The Properties to Be Divested shall be divested free and clear of (1) all royalties, mortgages, encumbrances and liens to Shell or Montell; and (2) any contractual commitments or obligations to Shell or Montell existing as of the date of divestiture.

H. Should any transfer of an agreement, contract or license required by paragraph II.A of this order not be possible after reasonable effort by Shell and Shell Oil due to a person other than a party to this order withholding its consent to the transfer, Shell Oil shall enter into an agreement with Polyco or the acquirer thereof the purpose of which agreement is to realize the same effect as such transfer. Shell Oil shall submit a copy of each such agreement with its compliance reports to the Commission pursuant to paragraphs VIII.A and VIII.B of this order. Further, Shell Oil shall secure, at its

expense, patent licenses, or assignments of patent licenses, extending to Polyco and the acquirer thereof rights and royalty rates with respect to the manufacture and sale of Propylene Polymers and PP Catalyst from the Properties to Be Divested, and rights to expand production and sale, no less favorable than those held by Shell Oil as of the date of transfer to Polyco of the Properties to Be Divested.

III.

It is further ordered, That:

A. Prior to transfer of any assets or businesses from Shell into Montell or merger of any part of Shell and Montell or Montedison, Shell shall

1. Extend to Polyco, without royalty to Shell or Montell, Shell's rights under agreements relating to the research and development, manufacture and sale of PP Catalyst, Catalyst Support, and Catalyst Systems by any person, including but not limited to nonexclusive rights to sell, and to contract with Akzo Nobel for the production of, PP Catalyst and Catalyst Support;

2. Disclose to Polyco all Shell Catalyst Technology in its possession or to which it has rights;

3. Grant Polyco, without royalty to Shell or Montell, the perpetual, non-exclusive right (1) to license, subject to the rights of Union Carbide, Shell Catalyst Technology to any person worldwide; (2) to sell worldwide to any person PP Catalyst and Catalyst Systems based on Shell Catalyst Technology; and (3) to enforce intellectual property rights with respect to Shell Catalyst Technology worldwide, including without exclusion the right to sue any person who by the manufacture, use or sale of any PP Catalyst or Catalyst System infringes any Shell patent which has been applied for in any country in the world before the date this order becomes final. All costs of any such suit by Polyco shall be borne by Polyco and all damages recovered shall be retained by Polyco; and

4. Grant Polyco, without royalty to Shell or Montell, the exclusive right, until seven years from the date of divestiture of the Properties to Be Divested, (1) to license, subject to the rights of Union Carbide, Shell Catalyst Technology to persons other than Montell and Montell Affiliates; and (2) to sell to persons other than

Montell and Montell Affiliates (or LIPP Process licensees for use in their LIPP Process plants) such PP Catalyst formulations or their equivalent as were manufactured or sold by Shell, or manufactured for Shell by Akzo Nobel, prior to the date this order becomes final; and

B. Shell and Montell shall grant to Polyco and licensees of Unipol PP Technology immunity under patents relating to PP Technology, Catalyst Technology, PP Catalyst, Catalyst Support, Catalyst Systems or Propylene Polymers, based on work conducted prior to December 31, 1997, or prior to one year after divestiture of the Properties to Be Divested, whichever is later, by persons who, as Shell personnel within one (1) year prior to the date of the formation of Montell, had access to Unipol PP Technology other than in the public domain and other than Catalyst Technology received by Shell Oil from other companies of the Shell Group.

C. Until one (1) year after divestiture of the Properties to Be Divested no Shell research personnel who, within one (1) year prior to the date of the formation of Montell, had access to Unipol PP Technology (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group) shall engage in research at facilities of Montell on PP Technology, Shell Catalyst, Technology or Montedison Catalyst Technology. Provided, however, nothing in this order shall require Shell to conduct any research and development for any person or to refrain from conducting research and development for, and at the expense of, any person, including Montell and communicating with, or receiving communications from, such person regarding such research and development work. The results of any research and development conducted by Shell prior to December 31, 1997, or one year after divestiture of the Properties to Be Divested, whichever is later, on Shell Catalyst Technology, including but not limited to research or development conducted for, or at the expense of, Montell, shall be provided to Polyco without payment for use in the Unipol/SHAC Technology Business.

D. Shell (including former employees of Shell transferred to Montell) shall not provide, disclose or otherwise make available to Montedison, Technipol, Montell or Montell Affiliates any Material Confidential Information relating to Unipol PP Technology or the Unipol/SHAC Technology Business (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group), provided however nothing in this paragraph III.D of this order shall

prohibit (1) Montell Affiliates who are licensees of Unipol PP Technology from receiving information, in accordance with such license, for use in their Unipol PP Technology licensed production facilities, including information obtained by Shell, prior to the formation of Montell, under The Tripartite Catalyst Research Agreement; and (2) any communication between Shell and Montell necessary to ensure that Montell and its employees make no unauthorized use or disclosure of any Material Confidential Information.

E. Until two (2) years after divestiture of the Properties to Be Divested, Shell, Montell and Technipol shall not employ, or make offers of employment to, any person employed by Shell Oil whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested. This provision, however, does not apply to employment by Shell Oil of any employee who is terminated by Polyco or by the acquirer of the Properties to Be Divested or who is not offered employment by Polyco or by the acquirer of the Properties to Be Divested at a base salary that is at least equivalent, and incentives and benefits that are comparable, to those held by the employee prior to the divestiture of the Properties to Be Divested. Provided, however, Shell Oil shall not be required to, but may, terminate employment of any employee who refuses to accept employment with Polyco; Shell Oil shall substitute alternative personnel of equivalent qualifications, education and experience for any persons declining to accept employment with Polyco who are not terminated by Shell. Shell Oil shall encourage and facilitate employment by Polyco or by the acquirer of the Properties to Be Divested of employees whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested; shall not offer any incentive to such employees to decline employment with Polyco or with the acquirer of the Properties to Be Divested or to accept other employment in Shell; and shall remove any impediments that exist which may deter such employees from accepting employment with Polyco or with the acquirer of the Properties to Be Divested, including but not limited to the payment for the benefit of the employees of all accrued bonuses, pensions and other accrued benefits to which such employees are entitled as of the date of the divestiture. Shell Oil

shall not impose any loss of pension benefits on employees to which such employees are entitled under the Shell Oil pension plan as administered under ERISA.

IV.

It is further ordered, That from the date this order becomes final and continuing until three (3) years following the date of the divestiture required by this order, Shell shall, at Polycol's request or at the request of the acquirer of the Properties to Be Divested, contract with Polyco or the acquirer of the Properties to Be Divested to supply to Polyco or the acquirer propylene monomer, in such quantities and product grade as Polyco or the acquirer may request for use in the Properties to Be Divested subject only to the capacity and grade constraints of Shell's propylene monomer production facilities in the United States and preexisting contractual obligations to persons other than Shell, Montedison, and Montell. The price, terms, and conditions at which Shell shall supply any grade of propylene monomer to Polyco and to the acquirer of the Properties to Be Divested shall be no less favorable to Polyco and the acquirer of the Properties to Be Divested than the price, terms, and conditions at which Shell supplies such grade of propylene monomer, directly or indirectly, to Montell in North America, through exchange or otherwise.

V.

It is further ordered, That:

A. If Shell or Shell Oil, as applicable, has not divested, absolutely and in good faith and with the Commission's prior approval, the Properties to Be Divested within the time required by paragraph II.A of this order or within such additional time as may be allowed in paragraphs II.B, II.C or II.D of this order, the Commission may appoint a trustee to divest the Properties to Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Shell 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 Shell to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph V.A of this order, Shell 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 Shell, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Shell 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 Shell of the identity of any proposed trustee, Shell 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 Properties to Be Divested.

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

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

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Properties to Be Divested or to any other relevant information, as the trustee may request. Shell and Polyco shall develop such financial or other information as such trustee may request and shall cooperate with the

trustee. Shell and Polyco shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Shell or Polyco shall extend the time for divestiture under this paragraph in an amount equal to the delay, an determined by the Commission or, in the case of 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 Shell's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II.A of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Shell from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of Shell, 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 Shell, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission or, 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 Shell 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 Properties to Be Divested.

8. Shell shall indemnify the trustee and hold the trustee harmless against any liabilities, losses, claims, damages, 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, claims, damages, 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 V.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 Properties to Be Divested pending completion of the divestiture.

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

VI.

It is further ordered, That:

A. Royal Dutch, Shell T&T and Montedison shall obligate Montell, Montedison shall obligate Technipol, and Shell Oil shall obligate Polyco, to be bound by this order and insure compliance with this order by Montell, Technipol and Polyco, respectively.

B. Shell, Montedison and Montell shall not restrict any Montell Affiliate from licensing PP Technology or Catalyst Technology from the Unipol/SHAC Technology Business or Technipol or from purchasing PP Catalyst or Catalyst Systems from Polyco or Technipol.

C. Polyco shall not withhold its consent, except for good cause, to Union Carbide to grant or negotiate license fees and royalty rates below those minimums specified in the Cooperative Undertaking Agreement dated December 22, 1983, and attachments thereto.

D. Shell, Montedison, Montell and Technipol shall not enter into or renew any agreement or understanding with any developer or licensor of PP Technology or Catalyst Technology or any manufacturer, or seller of PP Catalyst, Catalyst Support, or Catalyst Systems limiting the geographic area within which, or limiting the persons to whom, such person may license PP Technology or Catalyst Technology or may manufacture and sell PP Catalyst,

Catalyst Support, or Catalyst Systems, unless such agreement or understanding relates exclusively to markets other than the United States and has no effect on United States commerce, including but not limited to export commerce. Nothing in this paragraph VI.D shall prohibit Shell, Montedison, Montell or Technipol from legitimately designating a sales agent for the sale of, or contract manufacturer for the production of, PP Catalyst or Propylene Polymers in any geographic area, or from limiting the persons, geographic area or uses for which they respectively grant legitimate licenses of their PP Technology or Catalyst Technology.

E. Montedison, Montell and Technipol shall not (1) enforce any provision in any agreement with Mitsui providing for sharing of royalties with respect to licenses granted by Mitsui after the date this order becomes final for use of PP Technology and Catalyst Technology in the United States in Propylene Polymers plants and in the production of Propylene Polymers; or (2) enter into or renew any agreement with Mitsui providing for sharing of royalties with respect to licensing of PP Technology or Catalyst Technology in the United States for use in Propylene Polymers plants and in the production of Propylene Polymers.

VII.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, other than the acquisition by Shell or Montedison of additional shares of Montell, engaged in at the time of such acquisition, or within two (2) years preceding such acquisition engaged in,

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or

3. The manufacture or sale of Propylene Polymers in the United States or Canada; or

B. Acquire any assets used for or previously used for (and still suitable for use for)

1. The research and development (other than only implementation of technology licensed from others), or sale or licensing to any person, of PP Technology or Catalyst Technology anywhere in the world;

2. The research and development, sale, or manufacture for sale of PP Catalyst, Catalyst Support, or Catalyst Systems anywhere in the world; or

3. The manufacture or sale of Propylene Polymers in the United States or Canada.

Provided, however, these prohibitions shall not relate to the construction of new facilities or the acquisition of new or used equipment in the ordinary course of business from a person other than the persons referred to in paragraph VII.A of this order. Provided, further that this paragraph VII of this order shall not apply to the acquisition of Technipol by Montell following completion of the divestiture of the Properties to Be Divested and expiration of the attached Hold Separate Agreement.

VIII.

It is further ordered, That:

A. Within sixty (60) days from the date this order becomes final and every sixty (60) days thereafter until Shell has fully complied with the provisions of paragraphs II and V of this order, Shell Oil 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 and V of this order. Shell Oil 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 V of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Shell Oil 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, Royal Dutch, Shell Oil, Montedison and Montell shall each 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.

IX.

It is further ordered, That Royal Dutch, Shell T&T, Shell Oil, Montedison and Montell shall each notify the Commission at least thirty (30) days prior to any proposed change in such company, 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 such company that may affect compliance obligations arising out of this order.

X.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, and on reasonable notice, Shell, Montedison and Montell shall each permit any duly authorized representative of the Commission:

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

B. Upon five (5) days notice to Shell, Montedison or Montell and without restraint or interference from it, to interview its officers,

directors or employees, who may have counsel present, regarding such matters.

XI.

It is further ordered, That this order shall terminate twenty (20) years from the date this order becomes final.

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and among Montedison S.p.A., a corporation organized, existing and doing business under the laws of Italy with its principal executive offices located at Foro Buonaparte, 31, 20121 Milan, Italy, and its wholly-owned subsidiary, HIMONT Incorporated, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal executive offices located at Three Little Falls Centre, 2801 Centerville Road, Wilmington, Delaware (collectively "Montedison"); Royal Dutch Petroleum Company, a corporation organized, existing and doing business under the laws of the Netherlands with its principal executive offices located at Carel van Bylandtlaan 30, The Hague, The Netherlands, and The "Shell" Transport and Trading Company, p.l.c., a corporation organized, existing and doing business under the laws of England with its principal executive offices located at Shell Center, London SE1 7NA, England, and their wholly-owned subsidiary, Shell Oil Company, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal executive offices located at One Shell Plaza, Houston, Texas (collectively "Shell"); and the Federal Trade Commission (the "Commission"), an independent agency of the United Sates Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on or about December 30, 1993, Montedison and Shell Petroleum N.V., a holding company of the Shell Group, entered into an agreement providing for the merger (hereinafter the "Acquisition") of the majority of the polyolefin assets and businesses of Montedison

(hereinafter the "Montedison Merged Assets") and the majority of the polyolefin assets and businesses of Shell (hereinafter the "Shell Merged Assets"); and

Whereas, Montedison and Shell each develop and license PP Technology and Catalyst Technology and each develop, manufacture and sell PP Catalyst and Propylene Polymers; and

Whereas, Montedison will establish Technipol and hold Technipol separate from Montell in accordance with the Decision of the Commission of the European Communities in Case No. IV/M. 269-SHELL/MONTECATINI; 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 ("consent order"), which would require the divestiture of certain assets, the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission in concerned that if an understanding in not reached, preserving the *status quo ante* of the Montedison Merged Assets and the Shell Merged Assets, respectively, during the period specified in paragraph four of this Agreement, divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Properties to Be Divested as described in paragraph I.Q of the consent order and the Commission's right to have the Properties to Be Divested continue as a separate, viable and independent entity; and

Whereas, the purpose of this Agreement and the consent order is to:

(i) Preserve the Properties to Be Divested, also referred to herein as "Polyco," as a viable business independent from Montedison, pending the divestiture of the Properties to Be Divested as a viable and ongoing enterprise;

(ii) Preserve Technipol as a viable business independent from Shell, pending the divestiture of the Properties to Be Divested as a viable and ongoing enterprise; and

(iii) Remedy any anticompetitive effects of the Acquisition; and

Whereas, Montedison's and Shell's entering into this Agreement shall in no way be construed as an admission by Montedison and Shell that the Acquisition is illegal, and this Agreement shall in no way be construed as limiting in any way the obligations of Montedison and Shell pursuant to the Decision of the Commission of the European Communities in Case No. IV/M. 269-SHELL/MONTECATINI; and

Whereas, Montedison and Shell understand 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, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, the Commission will not seek a temporary restraining order, preliminary injunction, or permanent injunction with respect to the Acquisition, and in recognition that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and, in the event the required divestiture is not accomplished, to seek divestiture of the Properties to Be Divested and such other relief as the Commission may consider appropriate, the Parties agree as follows:

1. Montedison and Shell agree that from the date this Agreement in signed by Shell and Montedison until the earliest of the dates listed in paragraphs 1.a or 1.b, they each will comply with the provisions of this Agreement:

a. Ten days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the consent order has been completed.

2. Montedison, Royal Dutch, Shell T&T and Shell Oil agree to execute and be bound by the agreement containing consent order and to comply, from the date this Agreement is accepted, with the provisions of the consent order as if it were final.

3. The terms capitalized herein shall have the same definitions as in the consent order. In addition, the following terms used herein shall have the following definitions:

a. *"Montedison PP Technology"* means PP Technology and Catalyst Technology, including Know-How and patent rights, developed, under research and development, used, offered for license, or licensed to any person by Montedison at anytime prior to the date of transfer to Technipol of the Montedison Properties to Be, Transferred. For purposes of this Agreement Catalloy process and related catalyst technology and technology concerning the production of PP Catalyst or the production of any other component of Catalyst System shall be excluded from "Montedison PP Technology."

b. *"Montedison Properties to Be Transferred"* means the businesses, rights and interests and other assets, tangible and intangible, required to be transferred from Montedison to Technipol pursuant to paragraph eight of this Agreement.

c. *"Existing Montedison Licenses"* means licenses of Montedison PP Technology to persons other than Montell Affiliates in effect as of the date of transfer to Technipol of the Montedison Properties to Be Transferred and includes so-called "catalyst use know-how licenses," "process know-how licenses" and "patent licenses."

d. *"Improvements"* means all refinements, optimizations, or new technical developments, patentable or unpatentable, of Know-How, PP Technology and Catalyst Technology with commercial application, other than Major Advances.

e. *"Major Advances"* means all new technical developments of and changes, patentable or unpatentable, to existing Know-How, PP Technology and Catalyst Technology with commercial application, of the type generally recognized in the industry as revolutionary or of major consequence and would, upon commercial implementation, (a) reduce production costs of Propylene Polymers by at least one (1) cent per pound; (b) significantly increase the quality, productivity or selling potential of the PP Catalyst, Catalyst Support or Catalyst System, or the quality or selling potential of the Propylene Polymers; or (c) enable production of new Propylene Polymers commercially

competitive primarily in end-uses for which Propylene Polymers produced and sold commercially have not been previously suitable for technological reasons. Major Advances include, for example:

i. In the case of PP Technology, elimination of a unit operation, addition of a unit operation, or introduction of a new comonomer or additive;

ii. In the came of PP Catalyst, a change in the major type of Catalyst Support;

iii. In the case of Catalyst Systems, a change in the major type of components or elimination of one component together with a type change in another component; and

iv. In the case of Propylene Polymers, new compositions or types that display chemical and physical properties not previously achievable by the relevant technology.

4. Montedison and Shell agree that from the date this Agreement is signed by Montedison and Shell until March 1, 1995, Montedison will hold the Montedison Merged Assets separate and apart from Shell and from Montell, and Shell will hold the Shell Merged Assets separate and apart from Montedison and from Montell.

5. Commencing prior to, or concurrently with, transfer to Montell of the Shell Merged Assets, Shell will hold the Properties to Be Divested as they are presently constituted (hereafter "Polyco") separate and apart on the following terms and conditions:

a. Shell and Shell Oil, as applicable, shall transfer to Polyco all ownership and control of the Properties to Be Divested. Polyco shall be held separate and apart and shall be operated independently of Shell (meaning here and hereinafter, Shell excluding Polyco and excluding all personnel connected with Polyco as of the date this Agreement as signed) except to the extent that Shell Oil must exercise direction and control over Polyco to assure compliance with this Agreement or with the consent order.

b. Shell Oil shall separately incorporate Polyco and cause Polyco to adopt new Articles of Incorporation and By-laws and any other required documents for Polyco that are not inconsistent with other provisions of this Agreement. Shell Oil shall also elect a new six-person board of directors of Polyco ("New Board") prior to, or concurrently with, transfer of any assets or businesses from Shell into

Montell or merger of any part of Shell and Montell or Montedison. Questions before the New Board shall be approved by a simple majority of the directors voting on the matter, provided that Polyco shall engage in no transaction that is precluded by this Agreement or by the consent order. Shell Oil may elect the directors to the New Board; provided, however, that such New Board shall consist of at least three outside directors neither previously nor currently employed by Shell or Montedison; two officers of Polyco; and a maximum of one Shell Oil (but not Royal Dutch, Shell T&T or Montell) director, officer, employee, or agent; provided, further, that such Shell Oil director, officer, employee or agent shall enter into a confidentiality agreement in accordance with the provisions of paragraph 5.h hereof and shall not be a person involved in Shell or Montell's Propylene Polymers or PP Catalyst businesses, as defined in paragraph I. of the consent order. Such director who is also a Shell Oil director, officer, employee or agent shall participate in matters that come before the New Board only for the limited purpose of carrying out Shell Oil's and Polyco's responsibilities under this Agreement or under the consent order. Shell Oil will take no action to delay or limit expansion of production capacity by Polyco. Except as permitted by this Agreement, the Shell Oil director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters, including but not limited to expansion of capacity, that would involve a conflict of interest if Shell Oil and Polyco were separate and independent entities. In the case of deadlock by the New Board on any question in which the Shell Oil director participates, a second vote shall be taken on the question and the Shell Oil director shall not vote. The New Board shall include a chairman who is independent of Shell and is competent to assure the continual Viability and Competitiveness of Polyco. Shell Oil shall notify the Commission in its next compliance report submitted pursuant to paragraph VIII.A of the consent order of the identity and relevant qualifications and experience of any person whom Shell Oil has appointed as an original or subsequent director of Polyco.

c. Except for the single Shell Oil director, officer, employee, or agent serving on the "New Board" (as defined in paragraph 5.b) Shell shall not permit any director, officer, employee or agent of Shell to also be a director, officer, employee or agent of Polyco. In the event any members of management of the Properties to Be Divested should

choose not to accept employment with Polyco, or should retire or otherwise leave their management positions, the non-Shell (as Shell is defined in paragraph 5.a hereof) directors serving on the New Board (as defined in paragraph 5.b hereof) shall have the exclusive power to replace such members of management.

d. Polyco shall be staffed with sufficient employees to maintain the Viability and Competitiveness of the Properties to Be Divested. Shell, Montell and Technipol shall not employ, or make offers of employment to, any person employed by Shell Oil whose principal duties, during the year prior to the date of transfer to Polyco of the Properties to Be Divested, related to the management, development or operation of the Properties to Be Divested. This provision, however, does not apply to employment by Shell Oil of any employee who is terminated by Polyco or who is not offered employment by Polyco at a level of compensation and benefits at least equivalent to those held by the employee prior to the date of transfer to Polyco of the Properties to be Divested. Shell Oil shall encourage and facilitate employment by Polyco of Shell Oil employees who had line responsibility with respect to the Properties to Be Divested in the year prior to the transfer to Polyco of the Properties to Be Divested; shall not offer any incentive to such employees to decline employment with Polyco or accept other employment in Shell; and shall remove any impediments that exist which may deter much employees from accepting employment with Polyco, including but not limited to the payment, or transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of Shell Oil.

e. Shell shall not exercise direction or control over, or influence directly or indirectly, Polyco; provided, however, that Shell Oil may exercise only such direction and control over Polyco as is necessary to assure compliance with this Agreement or with the consent order, including dissolution, merger, consolidation, bankruptcy, sale of substantially all assets, major acquisitions, issuance of equity securities or any change in the legal status of Polyco.

f. Shell shall not cause or permit any destruction, removal, wasting, deterioration or impairment of Polyco, except for ordinary wear and tear. Shell Oil shall maintain the marketability and the Viability and Competitiveness of Polyco and shall not sell, transfer, encumber (other than in the normal course of business) or otherwise

impair its marketability or Viability and Competitiveness. Shell Oil shall provide Polyco with sufficient working capital to operate at current rates of operation, to perform all necessary routine maintenance to, and replacement of, plant and equipment of the Properties to Be Divested, and to maintain the Viability and Competitiveness of the Properties to Be Divested.

g. Shell shall not change the composition of the management of Polyco except that the non-Shell (as Shell is defined in paragraph 5.a hereof) directors or members serving on the New Board (as defined in paragraph 5.b hereof) shall have the power to remove any employee. With the exception of the single Shell Oil director, Shell Oil shall not remove directors of the New Board except for cause.

h. Except as permitted by this Agreement, the Shell Oil New Board member shall not in his or her capacity as a New Board member receive Material Confidential Information and shall not disclose any such information received under this Agreement to Shell, Montedison or Montell or use it to obtain any advantage for Shell, Montedison or Montell. Any Shell Oil director, officer, employee or agent who obtains or may obtain confidential information under this Agreement shall enter a confidentiality agreement prohibiting disclosure of confidential information until the day after the divestitures required by the consent order have been completed.

i. Except as required by law and except to the extent that necessary information is exchanged in the course of defending investigations or litigation, obtaining legal advice, acting to assure compliance with this Agreement or the consent order (including accomplishing the divestitures), or negotiating agreements to dispose of assets, Shell, Montedison and Montell shall not receive or have access to, or the use of, any Material Confidential Information of Polyco, except as such information would be available to Montedison in the normal course of business if the Acquisition had not taken place. Any such information that is obtained by Shell Oil pursuant to this paragraph shall only be used for the purposes set out in this paragraph. Provided, however, until divestiture of Polyco, hourly personnel assigned to Polyco plant operations may continue to be covered by existing contracts between Shell Oil and any unions representing such employees; and Shell Oil may assign Shell Oil personnel to perform the accounting, analytical chemistry, human resources, information systems, transportation services and tax

functions for Polyco provided that such Shell Oil personnel shall enter into confidentiality agreements in accordance with the provisions of paragraph 5.h hereof and provided further that those Shell Oil personnel working with Material Confidential Information of Polyco shall not be involved in Montell's PP Technology, Catalyst Technology, PP Catalyst or Propylene Polymers business, as defined in paragraph I. of the consent order for the period that Shell must comply with paragraph five hereof. Provided further that the New Board (as defined in subparagraph 5.b hereof) may designate and contract with Shell Oil as a non-exclusive sales agent for sales of PP Catalyst or Propylene Polymers by Polyco outside the United States, provided that all Shell Oil personnel with access to Material Confidential Information of Polyco in connection with such contract or agency shall, prior to gaining such access, enter into confidentiality agreements in accordance with the provisions of paragraph 5.h hereof.

j. All earnings and profits of Polyco shall be retained separately in Polyco.

k. Should any transfer to Polyco of an agreement, contract or license required to be included in the Properties to Be Divested not be possible after reasonable effort by Shell Oil due to another party withholding its consent to the transfer, Shell Oil shall enter into an agreement with Polyco the purpose of which agreement is to realize the same effect as such transfer. Further, Shell Oil shall secure, at its expense, patent licenses, or assignments of patent licenses, extending to Polyco rights and royalty rates with respect to the manufacture and sale of Propylene Polymers and PP Catalyst, and rights to expand production and sale, no less favorable than those held by Shell Oil as of the date of transfer to Polyco of the Properties to Be Divested.

6. Prior to, or concurrently with, transfer to Montell of the Shell Merged Assets, Royal Dutch and Shell T&T shall ensure that companies of the Shell Group shall:

a. Take such actions as are necessary to establish and maintain separate and apart from Montell the Koninklijke/Shell Laboratorium Amsterdam ("KSLA") research and development laboratory of Shell Research B.V., a company of the Shell Group; and

b. Take such actions as are necessary to ensure that no Shell research personnel who have had access to Unipol PP Technology

(other than Catalyst Technology received by Shell Oil from other companies of the Shell Group) within one (1) year prior to the date of the formation of Montell engage in research at facilities of Montell.

7. Shell Oil's Pecten international marketing organization shall not market or distribute products of Montell but may, as requested by Polyco, market and distribute products produced by Polyco.

8. Prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets, Montedison shall

a. Transfer to Technipol as an ongoing business:

i. PP research and development facilities in the Giulio Natta Research Center in Ferrara, Italy, by outright transfer or lease, including transfer of its P03 pilot plant, equipment, rights-of-way, easements, and other rights and assets appropriate and sufficient to preserve the Viability and Competitiveness of the Montedison PP Technology business.

ii. The irrevocable worldwide right, for a period not to expire prior to the divestiture of the Properties to be Divested, to grant to any person perpetual Montedison PP Technology licenses subject to any lawful rights previously granted to persons not parties to this Agreement. This right shall be exclusive subject to the right of Montell to license Montell Affiliates.

iii. Existing Montedison Licenses and Montedison's PP Catalyst supply contracts with persons other than Montell Affiliates. Should any such transfer not be possible after reasonable effort by Montedison due to the other party withholding its consent to the transfer, Montedison or Montell shall enter into an agreement with Technipol to service the licenses not transferred to Technipol and account for revenues from such licenses strictly for the benefit and account of Technipol, the purpose of which agreement is to realize to the extent possible the same effect of a transfer of such licenses.

iv. Montedison's PP Catalyst sales business.

v. Personnel who possess the specific skills and experience required by Technipol sufficient to support, conduct and preserve the Viability and Competitiveness of the Montedison Properties to Be Transferred. Montedison shall appoint Technipol's managers on the

basis of demonstrated ability and specific experience in the Montedison PP Technology field.

vi. Such other assets (including cash and working capital) and personnel as may be required to effectuate the remedial purpose of this order and to assure that Technipol will be capable of operating independently at the same level of research, development and licensing of PP Technology, and sale of PP Catalyst as existed in the Montedison Properties to Be Transferred on average during the two (2) years prior to the Transfer Date.

b. Physically separate, to the extent feasible, the assets, personnel, offices and facilities transferred or leased to Tetchnopol from those retained in Montedison and from those transferred to Montell so as to assure the independence of Technipol from Montell and to assure that Material Confidential Information that is not to be made available to another person pursuant to the consent order and this Agreement is not accessible to such person.

c. Assign to Technipol all other agreements in which Montedison grants to a person other than Montell or a Montell Affiliate the right to practice Montedison PP Technology. Should any such assignment not be possible after reasonable effort by Montedison due to the other party withholding its consent to the assignment, Montedison or Montell shall enter into an agreement with Technipol the purpose of which is to realize the effect of such assignment.

d. Take such actions as necessary to ensure an ongoing agreement between Montell and Technipol pursuant to which Montell will provide to Technipol, at Montell's cost, services (such as building security, fire protection, trash removal, shipping and receiving, accounting and cleaning services), utilities and common maintenance for the Montedison Properties to Be Transferred, as may be requested by Technipol.

Provided, however, that Montedison shall retain for Montell ownership of, and free right to practice and use, and sell product resulting from the practice or use of, all Montedison PP Technology and PP Catalyst production assets.

9. Commencing prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets, Montedison will hold Technipol as constituted in accordance with paragraph eight of this Agreement separate and apart on the following terms and conditions:

a. Montedison shall separately incorporate Technipol and adopt Articles of Incorporation and By-laws for Technipol that are not inconsistent with other provisions of this Agreement. Montedison shall also elect a board of directors of Technipol prior to, or concurrently with, transfer to Montell of the Montedison Merged Assets.

b. Technipol shall be operated independently of Montell and Shell, and neither Shell nor Montell shall have any ownership or other financial interest in Technipol or exercise direction or control over, or influence directly or indirectly, Technipol, except as specifically authorized by this Agreement.

c. Montedison shall not permit any director, officer, employee or agent of Montell, or any director, officer, employee or agent of Montedison involved in management or oversight of Montell, to also be a director, officer, employee or agent of Technipol.

d. Any Montedison director, officer, employee or agent who obtains or may obtain Material Confidential Information of Technipol under this Agreement shall not disclose to Shell or Montell such Material Confidential Information until the day after divestiture of the Properties to Be Divested has been completed.

e. Montedison shall not cause or permit any destruction, removal, wasting, deterioration or impairment of Technipol, except for ordinary wear and tear. Montedison shall also maintain the Viability and Competitiveness of Technipol and shall not sell, transfer, encumber (other than in the normal course of business) or otherwise impair its Viability and Competitiveness.

f. The purpose of the formation of Technipol and the transfer to it of the Montedison Properties to Be Transferred is to ensure the continuation of separate, full-functioning entity to conduct the business of the Montedison Properties to Be Transferred and to preserve the Viability and Competitiveness of that business until the Properties to Be Divested are divested.

g. Montell shall provide Technipol and its licensees and prospective licensees access to any and all of Montell's commercial scale PP plants using Montedison PP Technology for demonstrating the PP Technology and Catalyst Technology used in the plant to prospective licensees and shall provide technical assistance and training for personnel of Technipol's licensees. In consideration for providing such services and assistance to Technipol, Montell may charge no more than its actual hourly cost of pay and benefits for the

services of Montell personnel providing technical assistance and training and, in the case of technical assistance or training by Montell Personnel at a licensee's or prospective licensee's facilities, reasonable and customary travel and per diem subsistence costs of such personnel.

h. With respect to future Improvements or Major Advances in Montedison PP Technology by Technipol or Montell:

i. Technipol and Montell shall each own any Improvements or Major Advances it develops at its own cost or finances.

ii. Technipol shall have the right to license to any person any results obtained from research and development in the field of PP Technology performed by Technipol under contract for Montell.

iii. Technipol may grant Montell a paid-up, royalty-free, perpetual and non-exclusive right to use any Improvements owned by Technipol or received by Technipol from its licensees.

iv. Technipol may grant Montell a non-exclusive license to use any Major Advances owned by Technipol or received by Technipol from its licensees on a non-discriminatory basis on terms available to other persons.

v. Montell shall grant Technipol a paid-up, royalty-free, perpetual and non-exclusive right to license persons other than Montell Affiliates to use any Improvements owned by Montell.

vi. Montell shall grant Technipol the right to license third parties to use any Major Advances owned by Montell, unless Montell is contractually prohibited, by contract with any person other than a Montell Affiliate or a respondent, from sharing such Major Advances with Technipol. Such grant to Technipol shall be on reasonable terms and conditions which shall, in any event, be no less favorable to Technipol than those offered by Montell to any person other than a Montell Affiliate.

i. Technipol shall have the exclusive right, subject to any lawful rights previously granted to persons not parties to this Agreement, to enforce intellectual property rights with respect to Montedison PP Technology, and to sell PP Catalyst to persons other than Montell and Montell Affiliates.

j. Except as expressly provided in this Agreement, all sales, licensing and other business relationships between Technipol and

either Montedison, Shell or Montell shall be conducted on a non-discriminatory basis on terms available to other persons.

k. Pursuant to a PP Catalyst supply agreement between Montell and Technipol, Montell shall produce PP Catalyst, including Improvements thereto, for Technipol for use by Technipol's licensees and PP Catalyst customers, subject to the rights of Akzo Nobel. To this end, Montell shall dedicate such portion of its PP Catalyst production capacity as is required to supply Technipol's licensees and PP Catalyst customers. The price for PP Catalyst supplied by Montell to Technipol shall be negotiated between Montell and Technipol, but in no event shall be more than the lowest contract price, in terms of the price per pound of Propylene Polymers produced per pound of PP Catalyst, for PP Catalyst available to a licensee other than a Montell Affiliate or government controlled licensee, as of December 31, 1993, recalculated in accordance with the pricing formula in the PP Catalyst supply contract for that licensee, less eight percent (8%).

l. Pursuant to a Catalyst Support supply agreement between Montell and Technipol, Montell shall produce Catalyst Support, including Improvements thereto, for Technipol for sale to Akzo Nobel. The price for Catalyst Support supplied by Montell to Technipol shall be negotiated between Montell and Technipol, but in no event shall be more than the price charged to Akzo Nobel as of December 31, 1993, recalculated in accordance with the pricing formula in the Catalyst Support supply contract between Akzo Nobel and Himont, less eight percent (8%).

m. Notwithstanding any agreement entered into by Montell and Technipol pursuant to paragraphs 9.k and 9.l of this Agreement, Technipol may acquire PP Catalyst and Catalyst Support from any other person.

n. Technipol shall provide to Montell, on the date of transfer to Technipol of the Montedison Properties to Be Transferred and on the first day of every calendar quarter thereafter, an estimate of its requirements for PP Catalyst and Catalyst Support for the following twelve (12) months. Montell shall supply PP Catalyst and Catalyst Support in quantities sufficient to maintain an inventory of PP Catalyst and Catalyst Support equivalent to Technipol's requirements for PP Catalyst and Catalyst Support for a period of six (6) months. In the event that Montell is unable to maintain an inventory of PP Catalyst and Catalyst Support sufficient to supply Technipol's

requirements for PP Catalyst and Catalyst Support for a period of six (6) months, Montell will grant to Technipol the right and Know-How necessary to produce, or have produced on its behalf, PP Catalyst and Catalyst Support.

o. In the case of any shortage of PP Catalyst or Catalyst Support production Montell shall continue to supply Technipol with its requirements except that in the case of shortages that are not the result of Montell's actions Montell may allocate PP Catalyst and Catalyst Support to Technipol and Montell and Montell Affiliates on a pro rata basis based on the previous twelve (12) months. In the case of any shortage of PP Catalyst or Catalyst Support to Technipol, Technipol may request that Montell expand the production facilities, at Montell's expense, in order to meet the requirements of Technipol.

p. Technipol shall have the sole right to determine, subject to PP Catalyst supply contracts with persons other than Montell or Montell Affiliates existing as of the date the Montedison Properties to Be Transferred are transferred to Technipol and the existing Akzo Agreement, the sales price, quantity and type of PP Catalyst and Catalyst Support sold by Technipol to any person.

q. Montell and Shell shall not interfere in, or attempt to influence, any decisions or activities of Technipol.

r. Shell, Montedison, Montell, Technipol and Polyco shall not exchange or discuss between each other, directly or indirectly, current or future intentions, plans or forecasts for pricing, production or capacity for PP Catalyst, Catalyst Support, Catalyst Systems or Propylene Polymers, or royalty rates for licensing PP Technology or Catalyst Technology to others, except as required between Montell and Technipol in accordance with paragraphs 9.k and 9.l of this Agreement.

10. Except as otherwise provided in the consent order or this Agreement, as required for the purpose of tax return preparation, compliance with any law or request from a revenue authority, or to the extent that necessary information is exchanged in the course of evaluating and consummating the formation of Montell, Technipol or Polyco, defending government investigations or litigation, or negotiating to dispose of assets:

a. Neither Montedison, Montell, Technipol nor Polyco shall provide, disclose or otherwise make available to Shell any Material Confidential Information.

b. Neither Montedison nor Technipol shall provide, disclose or otherwise make available to Montell any Material Confidential Information of Technipol.

c. Shell shall not provide, disclose or otherwise make available to Montedison, Montell or Technipol any material Confidential Information of Polyco or the Unipol/SHAC Technology Business (other than Catalyst Technology received by Shell Oil from other companies of the Shell Group), provided however nothing in this paragraph 10.c of this Agreement shall prohibit (a) Montell Affiliates who are licensees of Unipol PP Technology from receiving information, in accordance with such license, for use in their Unipol PP Technology licensed production facilities, including information obtained by Shell, prior to the formation of Montell, under The Tripartite Catalyst Research Agreement; and (b) any communication between Shell and Montell necessary to ensure that Montell and its employees make no unauthorized use or disclosure of any Material Confidential Information.

d. Neither Montell nor Shell shall provide, disclose or otherwise make available to Montedison or Technipol any Material Confidential Information.

Provided, however, that nothing in this Agreement shall limit or prohibit (a) Montell, Technipol or Polyco from licensing or otherwise doing business on a nondiscriminatory basis with each other or with any entity in which Montedison or a Shell Group company has an interest; or (b) persons elected by Shell or Montedison to the Montell board of directors from participating in decisions relating to Montell if they do not also participate in decisions relating to similar businesses of Technipol or Polyco.

11. To the extent that this Agreement or the consent order requires Shell or Montedison to take, or prohibits Shell or Montedison from taking, certain actions that otherwise may be required or prohibited by contract, Shell and Montedison shall abide by the terms of this Agreement and the consent order and shall not assert as a defense such contract rights in a civil penalty action brought by the Commission to enforce the terms of this Agreement or the consent order.

12. Should the Federal Trade Commission seek in any proceeding to compel Shell (meaning here and hereinafter Shell including Polyco) to divest itself of the Montedison Merged Assets, to compel

Shell to divest any assets or businesses of the Shell Merged Assets or the Montedison Merged Assets that it may hold, to compel Montedison to divest itself of the Shell Merged Assets, to compel Montedison to divest any assets or businesses of the Montedison Merged Assets or the Shell Merged Assets that it may hold, or to seek any other injunctive or equitable relief for any failure to comply with the consent order or this Agreement, or in any way relating to the Acquisition, Shell and Montedison shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Shell and Montedison also waive all rights to contest the validity of this Agreement.

13. 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 Montedison, Shell, Polyco or Montell made to its principal office, Montedison, Shell, Polyco and Montell shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Montedison or Shell 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 Montedison, Shell, Polyco or Montell relating to compliance with this Agreement; and

b. Upon ten (10) days notice to Montedison, Shell, Polyco or Montell and without restraint or interference from it, to interview officers or employees of Montedison, Shell, Polyco or Montell who may have counsel present, regarding any such matters.

14. This Agreement shall not be binding on the Commission until it is approved by the Commission.

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.'

[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-ABCDEFG 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

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.

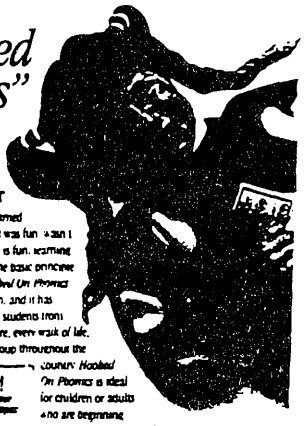
EXHIBIT A

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're easier to tell the world. When adults learn their reset is permanent-mine.

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 song? It was fun. Wasn't it? 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 unbiased private teacher.

It's Easy!

Kindness used to ask me to read her the comics in the Sunday paper. But after Hooked On Phonics she would read the comics to me. She was thrilled about that!"

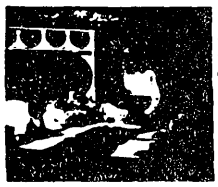
—Lorri, Dakin and Kenton

"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 & Tyler

Good reading comprehension is essential to success in all subjects and is the very heart and soul of education. Dr. Dan 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.



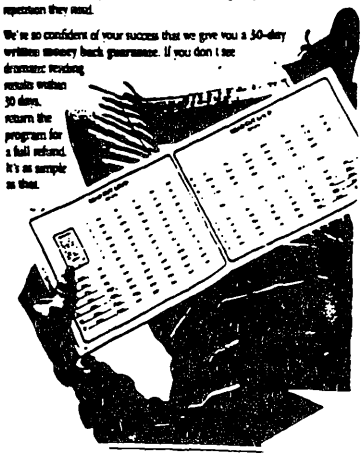
"Hooked On Phonics is a wonder teacher in my classroom. We have so many unmotivated children who have poor language skills, and I can never give them all the help they need. But Hooked On Phonics can. They can learn without me, at on their own, make progress and not feel ashamed."

—Gwen Barker

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 reaching children and adults to read.

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 personalized repetition they need.

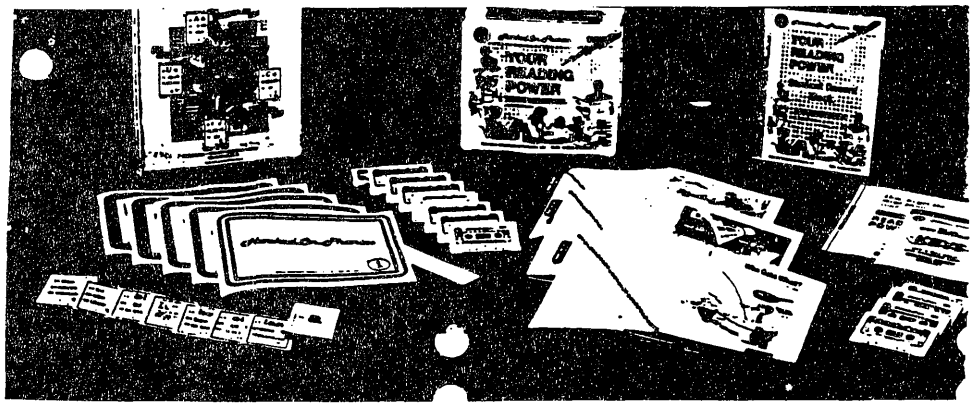
We're so confident of your success that we give you a 30-day written money back guarantee. If you don't see dramatic reading results within 30 days, return the program for a full refund. It's as simple as that.



Hooked On Phonics

GEP 003544

EXHIBIT B



CONFIDENTIAL

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 hom study by Dr. Don Parker, author of th SRA Reading Laboratories used by ove 61 million in 62 countries around the world

SRA Reading Power includes 100 excitin stories followed by exercises to help wit comprehension, vocabulary and gramma This program will strengthen your readin skills and lead to better comprehension c all subjects.

SRA Reading Power includes 4 aud cassettes, 100 Power Builder stories, student record book and an answer boo

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

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

Delores Coble, Oregon
*"When **Hooked on Phonics** first arrived, my daughte was in the 7th grade with only a 2nd grade reading leve After one month she went to a 5th grade reading level. I' watched her grow. Now that we have **Hooked on Phonic** 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 work It's really exciting! My son's report card went from C's an 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 scho life around."*

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

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

Bob Unger, Author of Tune In to Success, New York
*"I immediately noticed results with my son who's five. F it was the basics, and within several weeks he was read simplistic sentences. And now he's reading the boo wrote...college level material. What's the bottom li **Hooked on Phonics** works!"*

CONFIDENTIAL

GEP 005561

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

[illegible] 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.

WP/RADIO.SCH 9/10/93

GEP 0056

EXHIBIT F

EXHIBIT F

HOOKED ON PHONICS
CHRISTMAS '92

(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-ABCDEFG

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.

WP/RADIO.SCH 9/10/93

H

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.

WP/RADIO.SCH 9/10/93

GEF 00564

EXHIBIT J

TELEVISION EXHIBIT J

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 we.

Announcer: Call 1-800-ABCDEFG

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 especialy 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-ABCDEFG. 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-ABCDEFG. 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 an 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, 0, 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.

[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-ABCDEFG. 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.

Complaint

EXHIBIT L

INTRODUCING THE HOOKED ON PHONICS CLASSROOM PACKAGE.

CUSTOMIZED KITS FOR GROUPS OF FIVE TO FIT 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 more 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' overall efficiency. Our flash cards now come with a spiral 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 enhance previously learned skills without interference.

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.

Colorful materials appear friendly 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 privately. Our program also stresses repetition so rules and patterns of language are quickly acquired. Clear directions enable students to excel on 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.

You could well receive a 15% to 40% discount based on the number of kits you buy of a given title.

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

SAVE UP TO 40%

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 motivated and accomplished boys and girls.

And reading well isn't just practical it's cultural. As a teacher, the best gift you can give students is the knowledge of who they are, where they come 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.

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.

EXHIBIT 1

WHY IS HÄAGEN-DAZS® 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

EXHIBIT 2

WHY IS HÄAGEN-DAZS® FROZEN YOGURT BETTER THAN YOUR FIRST TRUE LOVE?

HÄAGEN-DAZS IS STILL 98% FAT FREE.*

COUPON EXPIRES 12/31/93

SAVE $1.00

ON ANY FLAVOR HÄAGEN-DAZS® FROZEN YOGURT PINTS

18023

74570 38100

VOID

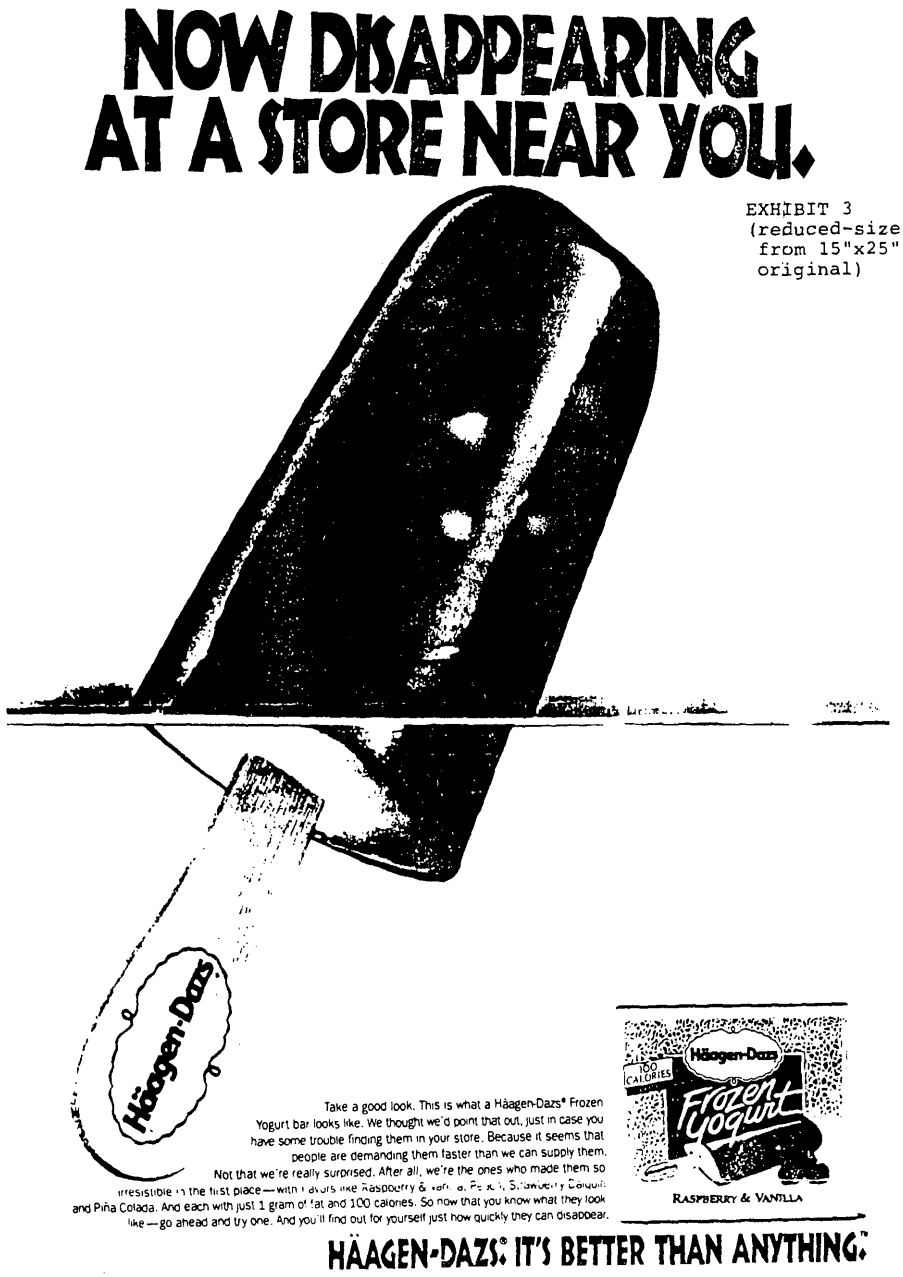
This certificate is redeemable at grocery/convenience stores or at participating Haagen-Dazs Ice Cream Shops

Try new Raspberry Rendezvous™ and Orange Tango™ Frozen Yogurt. Both are 98% fat free and still totally Häagen-Dazs.

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

*frozen yogurt and sorbet combinations

EXHIBIT 3


NOW DISAPPEARING
AT A STORE NEAR YOU.
EXHIBIT 3
(reduced-size
from 15"x25"
original)
Häagen-Dazs
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 Cabaret 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
100 CALORIES
Frozen Yogurt
RASPBERRY & VANILLA
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.

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 Physiatry 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 physiatrists regarding their decisions whether to participate in agreements with insurers and provide service; from passing such information along to other doctors; and from giving physiatrists 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 Médical") 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 physiatrists, 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 Physiatry 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 physiatrists, 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 physiatrists, 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.

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 $5HT_{1D}$ agonists. $5HT_{1D}$ 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 $5HT_{1D}$ agonists; and

c. Increasing Glaxo's ability to unilaterally reduce research and development of non-injectable $5HT_{1D}$ 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-methanosulfonamide 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-oxazolidinoneand/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 $5HT_{1D}$ agonists"* means any $5HT_{1D}$ 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 $5HT_{1D}$ agonists for approval by the FDA for the treatment of migraines or (2) the manufacture and sale of non-injectable $5HT_{1D}$ 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 $5HT_{1D}$ agonists for approval by the FDA for the treatment of migraines or (2) the manufacture and sale of non-injectable $5HT_{1D}$ 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.

IN THE MATTER OF

NATIONAL COMICS PUBLICATIONS, INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT

Docket 7614. Consent Order, July 6, 1960--Set Aside Order, June 14, 1995

The Federal Trade Commission has reopened a 1960 consent order (57 FTC 69) -- which required the companies to offer promotional allowances for their publications on proportionally equal terms to all customers -- and has set aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On February 16, 1995, DC Comics and Warner Publisher Services, Inc. ("WPS"), as respondents and successors to National Comics Publications, Inc. and Independent News Company, Inc.[1] filed a Petition to Reopen and Set Aside Consent Order ("Petition"), in this matter. DC and WPS request that the Commission set aside the 1960 consent order in this matter 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 its Petition, DC and WPS affirmatively state that neither has engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in

[1] Since the Commission issued the order in this matter, National Comics has become DC Comics, a general partnership between Warner Communications, Inc., and Time Warner Entertainment Co., L.P. Independent has changed its name to Warner Publisher Services, Inc., and is now owned by Warner Communications Inc.

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."[2] The Commission's consent order in Docket No. 7614 was issued on July 6, 1960, and has been in effect for more than twenty 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. 7614.

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. 7614 be, and it hereby is, set aside as of the effective date of this order.

[2] *See* Sunset Policy Statement, 59 Fed. Reg. at 45,289.

IN THE MATTER OF

INDEPENDENT NEWS COMPANY, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT

Docket 7611. Consent Order, July 6, 1960--Set Aside Order, June 14, 1995

The Federal Trade Commission has reopened a 1960 consent order (57 FTC 56) -- which required the company to offer promotional allowances for its publications on proportionally equal terms to all customers -- and has set aside the consent order as to respondent Warner Publisher Services, the sucessor of Independent News Company, pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On February 16, 1995, Warner Publisher Services, Inc. ("WPS"), as respondent and successor of Independent News Company, Inc.,[1] filed a Petition to Reopen and Set Aside Consent Order ("Petition"), in this matter. WPS requests that the Commission set aside the 1960 consent order in this matter 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 its Petition, WPS affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. 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

[1] Since the Commission issued the order in this matter, Independent has changed its name to Warner Publisher Services, Inc. and is now owned by Warner Communications Inc. The other respondent in this matter, The New American Library of World Literature, Inc., did not petition to have the order set aside as to it.

twenty years."[2] The Commission's consent order in Docket No. 7611 was issued on July 6, 1960, and has been in effect for more than twenty 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. 7611 as to WPS.

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. 7611 be, and it hereby is, set aside as to respondent Warner Publisher Services, Inc., as of the effective date of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to grant the request of Warner Publisher Services, Inc., the successor of Independent News Company, Inc., to set aside the 1960 order in this case. I dissent from the decision to limit the setting aside of the order to Warner, instead of setting aside the order in its entirety.

The decision to limit relief to Warner, one of the two respondents under the order, appears to be inconsistent with the Commission's announced policy to presume "that the public interest requires reopening and setting aside the order in its entirety" (emphasis added) "when a petition to reopen and modify a competition order is filed" and the order is more than twenty years old.[1] The Commission's recognition of the limitations of the findings underlying an order[2] further suggests that the presumption that an order will be terminated after twenty years should apply to the order in its entirety and not be limited to the petitioner.[3]

I previously have expressed my concern that the adoption of a presumption instead of an across-the-board rule in favor of sunset

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[2] *See* Sunset Policy Statement, 59 Fed. Reg. at 45,289.

[1] FTC, 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 (July 22, 1994), at 8 (hereafter "Sunset Policy Statement").

[2] "[F]indings upon which [orders] are based should not be presumed to continue" for longer than twenty years. Sunset Policy Statement at 4.

[3] The presumption of termination after 20 years applies automatically for new orders in competition cases and is not limited to individual respondents, further supporting the view that the twenty-year presumption in favor of sunset for existing orders should apply to the order, not to particular respondents.

"will impose costs by requiring respondents to file individual petitions and the Commission to assess in the context of each such petition whether the presumption has been overcome for that order."[4] Now the Commission would further increase the burden on both public and private resources by applying the presumption in favor of sunset not only on a case-by-case basis but on a respondent-by respondent basis.

The petition filed by Warner invoked the twenty-year presumption that the order should be set aside. No evidence of recidivist conduct by any respondent, including The New American Library of World Literature, Inc., having been presented to overcome the presumption,[5] the order should be set aside in its entirety.

[4] Separate Statement of Commissioner Mary L. Azcuenaga on Sunset Policy (July 22, 1994), at 7 (footnote omitted).

[5] *See* Sunset Policy Statement at 8 n.19

IN THE MATTER OF

TALEIGH CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3587. Complaint, June 16, 1995--Decision, June 16, 1995

This consent order prohibits, among other things, two marketing corporations and the owner from misrepresenting that any product is new or unique, the existence or conclusions of any test or study, or that an endorsement for any product represents the typical experience of people who use it. The consent order requires the respondents to have scientific evidence to substantiate any representation regarding the performance, benefits, efficacy or safety of any weight-loss or smoking cessation product, or for any food, dietary supplement, drug, or device. In addition, the consent order requires the owner to post a $300,000 performance bond before marketing any weight-loss product or smoking deterrent or cessation product in the future.

Appearances

For the Commission: *Richard L. Cleland* and *Joel Winston.*
For the respondents: *Sheldon Lustigman,* New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Taleigh Corporation and Choice Diet Products, Inc., corporations; and William J. Santamaria, individually and as an officer and director of said corporations ("respondents"), have violated 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 Taleigh Corporation ("Taleigh"), formerly known as Taleigh, Inc., is a Florida corporation doing business under the names "Choice Diet Products," "Choice Products," and other trade names. Its principal place of business is located at 4742 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent Choice Diet Products, Inc. ("Choice") is a New York

corporation. Its principal place of business is located at 4800 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent William J. Santamaria is or was at relevant times herein the sole owner, director, and officer of the corporate respondents. Individually or in concert with others, he participated in and/or formulated, directed, and controlled the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His address is 20640 Baybrooke Court, Boca Raton, FL.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed weight-loss pills and a smoking cessation product to the public. Respondents have marketed the weight-loss pills under various names, including "MegaLoss," "FormulaTrim," and "MiracleTrim." These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondents have marketed the smoking cessation product under the name "Nicotain Stop Smoking Patch."

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.

DIET PILLS
FormulaTrim 3000

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for FormulaTrim 3000, including, but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A. Exhibit A:

"Debbie Hoya lost 25 pounds fast.

Tamara Cowens lost 35 pounds fast." [*Video*: 'before' and 'after' photographs of consumer endorsers displayed with amounts of weight lost.]

"Now you too can lose weight fast, with the help of this new powerful FormulaTrim 3000 diet pill." [*Video*: "LOSE WEIGHT FAST!" displayed with product and, in the next screen, the words "NEW," "FormulaTrim 3000," and "POWERFUL!" displayed in full screen with small print at the bottom of the screen stating, "Use only as directed with diet plan."]

"FormulaTrim's new fat-burning plan is so powerful, you can burn more body fat relaxing all day than running 10 miles nonstop." [*Video*: "Based on 180 pound person" displayed in small print below full screen display of two young persons in pool with caption in large print "BURN AWAY FAT!"]

"Laurette Morello burned away 17 pounds."
LAURETTE MORELLO: "I went from a size 13 to a size 5."
"Adam Locas lost 36 pounds carving 7 inches from his waist....lost 52 pounds trimming from a size 14 to a size 6."
"This powerful, doctor-approved diet pill formula is medically proven to work." [*Video*: "Use only as directed with diet plan" displayed in small print at bottom of full screen displaying "DOCTOR APPROVED FormulaTrim 3000."]
"The new FormulaTrim fat burning plan is so powerful you can burn more body fat relaxing all day than sweating through five exhausting hours of aerobics . . . ." [*Video*: "BURN AWAY FAT!" superimposed over two young persons in a pool with "Based on 180 pound person" displayed in small white letters against light background at bottom of screen.]
"Terri Nigelson burned away 15 pounds; Joanne Benora lost 32 pounds and Annette Garton lost an incredible and amazing 59 pounds! Now you can burn away fat and lose weight fast by calling . . . for your powerful new FormulaTrim 3000 . . . . "
"Your satisfaction is 100% guaranteed."

* * *

[*Video*: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use only as directed with diet plan," "Testimonials compensated," and "Following diet plan is essential for loss of weight (average 1½ - 2 pounds per week) for results cannot be achieved solely through the use of pill."]

B. Exhibit B:

"Debbie Hoya lost 25 pounds, fast. Tamara Koons lost 35 pounds, fast."
"Now you too can lose weight fast with the help of this new powerful medically-proven FormulaTrim 3000 No Hunger Diet Pill." [*Video*: "Use only as directed with diet plan" displayed in small print below depiction of pill with the words "NEW," "FormulaTrim 3000," and "POWERFUL!" presented in large full-screen display.]
"Following this new powerful FormulaTrim fat burning diet plan, you can burn more body fat relaxing all day than running 10 miles nonstop or even sweating through 5 exhausting hours of aerobics." [*Video*: "Based on 180 pound person" displayed in small print below full screen display of two young persons in pool with caption in large print "BURN AWAY FAT!"]
"Terry Nigelson burned away 15 pounds.
Lorette Morello burned away 17 pounds." [*Video*: 'before' and 'after' photographs with "BURN AWAY FAT!" displayed on screen.]
LORETTE MORELLO: "I went from a size 13 to a size 5."
"Adam Locas burned away 36 pounds."
"Claire Contobi burned away 52 pounds [*Video*: 'before' and 'after' photographs with "BURNED AWAY 52 LBS" displayed on screen] and Annette Barton burned away an incredible and amazing 59 pounds!"
"Now you can end biting hunger pain, burn away fat and lose weight fast by calling . . . for your powerful FormulaTrim 3000 . . . . "

[*Video*: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use only as directed with diet plan," "Testimonials compensated," and "Following diet plan is essential for loss of weight (average 1½ - 2 pounds per week) for results cannot he achieved solely through the use of pill."]

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

A. FormulaTrim 3000 causes substantial weight loss rapidly;

B. FormulaTrim 3000 causes substantial weight loss without the need to exercise or reduce caloric intake;

C. FormulaTrim 3000 causes the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to users, than five hours of aerobic exercise or running ten miles nonstop;

D. FormulaTrim 3000's active ingredient is new and/or unique; and

E. Scientific studies prove that FormulaTrim 3000 causes substantial weight loss rapidly.

PAR. 6. In truth and in fact:

A. FormulaTrim 3000 does not cause substantial weight loss rapidly;

B. FormulaTrim 3000 does not cause substantial weight loss without the need to exercise or reduce caloric intake;

C. FormulaTrim 3000 does not cause the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to users, than five hours of aerobic exercise or running ten miles nonstop;

D. FormulaTrim 3000's active ingredient is not new and/or unique; and

E. Scientific studies do not prove that FormulaTrim 3000 causes substantial weight loss rapidly.

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

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that FormulaTrim 3000 burns body fat.

PAR. 8. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five A-C and seven, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time they made the representations set forth in paragraphs five A-C and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for FormulaTrim 3000 reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 11. In truth and in fact, testimonials from consumers appearing in advertisements for FormulaTrim 3000 do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

MegaLoss 1000

PAR. 12. Respondents have disseminated or have caused to be disseminated advertisements for MegaLoss 1000, including but not necessarily limited to the attached Exhibits C and D. These advertisements contain the following statements and depictions:

A. Exhibit C:
"You can start losing up to 10, 20, 50 even 100 pounds with the powerful, doctor approved, MegaLoss 1000 Miracle Diet Pill Program for only $9.95."

[*Video*: "Use Only As Directed With Diet/Exercise Plan" displayed in small print at bottom of screen below full screen depiction of pill on a finger and the words "MIRACLE DIET PILL" in large print, followed by the words "PROGRAM" and "Doctor Approved" in smaller print.]

"With this doctor-approved MegaLoss 1000 Program, you can burn more body fat relaxing in the sun than swimming 2½ miles or exercising 6 hours nonstop." [*Video*: young slender woman lying by a pool with statement "Based On 180 Pound Person" in small print displayed at bottom of screen.]

"Ohio's Faye Diamond lost a dramatic 15 pounds, rapidly dropping from a size 8 to a size 4."

FAYE DIAMOND: "I'm not embarrassed to wear a bikini anymore."

"Toronto's Debbie Holloway lost 53 pounds trimming from a size 16 to a size 7.

Wisconsin's A.J. Jr. rapidly lost 75 pounds, carving 10 bulging inches from his waist.

Tennessee's Sherry Capick lost 38 pounds with her doctor-approved Miracle Diet Pill Program.

And New York's Jeff Waldo rapidly lost an awesome 92 pounds!" [*Video*: photos of each consumer endorser displayed with amounts of weight lost; two consumer endorsements contain small video displays in the same color as background stating "Results Vary."]

"While under her Doctor's care, Mrs. McKinson quickly lost 32 pounds.

Lorraine Liberatti rapidly lost 46 pounds.

Lynn Clarey lost an astonishing 65 pounds, and E.J. Elkar lost an incredible 100 pounds! Now you can shed excess fat by calling . . . for your doctor approved MegaLoss 1000 Miracle Diet Pill Program. . . ."

"Your satisfaction is 100% guaranteed." [*Video*: "30-day Money-back Guarantee" displayed with ordering information; during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Use Only As Directed With Diet/Exercise Plan," "Testimonials Compensated," and "Following diet/exercise plan is essential for loss of weight for results cannot be achieved solely through the use of pill."]

B. Exhibit D:

"MIRACLE DIET PILL" [headline that appears in approximately 1-inch bold letters]

"Megaloss 1000 Diet Plan GETS THE FAT OFF FAST!" [smaller headline followed by word "Program"]

"Your Ultimate Anti-Fat Weapon!" [headline in ½ inch bold letters]

"SHRINK MILLIONS OF FAT CELLS IN JUST 24 To 48 HOURS!" [smaller headline]

"MEGALOSS GETS THE FAT OFF FAST!

MegaLoss 1000 really works wonders ... FAST! Debbie Holloway lost an amazing 53 pounds. Harold Albright rapidly burned away 75 pounds and Erma Alkire lost 100 pounds so fast her friends could barely recognize her."

"RAPIDLY LOSE POUNDS & INCHES

Just imagine yourself beginning to burn away years of unsightly fat as the MegaLoss 1000 diet plan helps you rapidly shrink millions of fat cells almost

overnight. Now you, like Debbie, Erma and Faye have the opportunity to rapidly lose weight and regain your figure thanks to the MegaLoss 1000 fat-burning diet and its powerful, clinically tested, medically proven and doctor-recommended diet pill formula."

"MEDICALLY PROVEN - DOCTOR APPROVED!

The MegaLoss 1000 diet plan was designed to trigger super fast weight loss. Results are simply fantastic! Your self-confidence and self esteem will grow each day as you regain your youthful figure with the help of this doctor approved diet program's special diet pill ingredient. Formerly available only through doctors, this powerful ingredient is now available to help you lose weight with the doctor-approved MegaLoss 1000 diet since being recommended for its safety to the United States Government . . . . "

"Watch as you:

• LOSE up to 23 INCHES off your WAIST
• LOSE up to 20 INCHES off your HIPS
• LOSE up to 10 INCHES off your THIGHS"

"Naturally, individual weight may vary depending largely on how much you need to lose. But you'll simply he amazed as your calorie intake reduces and gnawing hunger pains are shut off as your high-speed fat burn-off turns on full flame to trim away years of built-up fat. The results are fantastic!"

"ULTIMATE ANTI-FAT WEAPON

You'll no longer be a slave to your appetite. MegaLoss 1000's medically proven formula has been praised by leading doctors, featured in thousands of studies, medical books and national magazines. You now have the ultimate anti-fat weapon you need to lose weight fast. As you quickly drop pounds and inches, experience the more vibrant, desirable and exciting new you emerge."

"NO DANGEROUS SIDE EFFECTS

You'll simply be amazed at how fast the weight comes off. And best of all - you don't have to worry about those nervous jitters, insomnia, laxative effects or dangerous side effects. But you can lose weight so fast your friends may not even recognize you.... As if by magic on the MegaLoss diet plan, down go the calories, down go the inches and down go the pounds!"

"NOW IT'S YOUR TURN

Now it's your turn to rapidly lose weight . . .

Now you can:

• Shrink Millions of Fat Cells The Very First Day
• Trigger Awesome Fat-burning in 24 to 48 Hours
• Slim Stubborn Bulges in Record Time
• Dramatically Reshape Your Body"

"SATISFACTION 100% GUARANTEED OR YOUR MONEY BACK

Now is the proper time... the turning point of your life. Now you can shed your excess fat and have a firm, youthful-looking body faster than you ever dreamed possible. No matter how many years you have been overweight, this amazing anti-fat weapon not only can... but must work wonders for you... or it doesn't cost a single cent! You risk absolutely nothing when you call in your order."

"ORDER NOW WITHOUT RISK

You must be 100 percent satisfied with your rapid weight loss and the results you see in you waist, hips and thighs. If you are not completely satisfied in any way, simply return the unused portion in 30 days and receive a full refund of your purchase price. No questions asked. So act now. Call in your order today."

[Ad contains the following footnote in fine print: "If you read nothing else, read this . . . Following the High Speed diet plan is an extremely fast and effective means to conquer obesity. It causes you to lower caloric intake, which is essential to the rapid reduction of fat and body weight. Naturally, the incredible results described above may not be achieved solely though the use of the diet pills. You must follow the entire Hi-Speed diet plan, which includes behavior modification and walking to achieve the fastest results. Results vary. Average weight loss is 1-2 pounds per week. . . . This product should not be used by the elderly or children. Pregnant women, nursing mothers, individuals being treated for high blood pressure or depression or who have heart disease, diabetes, or thyroid disease should only use as directed by their physician."]

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that:

A. MegaLoss 1000 causes substantial weight loss rapidly;

B. MegaLoss 1000 causes substantial weight loss without the need to exercise or reduce caloric intake;

C. MegaLoss 1000 causes the burning of more body fat daily, thereby resulting in the same or greater weightloss benefit to users, than swimming two and a half miles or exercising six hours nonstop;

D. Prior to the sale of MegaLoss 1000, the active ingredient in MegaLoss 1000 was available only through doctors; and

E. Scientific studies prove that MegaLoss 1000 causes substantial weight loss rapidly.

PAR. 14. In truth and in fact:

A. MegaLoss 1000 does not cause substantial weight loss rapidly;

B. MegaLoss 1000 does not cause substantial weight loss without the need to exercise or reduce caloric intake;

C. MegaLoss 1000 does not cause the burning of more body fat daily, thereby resulting in the same or greater weight-loss benefit to

users, than swimming two and a half miles or exercising six hours nonstop;

D. The active ingredient in MegaLoss 1000 was available to the public without a doctor's prescription for a substantial period of time prior to the sale of MegaLoss 1000; and

E. Scientific studies do not prove that MegaLoss 1000 causes substantial weight loss rapidly.

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

PAR. 15. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that:

A. MegaLoss 1000 does not cause nervous jitters or insomnia or have any dangerous side effects;

B. MegaLoss 1000 burns body fat; and

C. MegaLoss 1000 significantly shrinks millions of fat cells within the first twenty-four to forty-eight hours of use.

PAR. 16. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs thirteen A-C and fifteen, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 17. In truth and in fact, at the time they made the representations set forth in paragraphs thirteen A-C and fifteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph sixteen was, and is, false and misleading.

PAR. 18. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisements attached as Exhibits C and D, respondents have represented, directly or by implication, that testimonials from consumers appearing in

advertisements for MegaLoss 1000 reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 19. In truth and in fact, testimonials from consumers appearing in advertisements for MegaLoss 1000 do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

MiracleTrim

PAR. 20. Respondents have disseminated or have caused to be disseminated advertisements for MiracleTrim, including but not necessarily limited to the attached Exhibit E. This advertisement contains the following statements and depictions:

"Now you can start shrinking millions of fat cells and begin regaining your youthful figure in 24 to 48 hours." [*Video*: heavy woman depicted putting on a pair of jeans and becoming a slim woman within three frames of the ad.]
"The very first day your powerful new MiracleTrim Diet Pill System attacks years of built up fat. You can start losing up to 10, 20, 50, even an atypical 100 pounds for only $9.95. "[*Video*: "100 lbs." and "RECEIVE A FULL 21-DAY SUPPLY," and "NEW!" superimposed over a package containing two bottles of MiracleTrim pills.]
"This new MiracleTrim Diet Pill System is doctor approved to help you quickly shrink millions of fat cells so you can easily regain your youthful figure."[*Video*:"Use Only As Directed With Diet Plan" in small print at bottom of screen below full screen depiction of pill on a finger and the words "NEW!" "DOCTOR APPROVED," and "EASILY REGAIN YOUR FIGURE!" in large print.]
"You can rapidly shrink up to 10 inches off your thighs. You can easily shrink as much as 20 inches from your hips and you can quickly shrink up to an amazing 23 inches from your waist."

* * *

"Pam rapidly went from a large size 15 to a slim 7. After 15 years of diets, Treva finally found one that really worked." [*Video*: 'before' and 'after' photos displayed with amounts of weight lost.]
A man is pictured as he says: "I quickly lost 55 pounds."
"Jo's incredible 59 pound loss gave her a knockout shape. Carol lost an astonishing 40 pounds. And Edie lost a mind boggling 110 pounds." [*Video*: 'before' and 'after' photos of consumer endorsers displayed with amounts of weight lost.]
"Now it's your turn to dramatically reshape your figure by calling . . . for your new MiracleTrim Diet Pill System for only $9.95." [*Video*: during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "Following Diet Plan Is Essential For Weight Loss (Average 1½ - 2 Pounds Per

Week) For Results Cannot Be Achieved Solely Through Use Of Pill," "testimonials compensated," and "use only as directed with diet plan."]

* * *

DR. PESHKIN [*shown in video*]: "Order today, you'll receive your own personal weight loss consultation, absolutely free. . . ."

PAR. 21. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that:

A. MiracleTrim causes substantial weight loss rapidly;

B. MiracleTrim causes substantial weight loss without the need to exercise or reduce caloric intake;

C. MiracleTrim's active ingredient is new and/or unique; and

D. Consumers who order MiracleTrim will receive a personal weight-loss consultation from a doctor or medically trained, professional weight-loss counselor.

PAR. 22. In truth and in fact:

A. MiracleTrim does not cause substantial weight loss rapidly;

B. MiracleTrim does not cause substantial weight loss without the need to exercise or reduce caloric intake;

C. MiracleTrim's active ingredient is not new and/or unique; and

D. Consumers who order MiracleTrim will not receive a personal weight-loss consultation from a doctor or medically trained, professional weight-loss counselor.

Therefore, the representations set forth in paragraph twenty-one were, and are, false and misleading.

PAR. 23. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that MiracleTrim significantly shrinks millions of fat cells within the first twenty-four to forty-eight hours of use.

PAR. 24. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as

Exhibit E, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs twenty-one A-B and twenty-three, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 25. In truth and in fact, at the time they made the representations set forth in paragraphs twenty-one A-D and twenty-three, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph twenty-four was, and is, false and misleading.

PAR. 26. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twenty, including but not necessarily limited to the advertisement attached as Exhibit E, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for MiracleTrim reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 27. In truth and in fact, testimonials from consumers appearing in advertisements for MiracleTrim do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph twenty-six was, and is, false and misleading.

FAILURE TO ADEQUATELY DISCLOSE MATERIAL CONNECTION

PAR. 28. In their advertising and sale of weight-loss pills, including but not necessarily limited to MegaLoss 1000, FormulaTrim 3000, and MiracleTrim, respondents have represented that consumers appearing in respondents' advertisements are endorsers of the weight-loss pills. Respondents have failed to disclose adequately that certain consumers appearing in respondents' advertisements have a material connection with respondents in that such consumers have been compensated, or offered significant compensation, for endorsing the weight-loss pills. This fact would be material to consumers in their purchase or use decisions regarding the products. The failure to disclose adequately this fact, in light of the representation made, was, and is, a deceptive practice.

TRADE PRACTICE VIOLATIONS

PAR. 29. In their advertisements for their weight-loss pills, respondents have directed consumers to call a toll-free telephone number to place an order. Typically, when consumers called this telephone number, they were given a choice of paying by check or by credit card. If consumers indicated that they preferred to pay by check, they were asked to read the numbers across the bottom of one of their checks. Respondents then magnetically encoded this information on a bank draft, which was submitted to the consumer's bank for payment. If consumers indicated that they preferred to pay by credit card, they were asked for their credit card number and respondents billed a charge directly to the consumer's credit card account.

UNAUTHORIZED DEBITS AND CHARGES

PAR. 30. In numerous instances, respondents have debited consumers' bank accounts or billed consumers' credit card accounts without the consumers' authorization or for amounts greater than those authorized by the consumers. Respondents' practices as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

FAILURE TO HONOR MONEY-BACK GUARANTEE

PAR. 31. In their advertisements and promotional materials for their weight-loss pills, respondents have represented that the weight-loss pills carry a "money-back guarantee," and that consumers can return the product within a specified time period after receipt of the product and receive a full refund within a reasonable period of time.

PAR. 32. In truth and in fact, in numerous instances, consumers have returned the weight-loss pills to respondents within the specified time period in order to obtain a refund, and respondents have failed to provide refunds of money paid by such consumers or failed to provide them within a reasonable period of time. The practices of respondents as set forth herein have caused substantial injury to consumers that is not outweighed by any countervailing benefits to

consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

TRUTH IN LENDING ACT VIOLATIONS

PAR. 33. Respondents are creditors as "creditor" is defined in Section 103(f) of the Truth In Lending Act ("TILA"), 15 U.S.C. 1602(f), and in Section 226.2(a)(17) of Regulation Z, 12 CFR 226.2(a)(17), and are, therefore, required to comply with the applicable provisions of that Act and Regulation.

PAR. 34. Section 226.12(e) of Regulation Z, 12 CFR 226.12(e), which implements Section 166 of the TILA, 15 U.S.C. 1666e, provides that:

> When a creditor other than a card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within seven business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements.

PAR. 35. In numerous instances, respondents have failed to transmit credit statements to the card issuer through the card issuer's normal channels for credit statements within seven business days from accepting the return of property or forgiving the debt for services in violation of the TILA and Section 226.12(e) of Regulation Z.

NONDELIVERY

PAR. 36. In connection with the sale of weight-loss pills to consumers, respondents have represented, directly or by implication, that the weight-loss pills would be delivered to purchasers within a reasonable period of time.

PAR. 37. In truth and in fact, in numerous instances, the weight-loss pills referred to in paragraph thirty-six that were sold to purchasers have not been delivered to such purchasers or have not been delivered to them within a reasonable period of time. Further, in numerous instances, respondents have failed to provide refunds of money paid by such purchasers or have failed to provide such refunds within a reasonable period of time. The practices of respondents as set forth herein have caused substantial injury to consumers that is

not outweighed by any countervailing benefits to consumers or competition and is not reasonably avoidable by consumers, and constitute unfair and deceptive acts or practices.

SMOKING CESSATION PRODUCT -- NICOTAIN

PAR. 38. Respondents have disseminated or have caused to be disseminated advertisements for the Nicotain Stop Smoking Patch, including but not necessarily limited to the attached Exhibit F. This advertisement contains the following statements and depictions:

[*Video*: "EASILY STOP SMOKING" displayed in large print.]
"You can easily stop smoking with the new nonmedicated, nicotine-free, doctor-approved Nicotain Stop Smoking Patch."
[*Video*: product box displayed with label reading: "nicotain STOP SMOKING PATCH."]
[*Video:* "DOCTOR APPROVED!" displayed in large print above depiction of person wearing patch on wrist.]
[*Video*: "NEW! NON-PRESCRIPTION" displayed in large print and "nicotain STOP SMOKING PATCH" displayed in smaller print over depiction of patch on wrist.]
"This revolutionary new behavior modification, nonprescription Nicotain Stop Smoking Patch Program is so effective, you can easily quit, whether you smoke one, two, even three packs a day." [*Video:* "Use nonmedicated patch only as directed with plan" in small print displayed at bottom of screen.]
"Roxanna Seles smoked for 12 years."
[*Video:* "SMOKED FOR 12 YEARS" displayed in large print.]
ROXANNA: "And I quit in just one week." [*Video:* "QUIT IN JUST ONE WEEK!" displayed in large print video over person identified as Roxanna Seles followed by other consumer endorsements.]
MAN: "Nicotain made it easy. And I didn't have to go to a doctor for it."
1st WOMAN: "Twenty years, twenty cigarettes a day--and I quit in just two weeks with Nicotain."
[*Video:* "QUIT IN JUST TWO WEEKS!" displayed in large print.]

* * *

2nd WOMAN: "I called, I quit, and it only cost $9.95."

* * *

MAN: "Every cigarette brings you seven minutes closer to death."
[*Video:* during ordering instructions, while telephone number and cost information is presented in audio and video, the following text is presented at the bottom of various screens in small print: "use nonmedicated patch only as directed with plan," "testimonials compensated/one-week starter program," "product effectiveness is directly related to user's motivation to stop."]

PAR. 39. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight,

including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that:

A. The Nicotain Stop Smoking Patch enables users to stop smoking easily, regardless of the number of cigarettes they currently smoke or the number of years they have smoked; and

B. The Nicotain Stop Smoking Patch works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

PAR. 40. In truth and in fact:

A. The Nicotain Stop Smoking Patch does not enable users to stop smoking easily, regardless of the number of cigarettes they currently smoke or the number of years they have smoked; and

B. The Nicotain Stop Smoking Patch does not work through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

Therefore, the representations set forth in paragraph thirty-nine were, and are, false and misleading.

PAR. 41. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph thirty-nine A, they possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 42. In truth and in fact, at the time they made the representation set forth in paragraph thirty-nine A, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph forty-one was, and is, false and misleading.

PAR. 43. Through the use of the statements and depictions contained in the advertisements referred to in paragraph thirty-eight, including but not necessarily limited to the advertisement attached as Exhibit F, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for The

Nicotain Stop Smoking Patch reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 44. In truth and in fact, testimonials from consumers appearing in advertisements for Nicotain Stop Smoking Patch do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph forty-three was, and is, false and misleading.

PAR. 45. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

RADIO TV REPORTS
41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT FORMULA TRIM 3000 DIET PILLS OH92-51134
TITLE "BEFORE & AFTER"
PROGRAM NEWS 07/06/92 :90
STATION WUAB (CLEVELAND) 10.58PM
PAGE 1 OF 2

EXHIBIT A (p. 1)

(MUSIC) MALE ANNCR: Debbie Hoya lost 25 pounds fast.

Tamara Cowens lost 35 pounds fast.

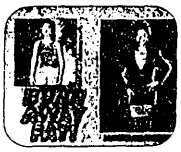
Now you too can lose weight fast,

with the help of this new powerful FormulaTrim 3000 diet pill.

FormulaTrim's new fat-burning plan is

so powerful,

you can burn more body fat relaxing all day than running 10 miles non-stop



Laurette Morello burned away 17 pounds

LAURETTE MORELLO: I went from a size 13 to a size 5.

MALE ANNCR: Adam Locas lost 36 pounds carving 7 inches from his waist.

... lost 52 pounds

trimming from a size 14 to a size 6.

This powerful

doctor-approved diet pill formula is medically proven to work.

The new FormulaTrim fat burning plan is so powerful.

you can burn more body fat relaxing all day

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

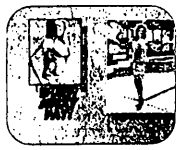
EXHIBIT A

RADIO TV REPORTS
41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT FORMULA TRIM 3000 DIET PILLS OH92-51134
TITLE "BEFORE & AFTER"
PROGRAM NEWS 07/06/92 90
STATION WUAB (CLEVELAND) 10:58PM
PAGE 2 OF 2

EXHIBIT A (p. 2)


then sweating through five exhausting hours of aerobics.


Terri Nigelson

burned away 15 pounds;

Joanne Benora lost 32 pounds

and Annette Garton lost an incredible and amazing 59 pounds!

Now you can

burn away fat and lose weight fast by calling 1-800-547-9500

for your powerful new FormulaTrim 3000

for only $9.95. We accept personal check and credit card orders by phone.

Call 1-800-547-9500 now to order your three week supply.

For only $9.95. Call right now

and receive your Swedish Cellulite Creme absolutely free.

Your satisfaction is 100% guaranteed.

Remember, have your check book

or credit card ready when calling;

that's 1-800-547-9500. Call now!

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT B

RADIO TV REPORTS
41 East 4.. .. Street, New York, NY 10017 (212) 309-1400

PRODUCT: FORMULA TRIM 3000 NO HUNGER DIET PILL 92-10715
TITLE: "END HUNGER PAIN"
PROGRAM: VICKI 9/15/92 :60
STATION: WPIX (NEW YORK) 10.30AM

EXHIBIT B

(MUSIC) ANNCR: Debbie Hoya lost 25 pounds, fast.

Tamara Koons lost 35 pounds, fast. Now you too can lose weight fast

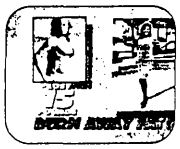
with the help of this new powerful medically-proven FormulaTrim 3000 No Hunger Diet Pill.

Following this new powerful FormulaTrim fat burning diet plan,

you can burn more body fat relaxing all day

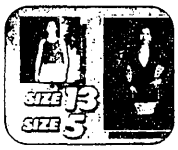
than running 10 miles non-stop

or even sweating through 5 exhausting hours of aerobics.



Terry Nigelson burned away 15 pounds.

Lorett Morello burned away 17 pounds.



LORETT MORELLO: I went from a size 13 to a size 5.

ANNCR: Adam Logus burned away 36 pounds.

Claire Contobi burned away 52 pounds

and Annette Barton burned away an incredible and amazing 59 pounds! (MUSIC OUT)

ANNCR: Now you can end biting hunger pain, burn away fat and lose weight fast by calling 1-800-542-9696

for your powerful FormulaTrim 3000 for only $9.95. We accept personal check and credit card orders by phone.

Call 1-800-542-9696 and receive your Swedish Cellulite Cream absolutely free.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

RADIO TV REPORTS
41 East 42nd Street New York, NY 10017 (212) 307-1430

PRODUCT TITLE: MEGA LOSS 1000 DIET PILLS "MIRACLE DIET" 91-11148
PROGRAM: MOVIE 10/06/91 120
STATION: WPIX (NEW YORK) 2:23PM
PAGE 1

EXHIBIT C (p. 1)

(MUSIC) ANNCR: You can start losing up to 10, 20, 50 even 100 pounds

with the powerful, doctor approved,

Mega Loss 1000 Miracle Diet Pill Program for only $9.95.

With this doctor approved Mega Loss 1000 Program, you can burn more body fat

relaxing in the sun then swimming 2½ miles

or exercising 6 hours nonstop

Ohio's Faye Diamond lost a dramatic 15 pounds.

rapidly dropping from a size 8 to a size 4

FAYE DIAMOND: I'm not embarrassed to wear a bikini anymore

ANNCR: Toronto's Debbie Holloway lost 53 pounds trimming from a size 16 to a size 7.

Wisconsin's A.J. Jr. rapidly lost 75 pounds

carving 10 bulging inches from his waist

Tennessee's Sherry Capick lost 38 pounds with her doctor approved Miracle Diet Pill Program

And New York's Jeff Waldo rapidly lost an awesome 92 pounds!

While under her Doctor's care, Mrs. McKinson

quickly lost 32 pounds

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C

RADIO TV REPORTS
41 East 42nd Street New York, NY 10017 (212) 309-1400

PRODUCT: MEGA LOSS 1000 DIET PILLS 91-11148
TITLE: "MIRACLE DIET"
PROGRAM: MOVIE 10/06/91 :120
STATION: WPIX (NEW YORK) 2:23PM
PAGE 2

EXHIBIT C (p. 2)

Lorraine Liberatti rapidly lost 46 pounds.

Lynn Clarey lost an astonishing 65 pounds.

and E.J. Elkar lost an incredible

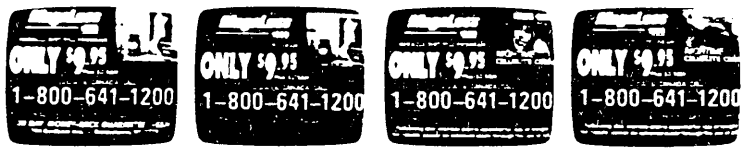
100 pounds!

Now you can shed excess fat by calling 1-800-641-1200

for your doctor approved Mega Loss 1000 Miracle Diet Pill Program

for only $9.95.

We accept all personal checks and credit card orders by phone.



Call 1-800-641-1200 now to order your 21-day supply

for only $9.95.

Call right now and receive

your Nighttime Cellulite Cream absolutely free.

Your satisfaction is 100% guaranteed

Remember: Have your check book or credit card ready when calling

That's 1-800-641-1200, call now!

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT D

illy Graham: he way you ray lakes reams ome ue

CAN unlock the se- s to life's riches by wing how to pray, says nous evangelist Billy n his sensational new orm Warning.

more to it than simply nd putting your hands he explains.

illy, few people have w to put prayer to work *We have no sense of com-* ily and expectantly to mply use prayer as a for- r Graham sighs s most revered preach- the correct way to pray our dreams come true *oose a proper setting for* quiet spot where you interrupted ... a spot where you can be alone with God

Next, clear your mind of anger *or animosity and engage in a one-*on-one conversation with the Lord

"You may not be able to pray like a clergyman in the begin- ning, but you can start with just a simple sentence 'Lord, I love you.' That's a prayer. Or, 'God, help me.' That's a prayer, too.

"Snatches of memorized verses are hastily spoken in the morn- ing, then we say goodbye to God *for the rest of the day, until we* rush through a few closing peti- tions at night," he laments.

"Since the disciples had to be taught to pray, we, too, ought to study the Scriptures and learn to pray," Dr. Graham says.

Prayer is not a button we can press and get an immediate an- swer, either.

"We can't manipulate God or dictate to him. Knowing far bet- *ter than we what's good for us,* God gives us what we NEED," he says.

Knowing how to pray isn't enough, however. We also need to know WHEN to pray.

"Of course, we need to pray in times of adversity, lest we become faithless and unbelieving. But we also need to pray in times of pros- perity, lest we become boastful and proud," he writes.

"God may not give us what we *ask for, for* that *may* not be his wise and loving will for us. But he WILL answer our prayer in his own way. He will not let us down in our hour of need."

And in such times of need, Dr. Graham promises, God will pro- vide us with patience, courage and strength.

BLOCKBUSTER NEW BOOK

worked for Naomi Judd

THE POWER of prayer has cured country singer Naomi Judd of a serious liver disease that forced her into an early retirement last year.

"Medical science is a wonderful thing," says the jubilant Judd, "but I had to go to a higher author- ity.

"It worked. I'm in full remission."

The case of chronic hepatitis she contracted in 1990 forced Naomi to retire from the superstar sing- ing duo with daughter Wynonna last year. Wy- nonna's now a big hit on her own.

EXHIBIT D

EXHIBIT D (p. 2)

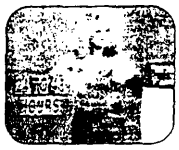
EXHIBIT E

RADIO TV REPORTS
41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: MIRACLE TRIM DIET PILL SYSTEM 93-01018
TITLE: "SHRINK FAT CELLS"
PROGRAM: MONTEL WILLIAMS 1/25/93 :90
STATION: WNYW (NEW YORK) 5:06PM
PAGE: 1 OF 2

(MUSIC) ANNCR: Now you can start shrinking millions of fat cells

and begin regaining your youthful figure



in 24 to 48 hours.

The very first day your powerful new Miracle Trim Diet Pill System

attacks years of built up fat.

You can start losing up to 10, 20, 50,

even a typical 100 pounds for only $9.95.

This new Miracle Trim Diet Pill System

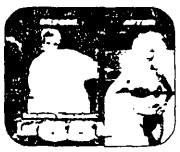
is doctor approved to help you quickly shrink millions of fat cells

so you can easily regain your youthful figure.

You can rapidly shrink up to 10 inches off your thighs.

You can easily shrink as much as 20 inches from your hips

and you can quickly shrink up to an amazing 23 inches from your waist.



WOMAN: Thanks to Miracle Trim I'm enjoying my new body.

ANNCR: Pam rapidly went from a

large size 15 to a slim 7.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

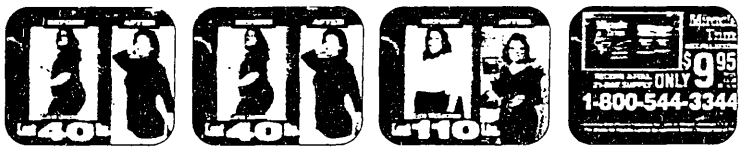
EXHIBIT E

RADIO TV REPORTS
41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT MIRACLE TRIM DIET PILL SYSTEM 93-01018
TITLE "SHRINK FAT CELLS"
PROGRAM MONTEL WILLIAMS 1/25/93 :90
STATION WNYW (NEW YORK) 5:06PM
PAGE: 2 OF 2

EXHIBIT E (p. 2)

After 15 years of diets, Treva | finally found one that really worked. | MAN: I quickly lost 55 pounds. | ANNCR: Jo's incredible 59 pound loss gave her a knockout shape.



Carol lost an astonishing 40 pounds. | And Edie lost a mind boggling 110 pounds. | 2nd ANNCR: Now it's your turn to dramatically reshape your figure | by calling 1-800-544-3344 for your new

Miracle Trim Diet Pill System for only $9.95. | We accept all personal checks and credit card orders by phone. | Call 1-800-544-3344 to order your new | Miracle Trim for only $9.95

and we'll give you this free supply to complete your 21 day system. | DR. PESHKIN: Order today, you'll receive your own | personal weight loss consultation, absolutely free. | 2nd ANNCR; Have your check book or credit card ready when calling. That's 1-800-544-3344, call now. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT F

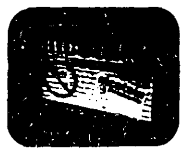
RADIO TV REPORTS

41 East 42nd Street, New York, NY 10017 (212) 309-1400

PRODUCT: NICOTAIN STOP SMOKING PATCH 93-13570 E
TITLE: "YOU KNOW YOU HAVE TO QUIT"
PROGRAM: SPORTS DESK 11/27/93 :60
STATION: MSG (NEW YORK) 11:53PM

EXHIBIT F

(MUSIC) ANNCR: You can easily stop smoking with the new non-medicated,



nicotine-free, doctor-approved Nicotain Stop Smoking Patch.

This revolutionary new behavior modification,

non-prescription Nicotain Stop Smoking Patch Program is so effective, you can easily quit,

whether you smoke one, two, even three packs a day. Roxanna Seles smoked for 12 years.

ROXANNA: And I quit in just one week.

MAN: Nicotain made it easy. And I didn't have to go to a doctor for it.

1st WOMAN: Twenty years, twenty cigarettes a day—

and I quit in just two weeks with Nicotain. (MUSIC OUT)

ANNCR: To order Nicotain, call 1-800-435-4466.

2nd WOMAN: I called, I quit, and it only cost $9.95.

ANNCR: Call 1-800-435-4466 now!

MAN: Every cigarette brings you seven minutes closer to death.

So don't wait. Make the call. Make the call now.

ANNCR: Order Nicotain now. Call 1-800-435-4466.

3rd WOMAN: You know you have to quit. So make the call.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

[illegible]
[illegible]

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 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, 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 Taleigh Corporation, formerly known as Taleigh, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. At times relevant hereto, its office and principal place of business was located at 4742 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent Choice Diet Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. At times relevant hereto, its office and principal place of business was located at 4800 N.W. Boca Raton Boulevard, Boca Raton, FL.

Respondent William J. Santamaria is an officer and director of said corporations. He formulates, directs and controls the policies,

acts and practices of said corporations and his address is 20640 Baybrooke Court, Boca Raton, FL.

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

For purposes of this order:

1. *"Clearly and prominently"* as used herein shall mean as follows:

(a) In a television or videotape advertisement: (1) an audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it; and (2) a video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

(b) In a print advertisement, the disclosure shall be in close proximity to the representation that triggers the disclosure in at least twelve (12) point type.

(c) In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

2. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. *"Purchase price"* shall mean all amounts paid to respondents in cash or by check, or charged to a consumer's credit card account or debited from a consumer's checking account, including, where applicable, sales tax, and any charges not authorized by consumers to be charged to their charge card accounts or debited from their checking accounts, provided however, with regard to Part XIV, purchase price shall not include shipping or handling charges if such charges are not included in respondents' guarantee or refund offer.

4. *"Weight-loss product"* shall mean any product or program designed or used to prevent weight gain or to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit in a user of the product or program.

5. *"Smoking deterrent or cessation product"* shall mean any product or program designed to aid or assist the user to stop or reduce the cigarette urge, break the cigarette habit, or stop or reduce smoking.

I.

It is ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of FormulaTrim 3000, MegaLoss 1000, MegaLoss 3000, MiracleTrim, or any other weightloss product containing phenylpropanolamine as the active ingredient, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product causes or assists in causing rapid weight loss;

B. Such product causes or assists in causing substantial weight loss without the need to exercise or reduce caloric intake;

C. Such product is new or unique or contains a new or unique ingredient;

D. Such product causes the burning of more body fat than five hours of aerobics, running ten miles nonstop, swimming two and a half miles, exercising six hours nonstop, or any similar exercise activity; or

E. Such product contains an active ingredient that, prior to the sale of such product, was available only through doctors.

II.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss 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 weight-loss product has any effect on weight or body size, unless respondents disclose, clearly and prominently, and, in a television or videotape advertisement, simultaneously in both the audio and video portions of the advertisement, that reducing caloric intake and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such product is effective without reducing caloric intake and/or increasing exercise.

III.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, from representing, in any manner, that:

A. Such product or program weight loss, causes or assists in causing weight loss, or assists in maintaining weight loss;

B. Such product or program causes or assists in causing weight loss without exercise or reducing caloric intake;

C. Such product or program causes the burning of more body fat than any amount of exercise activity; or

D. Such product or program causes or assists the user to stop or reduce smoking easily; unless such representation is true, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of Nicotain, or any substantially similar product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product or program enables users to stop smoking easily; or

B. Such product or program works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

V.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling,

promotion, offering for sale, sale, or distribution of Nicotain, or any other smoking deterrent or cessation product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, in any manner, directly or by implication, any misrepresentation, including through the name of the product, concerning the nature or mechanism of operation of such product, including, but not limited to, that such product contains nicotine or works through a mechanism substantially similar or equivalent to a prescription smoking deterrent patch.

VI.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, 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, that:

A. Such product or program is new or unique or contains a new or unique ingredient;

B. Consumers who order the product or program will receive a personal consultation from a physician, medical professional or weight-loss counselor; or

C. Any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of such product or program represents the typical or ordinary experience of members of the public who use the product or program.

VII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an

officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose, clearly and prominently, a material connection, where one exists, between a person providing an endorsement of any product or program, as "endorsement" is defined in 16 CFR 255.0 (b), and any respondent, or any other individual or entity manufacturing, labeling, advertising, promoting, offering for sale, selling, or distributing such product or program. For purposes of this order, "material connection" shall mean any relationship that might materially affect the weight or credibility of the endorsement and would not reasonably be expected by consumers.

VIII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, Subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

IX.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any

partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such product or program does not cause any dangerous side effects, nervous jitters, or insomnia;

B. Such product or program burns, reduces, or diminishes body fat; or

C. Such product or program significantly shrinks fat cells; unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

X.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any weight-loss product, smoking deterrent or cessation product, food, food or dietary supplement, drug, or device, as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, in any manner, directly or by implication, any representation regarding the performance, benefits, efficacy, or safety of any such product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

XI.

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

XII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

XIII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from charging a consumer's credit card account or debiting a consumer's checking account in an amount in excess of the amount affirmatively authorized by the consumer.

XIV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in

connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined, in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that consumers can receive a refund, through such terms as "money back guarantee" or similar terms, unless respondents refund the full purchase price at the consumer's request in accordance with the provisions of this Part;

B. Failing to disclose, clearly and prominently, any material limitations or conditions that apply to a guarantee, warranty or refund policy;

C. Failing to comply, where applicable, with the requirements of Section 166 of the Truth in Lending Act, 15 U.S.C. 1666e and 12 CFR 226.12(e)(1); and

D. Failing to refund the full purchase price in accordance with the terms of a guarantee, warranty or refund policy within a reasonable period of time after a consumer complies with the conditions for receiving a refund. For purposes of this Part, "a reasonable period of time" shall be:

(1) That period of time specified in respondents' solicitation if such period is clearly and prominently disclosed to the consumer in the solicitation; or (2) if no period of time is clearly and prominently disclosed, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving a refund.

For purposes of determining whether a consumer has complied with the conditions for receiving a refund, the date for determining whether the consumer has returned the product or program within the specified time shall be the date the consumer mails or causes the product or program to be shipped to the respondents or respondents' designated agents.

XV.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate respondents; and respondents'

agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from violating any provision of The Mail or Telephone Order Merchandise Rule, 16 CFR Part 435, as amended, effective March 1, 1994, 58 Fed. Reg. 49095.

XVI.

It is further ordered, That respondent William J. Santamaria, and respondent Santamaria's agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division, joint venture or other device, do forthwith cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss product or smoking deterrent or cessation product to the general public, unless prior to advertising, promoting, offering for sale, selling, or distributing to the general public any such product, respondent Santamaria first obtains a performance bond in the principal sum of three hundred thousand dollars ($300,000). Said bond shall be conditioned upon compliance by respondent Santamaria with the provisions of the Federal Trade Commission Act, and with the provisions of this order. The bond shall be deemed continuous and remain in full force and effect as long as respondent Santamaria continues to advertise, promote, offer for sale, sell, or distribute any weight-loss product or smoking deterrent or cessation product, directly or indirectly, to the general public, and for at least five (5) years after he has ceased any such activity. The bond shall cite this order as the subject matter of the bond and provide surety against respondent Santamaria's failure to pay consumer redress or disgorgement as set forth herein. Such performance bond shall be an insurance agreement providing surety issued by a surety company that is admitted to do business in a state in which respondent Santamaria is doing business and that holds a Federal Certificate of Authority as Acceptable Surety on Federal Bond and Reinsuring.

Respondent Santamaria shall provide a copy of such performance bond to the associate director of the Federal Trade Commission's Division of Enforcement, 6th Street & Pennsylvania Avenue, N.W.,

Washington, D.C., prior to the commencement of any business for which such bond is required.

Provided, however, in lieu of a performance bond, respondent Santamaria may establish and fund, pursuant to the terms set forth herein, an escrow account in the principal sum of three hundred thousand dollars ($300,000) in cash, or such other assets of equivalent value, which the Commission, or its representative, in its sole discretion may approve. Respondent Santamaria shall maintain such amount in that account for so long as he continues to advertise, promote, offer for sale, sell, or distribute any weight-loss product or smoking deterrent or cessation product, directly or indirectly, to the general public, and for at least five (5) years after he has ceased any such activity. Respondent Santamaria shall pay all costs associated with the creation, funding, operation, and administration of the escrow account. The Commission, or its representative, shall, in its sole discretion, select the escrow agent. The escrow agreement shall be in substantially the form attached to this order as Exhibit A.

The performance bond or escrow agreement shall provide that the surety company or escrow agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against respondent Santamaria for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that he has violated the terms of this order or the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, shall pay to the Commission so much of the performance bond or funds of the escrow account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the surety company or escrow agent, provided that, if respondent Santamaria has agreed to the entry of a court order or an order of the Commission, a specific finding that Santamaria violated the terms of this order or the provisions of the Federal Trade Commission Act shall not be necessary. A copy of the notice provided for herein shall be mailed to respondent Santamaria at his last known address.

Respondent Santamaria may not disclose the existence of the performance bond or escrow account to any consumer, or other purchaser or prospective purchaser, to whom a covered product is advertised, promoted, offered for sale, sold, or distributed, without

also disclosing at the same time and in a like manner that the performance bond or escrow account is required by order of the Federal Trade Commission in settlement of charges that respondent Santamaria engaged in false and misleading representations.

XVII.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., shall:

A. Within thirty (30) days after service of this order, provide a copy of this order to each of respondents, 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 issuance of this order, provide a copy of this order to each of respondents, future 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 who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her responsibilities.

XVIII.

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

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

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

XIX.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, 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 corporate change that may affect compliance obligations arising out of this order.

XX.

It is further ordered, That respondent, William J. Santamaria, shall, for a period of seven (7) years from the date of issuance of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include 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.

XXI.

It is further ordered, That respondents, Taleigh Corporation and Choice Diet Products, Inc., corporations, their successors and assigns, and their officers; and William J. Santamaria, individually and as an officer and director of the corporate 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.

Chairman Pitofsky not participating.

EXHIBIT A

THIS ESCROW AGREEMENT, made and entered into this_____day of _____ , ____ , by and between William J. Santamaria (hereinafter "Santamaria"); and the Federal Trade Commission, an agency of the Government of the United States of America, by and through_____ (hereinafter "FTC"); and_____ _____ (hereinafter "Escrow Agent");

WITNESSETH:

Whereas, the FTC and Santamaria have entered into an Agreement Containing Consent Order to Cease and Desist (hereinafter "Consent Order"), a copy of which is attached hereto as Exhibit A; and

Whereas, the Consent Order requires that Santamaria cease and desist from advertising, promoting, offering for sale, selling, or distributing any product listed therein to the general public unless he first establishes and maintains an escrow account, under the terms and conditions specified in the Consent Order;

Now, wherefore, in accordance with the terms of the Consent Order, which are incorporated herein by reference, the parties covenant and agree as follows:

1. Santamaria shall establish an Escrow Account at_____ _____to be styled Santamaria Escrow Account,_____ _____ Escrow Agent. Santamaria shall deposit into the Escrow Account an initial sum of at least three hundred thousand dollars ($300,000) in cash, or other approved assets of equivalent value. Thereafter, Santamaria shall deposit such additional amounts into the Escrow Account as are necessary to maintain the total amount in the Escrow Account at three hundred thousand dollars ($300,000).

2. The Escrow Agent shall be the sole signatory on the Escrow Account and access to the funds held in that account shall be solely through the Escrow Agent. It is understood by the parties to this Escrow Agreement that upon the signing of this Agreement, Santamaria relinquishes to the Escrow Agent, all legal title to the escrow funds, except as to such amounts in the Escrow Account that are in excess of three hundred thousand dollars ($300,000). Until and

unless the Escrow Account is terminated as provided for herein, Santamaria agrees to make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and, in the event of bankruptcy, Santamaria acknowledges that the funds are not part of Santamaria's estate, nor does the estate have any claim or interest therein.

3. The Escrow Agent and the parties hereto agree that the escrow funds shall be held only in accordance with the terms of the Consent Order and the Escrow Agreement. Santamaria shall pay all costs associated with the creation, funding, operation, and administration of the Escrow Account as they become due. In the event that Santamaria fails to pay such costs as they become due, the Escrow Agent shall pay the costs from the interest earned on the escrow funds.

4. The Escrow Agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against Santamaria for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that he has violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, which notice also shall be mailed to Santamaria at his last known address, shall pay to the Commission so much of the funds of the Escrow Account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the Escrow Agent, provided that, if Santamaria has agreed to the entry of a court order or an order of the Commission, a specific finding that Santamaria violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act shall not be necessary. The Escrow Agent shall have the power to convert to cash so much of the Escrow Account assets as are necessary to satisfy the obligations of the judgment or order.

5. The Escrow Account shall continue until at least five years after Santamaria last advertises promotes, offers for sale, sells, or distributes any product specified in the consent order, at which time, if there are no pending FTC investigations, legal or administrative actions by the FTC against Santamaria, or unsatisfied obligations pursuant to a judgment or order described in paragraph four herein, for which a claim could be made against the escrow funds under the

terms of the Consent Order, the FTC shall, upon Santamaria's request, instruct the Escrow Agent to terminate the Escrow Account and return the balance of the Escrow Account to Santamaria. At such time, the Escrow Agent shall be fully and completely released from its agency as herein described. The legal title to the escrow funds shall vest in Santamaria at such time as the Escrow Agent, pursuant to instructions from the FTC, returns the funds to Santamaria.

Witness the signatures of the parties, the day and year first above written.

DATE: _____
WILLIAM J. SANTAMARIA

FEDERAL TRADE COMMISSION

DATE: _____
COUNSEL FOR THE
FEDERAL TRADE COMMISION

IN THE MATTER OF

KOREAN VIDEO STORES ASSOCIATION OF MARYLAND, ET AL.

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

Docket C-3588. Complaint, June 20, 1995--Decision, June 20, 1995

This consent order prohibits, among other things, a Maryland-based video store association and its members from entering into any agreement to raise, fix, or maintain prices in the retail video tape rental business; and requires, within 30 days, its members to display a poster announcing the settlement, in both English and Korean, in their respective stores and to publish the entire text of the poster in three Korean-language newspapers in the Washington, D.C. area.

Appearances

For the Commission: *Joseph G. Krauss.*

For the respondents: *Robert Paul, Shaw, Pittman, Potts & Trowbridge,* 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 the Korean Video Stores Association of Maryland, Chang Hyun Cho, Bong Soo Ha, Yoo Kwan Jun, Dae Yong Kang, Yong Hoon Kang, Mi La Kim, Ki Sik Kim, Suk C. Kim, Ju Young Lee, Kyeong Hae Lee, Chang Jin Park, Mi Hwa Park, Young Min Ro, Chae Sul Song, Tae Eung Yu, and Seung Man Yun, hereinafter sometimes referred to as respondents, have violated the provision 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:

I. RESPONDENTS

1. Respondent Korean Video Stores Association of Maryland is an unincorporated trade association. Its mailing address is c/o Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

2. Respondent Chang Hyun Cho is an individual trading and doing business as Hana Video, 220 N. Crain Highway, Glen Burnie, MD.

3. Respondent Bong Soo Ha is an individual trading and doing business as Video Town, 2092 Veirs Mill Road, Rockville, MD.

4. Respondent Yoo Kwan Jun is an individual trading and doing business as Harford Video, 8904 Harford Road, Baltimore, MD.

5. Respondent Dae Yong Kang is an individual trading and doing business as Daenamoo Video, 5722 York Road, Baltimore, MD.

6. Respondent Yong Hoon Kang is an individual trading and doing business as Lotte Gifts Store, 2201 N. Charles Street, Baltimore, MD.

7. Respondent Mi La Kim is an individual trading and doing business as Koryo Video, 10820-G Rhode Island Avenue, Beltsville, MD.

8. Respondent Ki Sik Kim is an individual trading and doing business as Video Center, 29 W. North Avenue, Baltimore, MD.

9. Respondent Suk C. Kim is an individual trading and doing business as Nalee Video, 13-G Aquahart Plaza, Glen Burnie, Md.

10. Respondent Ju Young Lee is an individual trading and doing business as Young Video, 11790 Parklawn Drive, Rockville, MD.

11. Respondent Kyeong Hae Lee is an individual trading and doing business as Korean Corner, 12207 Veirs Mill Road, Wheaton, MD.

12. Respondent Chang Jin Park is an individual trading and doing business as Samsung Video, 3425 N. Chathom Road #108, Ellicott City, MD.

13. Respondent Mi Hwa Park is an individual trading and doing business as Sarangbang Video, 2430 York Road, Timonium, MD.

14. Respondent Young Min Ro is an individual trading and doing business as Hanyang Video, c/o Lucky World (Laurel), 14222 Cherry Lane Ct., Laurel, MD.

15. Respondent Chae Sul Song is an individual trading and doing business as Lucky Gifts, 1690-D Annapolis Road, Odenton, MD.

16. Respondent Tae Eung Yu is an individual trading and doing business as Hyundai Video, 10539 Greenbelt Road, Seabrook, MD.

17. Respondent Seung Man Yun is an individual trading and doing business as Gaymi Video, 801 S. Crain Highway, Glen Burnie, MD.

II. JURISDICTION

18. Respondents are now, and for some time have been, engaged in the purchasing, offering for rental, and rental of video tapes to retail customers.

19. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce with persons engaged in the retail video tape rental business. The retail video tape rental business means the business of renting video tapes for a fee to retail customers.

20. The respondents maintain, and at all times relevant herein have maintained, a substantial course of business, including the acts and practices hereinafter set forth, which are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

III. ACTS AND PRACTICES

21. Prior to August 1993, the individual respondents had been in substantial competition with one another in the retail video tape rental business in the Metropolitan Washington, D.C. area.

22. On or about August 22, 1993, several of the individual respondents held a meeting and discussed the retail video tape rental business, among other things, including the costs and pricing of retail video tape rentals.

23. During this meeting, those individual respondents that were present agreed to jointly increase the retail price of Korean language video tape rentals from approximately $1.00 to $1.50 per video tape.

24. Those individual respondents that did not attend the above-mentioned meeting learned of the price increase agreement and agreed to adopt and honor the agreement.

25. On or about August 25, 1993, in furtherance of the joint price increase agreement, the respondents announced the price increase to the general public by displaying at each individual respondents' place of business a poster setting forth the joint price increase agreement and signed in the name of the respondent Korean Video Stores Association of Maryland.

IV. EFFECTS OF THE HORIZONTAL PRICE FIXING

26. The aforesaid acts and practices of the respondents have had and are now having the effects, among others, of:

a. Raising, fixing, stabilizing, or otherwise interfering or tampering with the retail prices of Korean language video tape rentals in the Metropolitan Washington, D.C. area; and

b. Hampering and restricting competition in the Korean language retail video tape rental business in the Metropolitan Washington, D.C. area.

V. VIOLATION CHARGED

27. The acts and practices of the respondents described herein constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of the respondents, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Korean Video Stores Association of Maryland is an unincorporated trade association. Its mailing address is c/o Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

Respondent Chang Hyun Cho is an individual trading and doing business as Hana Video, 220 N. Crain Highway, Glen Burnie, MD.

Respondent Bong Soo Ha is an individual trading and doing business as Video Town, 2092 Veirs Mill Road, Rockville, MD.

Respondent Yu Kwan Jeon is an individual trading and doing business as Harford Video, 8904 Harford Road, Baltimore, MD.

Respondent Dae Yong Kang is an individual trading and doing business as Daenamoo Video, 5722 York Road, Baltimore, MD.

Respondent Yong Hoon Kang is an individual trading and doing business as Lotte Gifts Store, 2201 N. Charles Street, Baltimore, MD.

Respondent Mi La Kim is an individual trading and doing business as Koryo Video, 10820-G Rhode Island Avenue, Beltsville, MD.

Respondent Ki Sik Kim is an individual trading and doing business as Video Center, 29 W. North Avenue, Baltimore, MD.

Respondent Suk C. Kim is an individual trading and doing business as Nalee Video, 13-G Aquahart Plaza, Glen Burnie, MD.

Respondent Ju Young Lee is an individual trading and doing business as Young Video, 11790 Parklawn Drive, Rockville, MD.

Respondent Kyeong Hae Lee is an individual trading and doing business as Korean Corner, 12207 Veirs Mill Road, Wheaton, MD.

Respondent Chang Jin Park is an individual trading and doing business as Samsung Video, 3425 N. Chathom Road #108, Ellicott City, MD.

Respondent Mi Hwa Park is an individual trading and doing business as Sarangbang Video, 2430 York Road, Timonium, MD.

Respondent Young Min Ro is an individual trading and doing business as Hanyang Video, c/o Lucky World (Laurel), 14222 Cherry Lane Ct., Laurel, MD.

Respondent Chae Sul Song is an individual trading and doing business as Lucky Gifts, 1690-D Annapolis Road, Odenton, MD.

Respondent Tae Eung Yu is an individual trading and doing business as Hyundai Video, 10539 Greenbelt Road, Seabrook, MD.

Respondent Seung Man Yun is an individual trading and doing business as Gaymi Video, 801 S. Crain Highway, Glen Burnie, MD.

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) *"Respondent Korean Video Association"* means the Korean Video Stores Association of Maryland, its predecessors, subsidiaries, divisions, members, committees, and groups and affiliates controlled by the Korean Video Stores Association of Maryland, their directors, officers, employees, agents, and representatives, and their successors and assigns.

(B) *"Individual respondents"* means Chang Hyun Cho, individually and trading and doing business as Hana Video; Bong Soo Ha, individually and trading and doing business as Video Town; Yoo Kwan Jun, individually and trading and doing business as Harford Video; Dae Yong Kang, individually and trading and doing business as Daenamoo Video; Yong Hoon Kang, individually and trading and doing business as Lotte Gifts Store; Mi La Kim, individually and trading and doing business as Koryo Video; Ki Sik Kim, individually and trading and doing business as Video Center; Suk C. Kim, individually and trading and doing business as Nalee Video; Ju Young Lee, individually and trading and doing business as Young Video; Kyeong Hae Lee, individually and trading and doing business as Korean Corner; Chang Jin Park, individually and trading and doing business as Samsung Video; Mi Hwa Park, individually

and trading and doing business as Sarangbang Video; Young Min Ro, individually and trading and doing business as Hanyang Video; Chae Sul Song, individually and trading and doing business as Lucky Gifts; Tae Eung Yu, individually and trading and doing business as Hyundai Video; Seung Man Yun, individually and trading and doing business as Gaymi Video; and their respective successors and assigns.

(C) *"Respondents"* means the respondent Korean Video Association and the individual respondents.

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

(E) *"Video tapes"* means pre-recorded video cassette tapes.

(F) *"Retail video tape rental business"* means the business of renting pre-recorded video cassette tapes for a fee to retail customers.

II.

It is further ordered, That respondents, directly or indirectly, or through any corporation, association, or other device, in connection with the retail video tape rental business, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from:

(A) Entering into, attempting to enter into, organizing, continuing, adhering to, or maintaining any combination, conspiracy, contract, agreement, understanding, plan, or program with any person in the retail video tape rental business to construct, fix, stabilize, raise, maintain, or otherwise interfere or tamper with the prices charged or other terms or conditions for retail video tape rentals;

(B) Recommending or encouraging any person in the retail video tape rental business to charge certain prices or set other terms or conditions for retail video tape rentals;

(C) For a period of three (3) years after the date this order becomes final, continuing any formal or informal meeting of the respondent Korean Video Association or of any individual respondents, after:

1. Any person makes a statement, addressed to or audible to the body of the meeting, concerning the prices of retail video tape rentals and respondents fail to declare such statement to be out of order;

2. Any person makes two such statements concerning the prices of retail video tape rentals and respondents fail to eject him or her from the meeting; or

3. Two people make such statements concerning the prices of retail video tape rentals.

Provided, however, that without regard to the obligations of respondent Korean Video Association under paragraph II. (C), if a person making a prohibited statement is not ejected, and such meeting continues, then the individual respondents shall instead leave such meeting and within thirty (30) days after such meeting shall report to the Commission the circumstances of such meeting, a description of the prohibited statements and respondents' actions in response thereto.

III.

It is further ordered, That respondent Korean Video Association, directly or indirectly, or through any corporation, association, or other device, in connection with the retail video tape rental business, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, forthwith cease and desist from:

(A) Prohibiting, regulating, or advising against any form of price competition between or among persons in the retail video tape rental business; and

(B) Inviting, coordinating, or providing a forum for any discussion or agreement between or among persons in the retail video tape rental business concerning prices charged for retail video tape rentals.

IV.

It is further ordered, That:

(A) Each individual respondent shall, within thirty (30) days after the date this order becomes final, prepare and for a period of sixty (60) days, clearly display a corrective poster at each individual respondent's place of business. Each poster shall be in both English and Korean, shall be no less than two feet by two feet in size, and

shall have the text of Appendices A and B, attached to this order, enlarged and conspicuously displayed thereon; and

(B) Respondent Korean Video Association shall, within thirty (30) days after the date this order becomes final, publish Appendix B to this order in the Metropolitan Washington, D.C. editions of the periodicals "Korea Times," "Joong Ang Ilbo," and "Chosun Ilbo."

V.

It is further ordered, That:

(A) Respondent Korean Video Association and the individual respondents shall, within ninety (90) days after the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order. Among such other information as may be required, the individual respondents' compliance reports shall contain a picture of the corrective poster as displayed and the dates such poster was displayed;

(B) Respondent Korean Video Association shall, annually for three (3) years on the anniversary of the date this order becomes final, file with the Secretary of the Federal Trade Commission a verified written report setting forth in detail the manner and form in which respondents have complied and are complying with this order; and

(C) Respondent Korean Video Association and the individual respondents shall, for a period of three (3) years after the date this order becomes final, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in any respondent, such as dissolution, assignment, sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries, or any change in such respondent that may affect compliance obligations arising out of this order.

VI.

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

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

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

VII.

It is further ordered, That this order shall terminate on June 20, 2015.

APPENDIX A

ANNOUNCEMENT

The Korean Video Stores Association of Maryland (the "Korean Video Association") and its individual members (Chang Hyun Cho, Bong Soo Ha, Yoo Kwan Jun, Dae Yong Kang, Yong Hoon Kang, Mi La Kim, Ki Sik Kim, Suk C. Kim, Ju Young Lee, Kyeong Hae Lee, Chang Jin Park, Mi Hwa Park, Young Min Ro, Chae Sul Song, Tae Eung Yu, and Seung Man Yun) have entered into a consent agreement with the Federal Trade Commission ("Commission") to settle the Commission's charges that the Korean Video Association and its individual members named above violated Section 5 of the Federal Trade Commission Act when they jointly decided to increase prices for retail video tape rentals in 1993. The U.S. antitrust laws, including the Sherman Act and the Federal Trade Commission Act, prohibit competitors in the same line of business from jointly setting prices they charge to their customers.

Pursuant to this consent agreement, the Commission has issued an Order that prohibits the Korean Video Association and its individual members from jointly deciding prices that they charge to their customers in the retail video tape rental business. The Order also prohibits the Korean Video Association and its individual members from taking any other actions that may harm price competition.

The Korean Video Association and its individual members also understand and agree to honor that each person in the retail video tape rental business must unilaterally and independently determine its own prices.

Korean Video Stores Association of Maryland

Chang Hyun Cho Hana Video	Bong Soo Ha Video Town	Yoo Kwan Jun Harford Video
Dae Yong Kang Daenamoo Video	Yong Hoon Kang Lotte Gifts Store	Mi La Kim Koryo Video
Ki Sik Kim Video Center	Suk C. Kim Nalee Video	Ju Young Lee YoungVideo
Kyeong Hae Lee Korean Corner	Chang Jin Park Samsung Video	Mi Hwa Park Sarangbang Video
Young Min Ro Hanyang Video	Chae Sul Song Lucky Gifts	Tae Eung Yu Hyundai Video
Seung Man Yun Gaymi Video		

APPENDIX B

(Appendix B is the Korean version of Appendix A.)

공고문

미 연방 공정거래 위원회 (U.S. Federal Trade Commission)가 본 메릴랜드 한인 비디오 협회와 회원들 사이에 체결되어 있는 회원들의 활동중의 일부가 미 연방 공정거래 위원회법 (Federal Trade Commision Act)에 저촉이 된다고 사료하여 민사소송을 제기 하였습니다. 구체적으로, 1993년에 본 협회가 협회 회원들에게 일괄적으로 비디오 테이프를 빌리는 소매 가격을 인상, 책정한 점이 미 연방 공정거래 위원회법의 제 5 조항 (Section 5 of the Federal Trade Commission Act)에 위배되는 행동이라는 지적을 받았습니다. 미 독점 금지법 (Sherman Act 그리고 연방 공정거래 위원회법)은 같은 종류의 사업을 하는 경쟁자들이 함께 판매 가격을 책정, 인상, 또는 유지하는 것을 금지하고 있습니다.

본 협회와 각 회원들이 미 연방 공정거래 위원회 (U.S. Federal Trade Commission)와 맺은 협정에 의하여 미 연방 공정거래 위원회가 본 협회나 회원들이 비디오 테이프 빌리는 소매 가격을 함께 책정, 인상, 또는 유지하는 것을 금지 하였고, 또 본 협회나 회원들이 소매가격 경쟁을 방지하거나 훼방하는 행동도 금지하였습니다.

본 협회와 회원들은 각 비디오 소매상들이 비디오 테이프 빌리는 가격을 독자적으로 결정해야만 된다는 것을 알고 있으며 또 존중할 것 입니다.

메릴렌드 비디오 테이프 협회

조 창현 하나 비디오	하 봉수 비디오 타운	전 유관 하포드 동양식품
강 대웅 대나무 비디오	강 용훈 롯데 선물	김 미라 고려 비디오
김 기식 한국서적 비디오	김 숙자 나리 비디오	이 주영 롯데 수퍼 (영 비디오)
이 경해 코리언 코너	박 창진 삼성 비디오	박 미화 사랑방 비디오
노 영민 한양식품 (로컬 장터)	송 제술 럭키 선물	유 태웅 현대식품 (한아름 마켓)
윤 승만 개미네 집		

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

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

Docket 9189, Final Order, Feb. 22, 1989--Modified Final Order, June 20, 1995

This order modifies an earlier Commission order to require, for one year, that the automobile dealership and dealership owner respondents involved in the proceeding to open their showrooms for a minimum of 64 hours per week, or, at their option, to maintain minimum hours of operation of an average of ten and one half hours per day on weekdays, plus a minimum of eight hours on Saturdays. In addition, the Commission modifies Part VII.D of the final order (111 FTC 417), isued in 1989, by changing from 30 days to 60 days the time period within which the dealership association respondent must investigate and resolve allegations that association members have violatecd by-laws, rules, or regulations affected by the order.

ORDER

This matter has been heard by the Commission on remand from the United States Court of Appeals for the Sixth Circuit and on briefs, proposed findings of fact, affidavits and other materials filed by complaint counsel and by respondents. For the reasons stated in the accompanying opinion, the Commission has determined to modify the final order, issued on February 22, 1989, 111 FTC at 513-521, as set forth below and to issue the modified order with respect to all respondents that remain in the proceeding.

Part III of the order of February 22, 1989, is hereby deleted, and *It is hereby ordered,* That the following is substituted as new Part III:

III.

It is further ordered, That each dealership and individual respondent shall, commencing thirty (30) days after this order becomes final and continuing for a period of one (1) year, either maintain a minimum of sixty-four (64) hours of operation per week for the sale and lease of motor vehicles, or alternatively, maintain a minimum of an average of ten and a half hours of operation per day during weekdays for the sale and lease of motor vehicles, plus an

additional eight hours of operation on Saturdays for the sale and lease of motor vehicles. Each dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the showroom of the dealership. Each dealership and individual respondent shall conduct its sales operation during any non-weekday hours in all respects in the same manner as during weekday hours, except that the motor vehicle sales force on duty during non-weekday hours may equal in number no less than one-third of the motor vehicle sales force generally on duty during weekday hours.

The requirement of this Part III to maintain minimum weekly hours of operation shall not apply to any individual respondent who does not own or operate any dealership in the Detroit area.

Subpart VII.D of the order of February 22, 1989 is hereby deleted, and it is hereby ordered that the following is substituted as new Subpart VII.D:

D. Within sixty (60) days after receiving information from any source concerning a potential violation of any bylaw, rule, or regulation required by Part VII.B of this order, investigate the potential violation, record the findings of the investigation, and expel for a period of one (1) year any member who is found to have violated any of the bylaws, rules or regulations required by Part VII.B of this order.

Chairman Pitofsky and Commissioner Varney not participating.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

On February 22, 1989, the Commission ordered the Detroit Auto Dealers Association, Inc. ("DADA"), other associations of automobile dealers in the Detroit area, and many dealerships and individuals to cease and desist from agreeing to fix their hours of operation.[1] The respondents appealed, and on January 31, 1992, the

[1] In addition, the order prohibited certain exchanges of information about hours of operation and prohibited the coercion of other dealers to adopt particular hours of operation. The order required the dealership to remain open for a minimum of sixty-four hours of operation per week for a one-year period and contained other provisions to prevent a recurrence of unlawful agreements on hours of business operation.

United States Court of Appeals for the Sixth Circuit "generally" affirmed the Commission, but remanded for the limited purposes of further proceedings as set forth in Section II of the Court of Appeals' opinion and for consideration of two remedial issues.[2] The Supreme Court denied cross petitions for *certiorari* on November 9, 1992.

Subsequently, sixty-one individuals, sixty-eight dealerships, and fifteen dealer associations signed a consent agreement settling the charges.[3] The consent order with these respondents was made final on May 5, 1994. The Detroit Automobile Dealers Association and a former association officer settled on similar terms on July 27, 1994. In addition, the Commission dismissed the complaint against certain individual respondents who died during the course of the litigation and against dealerships that had their franchises terminated and are no longer in business. As a result of the settlements and dismissals, the case remains pending against a total of twenty-seven respondents. Twenty-two respondents, including twelve dealerships and ten individuals, filed a joint brief and evidentiary materials in response to the Commission's Order On Remand.[4]

I. INTRODUCTION

A. Factual Background

The complaint alleged that the Detroit automobile dealers violated Section 5 of the Federal Trade Commission Act by agreeing to close their automobile sales showrooms on Saturday and three weekday evenings. The existence of agreements among dealers to close, orchestrated by the Detroit Auto Dealers Association and the line groups (associations of dealers of a particular automobile brand), is not in dispute at this point in the proceeding.

The agreement to close on Saturdays and three weekday evenings evolved over a fourteen-year period when the automobile dealers in Detroit were resisting union efforts to organize their sales employees. Until 1959, Detroit auto dealerships were open weekday evenings

[2] *Detroit Auto Dealers Association, Inc. v. Federal Trade Commission*, 955 F.2d 457, 472 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

[3] In January 1993, the parties filed a joint memorandum requesting that the Commission take no action for forty-five days, pending settlement discussions. On March 17, 1993, after the expiration of that period, the Commission issued an Order On Remand, requesting briefing on certain remand issues. Briefs were filed on August 20, 1993, and Answering Briefs were filed on September 20, 1993.

[4] The other five respondents did not file briefs or any other documents in response to the Commission's Order on Remand.

and Saturdays. IDF ¶ 9.[5] Beginning in June 1959, the Detroit Auto Dealers Association encouraged members to close early two evenings per week. IDF ¶¶ 11-18. When this agreement to close proved successful, in 1961, members of the Association agreed to close early on a third weekday evening. IDF ¶¶19-34. From 1968 to 1971, members of the various line groups agreed to close on Saturdays during the summer months. IDF ¶¶ 38-46. In 1973, the dealers agreed to close year-round on Saturdays. IDF ¶¶ 47-50.[6]

Union organizing drives occurred contemporaneously with the agreements among dealers to reduce hours of operation. Before 1959, most dealers were open a total of 69 hours per week. IDF ¶ 92. Some dealers required the sales staff to work during all hours of operation. IDF ¶ 96. Others used split shifts, but sales employees felt pressure to be present during all hours of business for fear of losing commissions. IDF ¶¶ 98, 101, 120-21.

Both the Teamsters and the Salesmen's Guild of America began organizing campaigns in 1959. Both unions demanded multi-employer bargaining, uniform five-day work weeks, higher commissions, and other concessions. IDF ¶ 125-130. In 1960, the line groups recommended that member dealers adopt minimum employment standards to satisfy many of the demands being made by the unions. 111 FTC at 481. These changes included paid vacations, minimum commissions, shorter work weeks and group insurance. *Id.* This strategy proved to be successful, and by the end of 1960, the Teamsters lost most representation elections. IDF ¶ 145.

By the end of 1960, most dealerships were closed on Wednesday, Friday and Saturday evenings, but the sales employees remained dissatisfied with the length of the work week. IDF ¶¶ 148, 151. In 1966, the Automotive Sales Association ("ASA") began to recruit

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[5] References to the record are abbreviated, as follows:

ID -- Initial Decision
IDF -- Initial Decision Finding
Tr. -- Transcript of Hearing
CX -- Complaint Counsel's Exhibit
RX -- Respondents' Exhibit
RRX -- Respondents' Remand Exhibit
RPF -- Respondents, Proposed Finding
RPSF -- Respondents' Proposed Supplemental Finding

[6] The Commission adopted these findings by the ALJ. *Detroit Auto Dealers Association, Inc.*, 111 FTC 4171 47G-79 (1989), aff'd in part and remanded in part, *Detroit Auto Dealers Association, Inc. v. FTC*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

members and demanded evening and Saturday closing as a primary union objective. IDF ¶¶ 152-53. Although the ASA won approximately 81 representation elections, it was not successful in negotiating Saturday closing as part of collective bargaining agreements. IDF ¶¶ 166-69. In 1967, the ASA struck some dealers and picketed some nonunion dealers. IDF ¶¶ 184-86. Threats, assaults, and property damage against dealers occurred during this period. IDF ¶¶ 186-92.

The ASA affiliated with the Teamsters who made uniform Saturday closing the centerpiece of their organizing efforts. IDF ¶¶ 205-206. The dealers discussed the Teamsters' demands at line group meetings and discussed making concessions to achieve labor stability. IDF ¶ 232. The dealers decided that the only way to end the labor strife was to adopt uniform year-round Saturday closing. IDF ¶ 238. Saturday closing was adopted to satisfy the salesmen and avert further unionization. IDF ¶¶ 240-41.

A period of relative labor peace has prevailed since the dealers agreed to adopt uniform Saturday closing in 1973. IDF ¶ 242. Since 1973, however, dealers who have attempted to open on Saturday have been picketed and have suffered vandalism and threats of violence. IDF ¶¶ 245-284. Although the Commission found that some salesmen participated in the picketing, it concluded that "the perpetrators of the threats and vandalism remain unidentified." 111 FTC at 483 (footnote omitted).

B. Commission Proceedings

The Administrative Law Judge ("ALJ") dismissed the complaint, concluding that the non-statutory labor exemption shielded the agreement among dealers to establish uniform hours of operation. 111 FTC at 474-75. The ALJ stated that the exemption depended on the following considerations: whether a labor dispute led to the concerted activity, whether labor concerns were the motivation for the concerted action, and whether its primary effect was on the labor concern. *Id.* at 466. He found that the automobile dealers were motivated by the labor dispute to enter into the agreement and that its primary effect would be on the sales employees, and not the customers, who would suffer comparatively little inconvenience in shopping. *Id.*

The Commission reversed, deciding that the non-statutory labor exemption did not apply to the agreement among dealers. The Commission concluded that the agreement was not part of a labor negotiation, but rather was adopted by employers to forestall unionization of their employees and to head off collective bargaining. 111 FTC at 488. Rejecting the ALJ's motivation test for determining the applicability of the exemption, the Commission observed that such a subjective test would simply invite abuse. Since the employees and the dealers had parallel incentives, the benefit to the employees from reduced hours of operation did not provide a basis for exemption from Section 5. *Id.* at 489.

The Commission found that the respondents did not present any evidence that the agreement among dealers resulted from "arm's length negotiation with their sales employees." 111 FTC at 492 (footnote omitted). It observed that the purpose of the non-statutory labor exemption was to preserve the integrity of the labor negotiation process, and that it would be inconsistent with national labor policy to use the exemption to immunize conduct that was designed to head off collective bargaining. *Id.* Further, the Commission decided that a finding of a Section 5 violation would not upset any carefully negotiated balance of interests between employers and employees.

II. THE REMAND BY THE COURT OF APPEALS

The respondents sought judicial review of the Commission's final order and opinion. On January 31, 1992, the Court of Appeals for the Sixth Circuit remanded the case to the Commission.

A. The Opinion of the Court of Appeals

The Court of Appeals "agreed with the FTC's conclusion generally that the agreement in controversy was not subject to the non-statutory labor exemption," but remanded for consideration whether "this same conclusion applies to the distinct minority of petitioner dealers who entered into collective bargaining agreements . . . ." 955 F2d at 467. The court pointed out that as a factual matter, it was unclear whether these agreements were the result of *bona fide* negotiations. *Id.*

The Administrative Law Judge made findings that seven dealerships entered agreements with their employees. IDF ¶ 288-

299. The Commission opinion dismissed the significance of those agreements, saying that they did not establish "bargained-for" hours, but merely incorporated, by maintenance of standards provisions, the unlawful hours limitations orchestrated by the Detroit Automobile Dealers Association. 111 FTC at 491.

The Court of Appeals, however, indicated that the Commission had failed to deal adequately with the individual collective bargaining agreements. It said that a petitioner "may well be able to claim" the exemption if direct negotiations and collective bargaining brought about "additional or different limits on showroom hours." 955 F.2d at 468. The court said that individual, good faith negotiations between a dealer and the employee union should not be discounted, emphasizing that the important question is "whether *bona fide* bargaining took place" with respect to hours. *Id.*

Recognizing that the agreement to establish uniform showroom hours was among dealers, the court nonetheless found it "material for the FTC to consider whether" the individual dealer-union agreements contained hours restrictions that were the product of "genuine collective bargaining." *Id.* Although the Sixth Circuit agreed with the Commission that the dealers' association could not claim the exemption, it nevertheless directed the Commission to examine dealers individually "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.*

The court concluded that the Commission had not adequately analyzed the ALJ's findings of fact and conclusions of law. It directed the Commission on remand to consider the record and findings "regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours." *Id.* at 468 (emphasis in original, footnote omitted).

B. The Positions of the Parties on the Scope of the Remand

On remand, complaint counsel take the position that none of the dealers is entitled to the protection of the non-statutory labor exemption. The respondents take the opposite position that all are exempt. Complaint counsel's position is consistent with the holding

of the Commission in 1989 that whatever antitrust immunity might attach to individual dealer-employee negotiations does not extend to shield an agreement among dealers. 111 FTC at 492. The Commission is mindful, however, that although the Court of Appeals agreed with the Commission that the non-statutory labor exemption does not shield an agreement among dealers, the court's remand requires us to consider individual claims by dealers that their restrictions on hours of operation were the result of *bona fide* negotiations either with a union or their employees in order to decide whether any individual dealers might be exempt.

The respondents argue that the dealers (apparently meaning all Detroit auto dealers) should be exempt from Section 5 if they acted in response either to union directed violence or to nonviolent, lawful union pressure. Brief of respondents at 91. The respondents argue that in light of national labor policy to encourage unions to use lawful economic pressure, such as strikes, to resolve labor disputes, antitrust immunity should be extended to collective action responsive to such lawful pressure. *Id.* at 91-92.

The respondents further argue that the antitrust exemption should not be limited to those dealers who were the specific targets of union directed violence or force. *Id.* at 94-101. They argue that immunity should extend to any dealer who acted in response to press reports or other reports of union violence. The respondents also argue that there is no reason to require proof of union involvement in specific acts of coercion, as long as some violence was attributable to a union and the dealers perceived the violence to be union directed. *Id.* at 105. We do not so read the opinion of the Court of Appeals.[7]

The court affirmed the Commission's decision that the non-statutory labor exemption does not shield the agreement among dealers to reduce their hours of operation. Indeed, the court explicitly affirmed the Commission's finding that "motivation by labor concerns" is not sufficient to support the exemption. 955 F.2d at 466. The Commission concludes that for purposes of this remand, motivation "by labor concerns" includes motivation based on dealers' subjective perceptions of union violence or threats thereof and,

[7]Under the respondents' interpretation of the non-statutory labor exemption, businesses would be excused from compliance with the antitrust laws if they acted in response to lawful union pressure or in response to their own subjective perception of union violence. This position appears to be a variation of the coercion defense that the respondents unsuccessfully asserted before the Administrative Law Judge and did not pursue on appeal to the Commission or the Court of Appeals. Respondents' Memoranda and Proposed Conclusions of Law, April 21, 1987, at V-43 to V-47, V-100 to V-102.

consistent with the opinion of the court, is not sufficient to justify the exemption.

C. The Scope of the Remand

The Court of Appeals indicated that the remand is for the "limited purposes," set forth in Part II of the opinion. In Part II, the court indicated that it was considering whether the non-statutory labor exemption "applies to the distinct minority of petitioner dealers who entered collective bargaining agreements with unions . . . . " 955 F.2d at 467. This statement suggests that the remand is limited only to those respondents that engaged in formal collective bargaining with their sales employees.[8] This interpretation is supported by the court's subsequent statement that if a petitioner's "direct negotiations and collective bargaining with salesperson employees or their representatives" brought about "additional or different limits on showroom hours," that dealer might be able to claim the protection of the exemption. 955 F.2d at 468.

The respondents, however, argue that the Commission should grant the exemption to any dealer who reduced hours either as a direct result of union directed violence and force or as a result of bargaining for shorter hours. The respondents would not require proof that the hours reduction resulted from *bona fide* bargaining between the dealer and the union or the employees, but would require only a showing that the hours reduction was at least partly motivated by a perception of union violence. The respondents rely heavily on the following sentence of the Court of Appeals, opinion:

> Our remand, then, concerns a requirement that the Commission consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of *bona fide* collective bargaining with a union for shorter showroom hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468 (emphasis in original; footnote omitted)

We reject the respondents' position, because the opinion, read as an entirety, indicates that the exemption applies only to dealers who actually engaged in *bona fide* bargaining, either with a union or in response to union directed violence. The sentence immediately

[8] The seven dealerships and four individual respondents found to have engaged in some form of collective bargaining are identified in the Initial Decision. IDF 288-299.

preceding the quoted language states that the Commission should consider individual dealerships "with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage)." *Id.* This phrasing indicates that the court required either bargaining in good faith or bargaining in response to violence, and not, as the respondents suggest, either bargaining or a perception of violence.

Other statements in the opinion confirm that the Court of Appeals intended that the exemption apply only if the dealers engaged in good faith negotiation with their employees. The court stated: "The important question, as stated by the FTC, is 'whether *bona fide* bargaining took place' with respect to restrictions on hours of operation." *Id.* It continued that "we find it material for the FTC to consider whether separate dealer union agreements existed with unions which 'contained bargained for hours restrictions,' which were the product of genuine bargaining." *Id.* Indeed, the sentence that the respondents emphasize so heavily, quoted above, directs the Commission to consider the record and findings of the ALJ, quoting six of the ALJ's conclusions in a footnote. 955 F.2d at 468 n.9, quoting 111 FTC at 467-68 and n.20. These six conclusions from the ALJ's opinion refer repeatedly to bargaining, to collective bargaining agreements, and to dealers' agreements with their employees. *Id.*

Our reading of the court's opinion that bargaining between the employer and the union or employees is an essential element of the non-statutory labor exemption and that unlawful agreements are not immunized simply because they are a result of union directed violence and force is consistent with the law of this case and established precedent. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797, 799-800 (1945), the Supreme Court held that the labor exemption did not shield "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control." Employers and the union entered collective bargaining agreements under which the employers would decline to deal with companies that employed workers who were not members of Local Union No. 3. Without addressing whether those collective bargaining agreements violated the Sherman Act, the Court found that they were only one element in a broader scheme among the manufacturers and contractors to monopolize the New York City market. *Id.* at 809.

Allen Bradley stands for the proposition that even collective bargaining agreements between an employer and union cannot shield an unlawful agreement among employers to restrain trade outside the labor market in question.[9]

Our reading of the Court of Appeals' opinion is supported by the court's specific endorsement of the Commission's analysis of *Mackey v. National Football League,* 543 F.2d 606, 612 (8th cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977), and *McCourt v. California Sports, Inc.,* 600 F.2d 1193 (6th Cir. 1979) (applying the Mackey test). 955 F.2d at 467. Under the Mackey test, the nonstatutory labor exemption is available only if: (1) the restraint of trade "primarily affects only the parties to a collective bargaining relationship"; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of *bona fide*, arm's length bargaining. 434 F.2d at 614. The Commission found that since the hours restriction was not established through *bona fide*, arm's length bargaining between dealers and employees, respondents failed to satisfy the third element of this test. Because the third element was not satisfied, the Commission found no need to consider the other elements of the test. 111 FTC at 488 n.9. Mackey and McCourt require that any agreement immunized under the exemption be the product of good faith bargaining between employer and employees.

Our interpretation of the Court of Appeals' opinion ordering this remand is also consistent with three recent decisions that take a highly expansive view of the non-statutory labor exemption. In *Brown v. Pro Football Inc.*, No. 93-7165, (D.C. Cir. March 21, 1995), the Court of Appeals decided that the exemption protected action by the National Football League taken without the consent of the players after the League and the union had reached impasse in multi-employer bargaining.[10] The court held that the "exemption waives antitrust liability for restraints on competition imposed

[9] *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 106,* 421 U.S. 616 (1975), the Supreme Court held that the non-statutory labor exemption did not shield a collective bargaining agreement between a general contractor and Local 100 under which the general contractor would deal only with mechanical subcontractors that were parties to the general contractor's agreement with the union. Local 100 did not represent the employees of the general contractor, but represented the employees of certain mechanical subcontractors. The agreement eliminated competition in the mechanical subcontracting market from non-union mechanical subcontractors. The Court observed that this restraint had anticompetitive effects that did not follow from elimination of competition over wages and working conditions and was not protected by the nonstatutory labor exemption. 421 U.S. at 625.

[10] Judge Wald wrote a vigorous dissent, arguing that to preserve the bargaining process, the exemption should protect only the bargaining process before impasse. The Commission in deciding the instant case takes no position on the merits of the issue in Brown.

through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Slip Op. at 27. The court further stated that if the players wanted to seek the protection of the Sherman Act, they may "forego unionization or...decertify their unions." Slip Op. at 28. *See also National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. National Football League,* 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). In the instant case, the respondent automobile dealers entered into a conspiracy to discourage the unionization of their employees and, thereby, to avoid the bargaining relationship that the non-statutory labor exemption protects. Even the expansive view of the exemption in these court decisions stops at protecting the overall bargaining process and does not extend to employer conspiracies to defeat unionization of their employees.

III. REVIEW OF EVIDENCE REGARDING INDIVIDUAL RESPONDENTS

A. Introduction

As developed above, we conclude that the Court of Appeals directed the Commission to review the record and the ALJ's findings with respect to those dealers who entered collective bargaining agreements with their employees. Although the Court of Appeals remanded for the Commission to consider the hours restraint imposed by the "distinct minority . . . of dealers who entered into collective bargaining agreements with unions representing their sales employees," 955 F.2d at 467, the respondents urge the Commission to review the evidence for all the respondents who participated in the remand proceeding. As set forth below, the Commission has reviewed the record and the findings with respect to all the respondents who participated in the remand proceeding to determine whether the reductions in showroom hours were the result of good faith, arm's length negotiations between the dealers and their employees, whether or not part of formal collective bargaining.[11]

[11] The five respondents who did not participate in the remand have not supplemented the record beyond what was before the Commission in the first instance. The five respondents who did not participate in the remand were not among those identified in the initial decision as having entered a collective bargaining agreement. Because we are not aware of evidence suggesting that they imposed the hours restraint as a result of good faith bargaining with a union or their employees, we conclude that the non-statutory labor exemption does not protect them from liability and that they are subject to Part III of the order.

In addition to reviewing the record and findings developed during the administrative trial, the Court of Appeals stated that "f] urther proof may be presented on this issue, if necessary." 955 F.2d at 468. In light of this directive to permit further proof, the Commission's order on remand invited the parties to proffer evidence and propose supplemental findings of fact. The respondents proffered a number of supplemental affidavits and documents, primarily newspaper clippings, and proposed supplemental findings. Complaint counsel opposed the admission of the supplemental affidavits and other evidentiary material on the ground that it is hearsay (often, double or triple hearsay) and requested the opportunity to conduct discovery and cross-examine the affiants. Complaint Counsel's Answer to Respondents' Brief on Remand at 6.

Although complaint counsel's objections to the introduction of much of the supplemental material appear to be well founded, in the interest of economy we have decided not to remand the matter for supplemental administrative hearings. We assume the truth of the allegations in the affidavits and supplemental materials, but find that they do not provide the evidentiary basis for applying the nonstatutory labor exemption.

B. Thompson Chrysler-Plymouth, Inc., and Joseph P. Thomson

Joseph Thompson was the President and Chief Executive officer of Thompson Chrysler-Plymouth, Inc., from 1960 to 1981. Tr. 1938-40. When Mr. Thompson began his career in Detroit automobile sales, his hours of operation were from 8:30 a.m. until 9:00 p.m. weekdays and until 6:00 p.m. on Saturday. Tr. 1942-43.

On September 14, 1960, Mr. Thompson's dealership began to close its showroom on Wednesday and Saturday evenings at 6:00 p.m. Tr. 1944-45. Thompson and eleven other Chrysler-Plymouth dealers placed a joint advertisement in the Detroit Free Press on September 14, 1960, stating, "[t]he Chrysler Dealers of Greater Detroit have agreed to close their new car showrooms and used car lots" on Wednesday and Saturday evenings at 6:00 p.m. CX 3379, Tr. 1944. Mr. Thompson testified that the sales employees constantly complained about their long hours and that the closings were discussed at the Chrysler-Plymouth line group as a means to satisfy the complaints. Tr. 1944-46. His trial testimony did not refer to any negotiation or collective bargaining with employees or a union about

this reduction of hours. In the early 1960's, the Chrysler-Plymouth dealers in Detroit all began to close early on Friday evenings. Tr. 1951-52. In the mid-1960's, Thompson's dealership and all the other Chrysler-Plymouth dealers began to close early on Tuesday evenings, as well. Tr. 1956.

On June 12, 1969, Thompson Chrysler-Plymouth, Inc., together with twenty-eight other dealers, placed an ad in the Detroit News stating that "a majority" of the Detroit area Chrysler-Plymouth dealers had decided to close on Saturday during the summer months. CX 3306, Tr. 1956-57. Mr. Thompson again testified that this action was in response to requests for shorter hours from the sales staff, but again, he did not testify about any bargaining or negotiation with the employees or a union. Tr. 1957.

On August 14, 1973, Thompson Chrysler-Plymouth executed a collective bargaining agreement with Local 212 of the Teamsters union. RX 1006.[12] The agreement did not explicitly cover the hours of operation, but contained the following "Maintenance of Standards" clause:

> The Employer agrees that conditions of employment relating to direct wages and hours of work as set forth in this Agreement shall be maintained at not less than the highest minimum standards in effect on the effective date of this Agreement. The Employer may, however, change hours of work to conform to local practices characteristic of the industry. Conditions of employment may he improved; however, if modified, upon the request of the Union, the Employer agrees to consult with the Union about the matter. The Employer may, where the Agreement leaves it to its discretion to do so, including by way of illustration, but not by way of limitation, add special incentive programs the Employer considers necessary due to present circumstances, sales contests, special "spiffs" on old inventory, etc., the existence, nature and duration of which shall be determined at the sole discretion of management.

RX 1006T. According to Mr. Thompson, the provision was a compromise. The first and third sentences reflected the union demands, and the second and fourth sentences reflected the dealership's position. Tr. 1962-64. With the exception of a five-year period in the 1980's, the employees of Thompson Chrysler-Plymouth have been covered by a collective bargaining agreement that contains a provision substantially the same as the one quoted above. RRX

[12] Apparently Thompson Chrysler-Plymouth had an agreement with the Automotive Sales Association in 1971. The text of the agreement is not in the record, and the respondents did not offer it as a supplemental exhibit or argue that it constrained hours of operation.

145, RRX 146, RX 1006, RX 1011, RX 1013, RX 1030, RX 1053, RX T1, RX T2.

On December 1, 1973, Thompson Chrysler-Plymouth began to close on Saturday throughout the year, not just during the summer months. Tr. 1966. The full year Saturday closings were discussed at the Chrysler-Plymouth line group meetings. Tr. 1967. Three months earlier, on September 8, 1973, the Chrysler-Plymouth dealers had jointly announced that they would reopen on Saturday after the summer period of Saturday closure. CX-3416. The reversal of this action and the decision by the Chrysler-Plymouth dealers to close year-round on Saturday followed similar actions by other automobile line groups in October and November 1973. IDF ¶ 47-50. Mr. Thompson said that the dealers were trying to give their employees shorter work weeks. Tr. 1966-67. Mr. Thompson did not testify that he bargained with either the Teamsters or his employees about Saturday closing. He did testify that the Chrysler-Plymouth dealers discussed it among themselves at the line group meeting, but the nonstatutory labor exemption does not protect negotiations among employers.

The Administrative Law Judge found that the maintenance of standards clause prevented Thompson from extending his hours of operation. IDF ¶ 288. The ALJ also found that the maintenance of standards was a compromise between the dealer's and union's positions, and that "[t]he restraint also was the product of *bona fide* arm's-length bargaining." IDF ¶ 289. Although the restraint on hours of operation imposed by the collective bargaining agreement was the product of good faith bargaining between Thompson and the Teamsters local, and that provision compelled the dealership to follow the "highest minimum standards" regarding hours of operation, it is important to distinguish that restraint from restraints resulting from the unlawful agreements among dealers to reduce hours of operation.

As developed above, the evidence shows that Thompson Chrysler-Plymouth entered agreements on hour limitations with other members of the Chrysler-Plymouth line group: (1) on September 14, 1960, to close at 6:00 p.m. on Wednesday and Saturday; (2) in the early 1960's, to close at 6:00 p.m. on Friday; (3) in the mid-1960's, to close at 6:00 pm on Tuesday; and (4) in June 1969, to close on Saturday during the summer months. These agreements among

dealers cannot retroactively be rendered lawful by the subsequent inclusion of a maintenance of standards clause in a labor contract.

In December 1973, four months after Thompson signed the collective bargaining agreement, dated August 14, 1973, with Teamsters Local 212, Thompson and the other Chrysler-Plymouth dealers agreed to close on Saturdays throughout the year. IDF ¶ 50. Thompson's collective bargaining agreement was for a three-year period, expiring on August 13, 1976. RX 1006W. Mr. Thompson's trial testimony and the supplemental affidavits do not provide a basis for finding that the year-round Saturday closings were the product of negotiations with the union or the sales employees. If the Thompson dealership had been willing to make such a concession to the union or the employees, the appropriate terms could have been included in the August collective bargaining agreement. Thompson did not strike such a bargain with the union or his employees but, rather, entered into that agreement only with his competitors.

Indeed, absent the unlawful agreement among dealers, it is unclear that the bargaining agreement would restrict the hours of operation. The maintenance of standards clause provides that Thompson Chrysler-Plymouth may change its hours of operation to "conform to local practices characteristic of the industry." RX 1006. This language seems to suggest that Thompson may stay open if the other dealers are open. The agreements among dealers, however, established the "local practices characteristic of the industry" in Detroit. Absent the agreement among dealers, the "local practice" in Detroit might differ considerably from the local practices that evolved through their unlawful agreements.

Mr. Joseph Thompson's supplemental affidavit states that he was "aware generally" of the history of union force and violence in Detroit. RRX 145 at 3. His affidavit states that in setting hours of operation, "I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence . . . . " *Id.* at 6. Assuming this to be true, it is not a sufficient basis or the non-statutory labor exemption. As developed in Section II.C above, some collective bargaining or negotiation with the union or the employees is required to support the exemption. Even if the courts were to expand the non-statutory labor exemption to include an exemption for actions coerced by union violence, which they have not, a general awareness of the possibility

of union violence would likely be too thin a basis for a claim of coercion.

In sum, whether or not any restraint imposed by the maintenance of standards clause of Thompson Chrysler-Plymouth's August 14, 1973, collective bargaining agreement is exempt from antitrust scrutiny, we conclude that the bargaining agreement does not provide retroactive immunity to the unlawful agreements among Chrysler-Plymouth dealers in the 1960's to reduce evening hours of operation and does not prospectively extend immunity to the December 1973 agreement among dealers to reduce Saturday hours during the full year, not just the summer months.

Although the nonstatutory labor exemption does not apply to the original decision to reduce hours, Mr. Thompson and his dealership subsequently, in good faith, negotiated bargaining agreements on the basis of expectations arising from the maintenance of standards provision, and these subsequent agreements between the employees and the Thompson respondents do provide a basis for the exemption. *See* RRX 147 at 22; RRX 148 at 24. As the original Commission opinion indicated, the finding that the agreement among dealers was unlawful does not "affect expectations that a settlement negotiated in the future -- whether through formal, multi-employer collective bargaining or at arm's length talks at individual dealerships -- would be protected from antitrust sanctions." 111 FTC at 492. Accordingly, we conclude that Part III of the order will not require Mr. Thompson or Thompson Chrysler-Plymouth, Inc., to remain open beyond the provisions of the current labor contract, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.[13]

C. Crestwood Dodge, Inc.

Mr. George Beals operated Crestwood Dodge, Inc., from October 1967 to March 1972. RX 3442. At the time Beals took over, the hours of operation were from 8:30 a.m. to 6:00 p.m. on Tuesday,

[13] Mr. Thompson, in his remand affidavit of August 20, 1993, stated that the dealership was subject to a collective bargaining agreement, dated October 1, 1992, and that the agreement contained a maintenance of standards provision that limited his authority to extend hours of operation. RRX 146 and RRX 148 at 24. That agreement expired on March 31, 1994, according to the affidavit. RRX 146 at 10. To the extent that no such agreement presently exists, Part III of the order applies to Mr. Thompson and Thompson Chrysler-Plymouth, Inc.

Wednesday, Friday and Saturday and from 8:30 a.m. until 9:00 p.m. on Monday and Thursday, and he continued those hours. RX 3442E. Mr. Alfred Dittrich operated Crestwood Dodge, Inc., from October 1, 1973, until approximately April 1976. RRX 138 at 1, Tr. 31606

In October 1967, Crestwood Dodge, Inc., signed a collective agreement with the Automotive Sales Association. RX 1300.[14] That agreement did not specify the hours of operation or contain a maintenance of standards clause. *Id.* The agreement expired in 1970. RX 3442G. In 1970-1971, Crestwood Dodge negotiated a second three-year collective bargaining agreement with ASA. RX 3442H. Although the text of the second agreement is not in the record, Mr. Beals' affidavit states that it was similar to RX 2991, which is a bargaining agreement between Suburban Motors Co. and the ASA containing specified hours of operation. *Id.* The Suburban agreement specified that the hours of operation were to be 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday. RX 2991 at Z8. According to Mr. Beals' affidavit, under the bargaining agreement, he "could not increase Crestwood's hours of operation during the term of the agreement, unless the ASA consented to such a change." RX 3442H.

On June 13, 1969, the Detroit area "Dodge Boys" ran an advertisement in the Detroit News stating that "practically all" the Detroit area Dodge dealers would close on Saturday. CX 3307. According to Mr. Beals' affidavit, 1969 was the first year that Crestwood and other Dodge dealers closed on Saturday during the summer months, and the Dodge dealers placed a joint advertisement announcing the closing. RX 3442F. A union was then attempting to organize automobile sales employees, and Mr. Beals discussed the proposed closing with the other Dodge dealers as a response to labor demands. RX 3442G. He said that "my understanding at the time was that most of the other Dodge dealers closed their dealerships for the same reasons." RX 3442G.[15]

Mr. Beals' affidavit indicates that in June 1969, he made the decision to close the dealership on Saturday during the summer months. That decision was made after discussions with the other

[14] RX 1300 may not be the full text of the bargaining agreement, but it appears to be all that remains available. RX 3442E.

[15] Minutes of meetings of the Greater Detroit Dodge Dealers Association, Inc., at which Crestwood representatives were present, reflect that the association concurred in proposals for summertime Saturday closing when that issue was discussed at meetings of the Detroit Auto Dealers Association. CX 606B, CX 615A.

Dodge dealers and with the understanding that the other dealers would also close on Saturday. The decision was collectively announced in an advertisement by the Dodge dealers association. At the time of this agreement among the Dodge dealers, Crestwood had a collective bargaining agreement with the ASA, but that bargaining agreement did not contain any restriction on the hours of operation. RX 1300. In his affidavit, Mr. Beals does not claim that he negotiated with the union regarding the decision made in 1969 to close on Saturdays during the summer.

On November 13, 1973, the members of the Greater Detroit Dodge Dealers Association, Inc., including Mr. Dittrich for Crestwood, met and voted to prepare a notice to the media that they would close on Saturdays year-round, beginning on December 1, 1973. CXG22B. This vote followed a report to the meeting that "essentially all the line groups" had decided to close on Saturday beginning on December 1, 1973. *Id.* On November 30, 1973, the "Dodge Boys" placed an advertisement in the Detroit News that their showrooms would be closed on Saturday as of December 1, 1973, listing the names of twenty participating Dodge dealers, including Crestwood Dodge, Inc. CX 3357.

When Mr. Dittrich took control of Crestwood Dodge in October 1973, the union contract negotiated by Mr. Beals was still in effect. According to Mr. Beals' affidavit, he negotiated the bargaining agreement in late 1970 or early 1971, and the agreement was for a three-year term. RX 3442G, H. We, therefore, assume that the agreement would have expired in late 1973 or early 1974. According to Mr. Beals' recollection, as discussed above, the bargaining agreement set forth the hours of operation, including hours of operation from 8:30 a.m. until 6:00 p.m. on Saturday.[16] In November 1973, Mr. Dittrich attended the Dodge line group meeting at which the members voted to announce their closing every Saturday beginning on December 1, 1973. Crestwood Dodge, Inc., participated in the advertisement announcing this reduction of hours.

Mr. Dittrich testified that shortly after he took over Crestwood Dodge, the union steward, Nicola Shelly, told him, "You know we're going to close Saturdays in a few weeks." Tr. 3166. Dittrich said that this was a "shocker for me," and that "I understood her to be telling

[16] Since this collective bargaining agreement did not provide for elimination of Saturday sales hours, the anticompetitive effects of the agreement among dealers to reduce Saturday hours cannot be attributed to the collective bargaining agreement.

me that all the dealerships were going to close on Saturdays shortly." *Id.* At that time, Dittrich had not attended any line group meetings and was unaware of any plan to close all dealerships on Saturdays.

Although Mr. Dittrich testified that he first learned of the plan to close on Saturday from the union steward, he did not testify or even suggest that he bargained with the union for this reduction in hours of operation. His testimony was that Ms. Shelly informed him that "all dealerships" were going to close on Saturday. Whether he first learned about the conspiracy among dealers from the union steward or at the Dodge line group meeting does not change the fact that Mr. Dittrich apparently decided to join an agreement among dealers to close on Saturday throughout the year, and he did not reach that decision through negotiation with his employees. Because the reduction in hours was the result of an agreement among dealers, not a good faith negotiation with employees, the non-statutory labor exemption does not apply.

Both Mr. Beals and Mr. Dittrich submitted affidavits containing precisely the same language as Mr. Thompson's affidavit, namely that "[i]n establishing the Dealership's showroom hours during this period, I followed the hours in effect at most Detroit area retail automobile dealerships at the time. I did so in part because of fear of union force and violence . . . ." RRX 138 at 4 (Dittrich), RRX 144 at 5 (Beals). Mr. Dittrich was more precise about the union threat that persuaded him to close: "I closed the Dealership on Saturdays year-round in late 1973 because of fear of union directed force and violence, namely, because of the certainty that Crestwood would be struck if the Dealership attempted to stay open." RRX 138 at ¶ 10. This general assertion is not sufficient to support an exemption from Section 5 for the reasons stated above.

The supplemental materials do not show that Crestwood currently operates under a collective bargaining agreement or other negotiated agreement on hours of operation with its employees. Part III of the order, therefore, applies to Crestwood Dodge.

D. Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst

Robert C. Borst is the majority shareholder of Bob Borst Lincoln-Mercury Sales, Inc., which has been in business since 1961. Its current hours of operation are from 7:30 a.m. to 9:00 p.m. on Monday and Thursday and 7:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and

Friday. RRX 139 at 1. Robert Borst has represented Bob Borst Lincoln-Mercury Sales, Inc., at Detroit Automobile Dealers Association meetings since 1961. RRX 139 at 1.

Robert Borst closed his dealership on weekday evenings "at or around the same time most of the other dealers" also closed. RPF ¶ 1634. Before reducing his hours of operation, Mr. Borst discussed uniform hours reductions with other dealers and in some instances, the effective dates for the hours reductions. RPF ¶ 1635. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX-172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays for the summer months. *See* CX-51. In May 1972, and May 1973, the Lincoln-Mercury dealers placed joint newspaper advertisements stating that "all Detroit area Lincoln-Mercury dealers" would close on Saturday for the summer months. CX-3336, CX-3340. In late 1973, a time when Robert Borst was the President of the Metropolitan Lincoln-Mercury Dealers Association, the line group placed an advertisement in the Detroit Free Press stating that Lincoln-Mercury dealers would close on Saturday. CX-3353, CX-2935-C.

The respondents' Proposed Findings of Fact were filed with the Administrative Law Judge on April 21, 1987. In addition to general findings, they include proposed findings with respect to each respondent. The respondents proposed eight findings relating to Bob Borst Lincoln-Mercury Sales, Inc., and Robert C. Borst. RPF ¶¶ 1632-39. Respondents' Proposed Finding ¶ 1636 states that "Borst's reasons for closing his dealership's showroom on certain evenings and Saturday in the summer and then year-round and his reasons for maintaining his current hours were and are": (1) to respond to demands by and on behalf of employees; (2) to avoid unionization; (3) because too few sales were made to justify remaining open; and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1636. None of the eight proposed findings relate to bargaining between Borst and a union or his employees, and none suggests that Borst reduced hours out of fear of union violence. RPF ¶¶ 1632-39.

On this remand, Mr. Borst submitted a supplemental affidavit consisting first of an approximately ten page recital of his recollection of incidents of union force and violence in Detroit. RRX 139. With the exception of one incident that had nothing to do with hours of operation and that occurred in 1948 (thirteen years before Bob Borst Lincoln-Mercury was founded), when Borst was working

at Burt Baker Used Cars, Mr. Borst's recollections appear to be of events that happened to other auto dealers. Respondents' Proposed Supplemental Findings of Fact with respect to Bob Borst Lincoln-Mercury recite that Mr. Borst "was aware of" the various incidents of violence and intimidation and that he "kept abreast of" published news reports about the retail automobile sales business in Detroit. RPSF ¶¶ 49-57.

Robert Borst's and Bob Borst Lincoln-Mercury's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation, Robert Borst "followed" the hours in effect at other dealerships and "did so primarily because of fear of union force and violence . . . ." RRX 139 at ¶ 36. Mr. Borst's affidavit on remand does not refer to the four reasons for closing his dealership that were stated in the 1987 proposed finding of fact, RPF ¶ 1636, or offer any explanation why the 1987 proposed findings failed to refer to the fear of union force and violence as a reason for reducing hours of operation. RRX 139. Mr. Borst's affidavit also claims that although he was opposed to closing on Saturday, he "had to close in light of union violence, union threats, property damage and to preserve my family's safety." RRX 139 at ¶ 40.[17]

Mr. Borst's claim of exemption appears to be based on his subjective perception of union directed violence. Given the apparent inconsistency in the reasons for closing offered in respondents Proposed Findings and the supplemental affidavit, a full hearing would be required to make findings on his perceptions and fears. Such a hearing is unnecessary because, as developed above, proof of *bona fide* arm's length negotiations between the employer and his employees or the union regarding hours of operation is a prerequisite to establishing a claim based on the non-statutory labor exemption. Whatever Mr. Borst's perceptions or recollections, there is no evidentiary basis to support a finding that his reductions in showroom hours were the product of *bona fide* negotiations with his employees or any union.

Since the supplemental materials do not state that Bob Borst Lincoln-Mercury currently operates under a collective bargaining agreement with a union or an agreement with its employees relating

[17] Mr. Borst's remand affidavit, which does not identify a particular event that caused him to close on Saturday at the time he did so, describes incidents of alleged union violence from 1947 on and states that Mr. Borst was "always aware" of the employees' desire for a five-day work week.

to hours of operation, Part III of the order applies to these respondents.

E. Bob Dusseau Lincoln-Mercury and Robert F. Dusseau

In 1955, Bob Dusseau started Bob Dusseau Lincoln-Mercury as President and, since that time, has been the majority shareholder in the business. RPF ¶ 1717. He was a member of the Metropolitan Lincoln-Mercury Dealers Association and was president of the association in 1970-1971. RPSF ¶ 4. When it opened for business, Bob Dusseau Lincoln-Mercury was open from 7:30 a.m. to 9:00 p.m. weekdays and 7:30 a.m. to 6:00 p.m. on Saturday. Its current hours are 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RPSF ¶ 2.

Dusseau closed his dealership during evening hours and on Saturdays at or around the same time that most other Detroit auto dealers did so. RPF ¶ 1722. In 1966, the Lincoln-Mercury line group agreed to close on Tuesday evenings. CX 172. In 1969, the Lincoln-Mercury dealers agreed to close on Saturdays during the summer months. CX 51. On May 26, 1972, and May 24, 1973, the Lincoln-Mercury line group placed advertisements in Detroit newspapers indicating that all Lincoln-Mercury dealers would close on Saturday for the summer months. CX 3336, CX 3340. Later in 1973, the Lincoln-Mercury line group placed an advertisement that they would close on Saturday during the remainder of the year. CX 3353.

The respondents' Proposed Findings of Fact, filed on April 21, 1987, include ten specific findings related to Bob Dusseau Lincoln-Mercury, Inc., and Robert F. Dusseau. RPF ¶¶ 1717-26. Respondents' Proposed Finding ¶ 1723 states that Dusseau's "reasons for closing his dealership's showroom on certain evenings and Saturdays during the summer and then year round and his reasons for maintaining his current hours were and are": (1) to respond to demands by employees, (2) to avoid unionization, (3) because too few sales were made to justify remaining open, and (4) to reduce energy consumption following the oil embargo. RPF ¶ 1723. None of the ten proposed findings relate to bargaining between Dusseau and a union or the employees, and none indicate that Dusseau reduced hours out of fear of union violence. RPF ¶¶ 1717-26.

Like Mr. Borst, Mr. Dusseau submitted a supplemental affidavit consisting first of an approximately ten page recital of his

recollections of incidents of union force and violence in Detroit from 1947 on. RRX 140. Mr. Dusseau describes one incident he found intimidating in which "two union goons" came to his showroom to talk with salesmen and refused to leave until after he called the police and the police arrived and threatened to arrest them. RRX 140, ¶ 8. With the exception of this single, albeit unfortunate incident, Mr. Dusseau's recollections are of events that happened to others. The proposed Supplemental Findings of Fact recite that Mr. Dusseau "was aware of " various incidents of violence and that he "kept abreast of" press reports on labor relations in Detroit. RPSF ¶¶ 66-71.

Like Mr. Borst, Mr. Dusseau's claim under the non-statutory labor exemption rests on the assertion that in setting the hours of operation at his dealership, he "followed" the hours in effect at most other dealerships and "did so primarily because of fear of union force and violence . . . ." RRX 140 at ¶ 35. Mr. Dusseau's perceptions regarding any incidents of labor strife, even assuming that those perceptions are based on fact, do not support his claim of exemption, because they do not bear on any employer-employee or employer-union bargaining.

As developed above, proof of *bona fide* negotiations between the employer and a labor union or the employees is necessary to establish a claim under the non-statutory labor exemption. Evidence of Mr. Dusseau's motivation or perception alone is not sufficient to support a finding that the reductions in showroom hours were protected by the non-statutory labor exemption. There is no indication of a current collective bargaining agreement relating to hours of operation between this dealership and a union or the employees. Part III of the order, therefore, applies to Mr. Dusseau and to Bob Dusseau Lincoln-Mercury.

F. Bob Maxey Lincoln-Mercury Sales, Inc. and Robert Maxey

Robert Maxey is and has been the President and owner of Bob Maxey Lincoln-Mercury since 1972. RPSF ¶ 78. Bob Maxey Lincoln-Mercury Sales, Inc., has been a member of the Lincoln-Mercury dealers association since 1972. CX 2962. The dealership's hours of operation are from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and from 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday. RRX 141 at ¶ 2.

In May 1972, the Lincoln-Mercury line group ran a newspaper advertisement stating that all Lincoln-Mercury dealers would be

closed on Saturdays during the summer. CX 3336. In May 1973, the line group ran another advertisement announcing Saturday closing for the summer. CX 3340. In September 1973, the line group ran an advertisement announcing that the Lincoln-Mercury dealers were again opening on Saturday, and Bob Maxey Lincoln-Mercury was specifically listed in the advertisement. CX 3422. In November 1973, the group ran an advertisement announcing the full year Saturday closing. CX 3353.

The respondents filed Proposed Findings of Fact on April 21, 1987, including six findings dealing specifically with Bob Maxey Lincoln-Mercury and Robert Maxey. RPF ¶¶ 1673-79. We find nothing in the record that the sales employees of this dealership have ever been unionized. RRX 141. Proposed Finding ¶ 1675 recites that before Mr. Maxey opened his Lincoln-Mercury dealership, he was sales manager at Al Long, Inc., in 1968, during a violent strike by the ASA. The proposed findings state that Maxey closed on Saturday when the other dealers did so to avoid the union, to obtain labor peace, and to conserve energy and that further sales on Saturday were "too poor to justify being open." RPF ¶ 1676.

Like the affidavits of Messrs. Dusseau and Borst, Mr. Maxey submitted a supplemental affidavit containing a lengthy statement of recollections of incidents of union violence that occurred to others. RRX 141. Mr. Maxey's affidavit describes the 1968 strike at Al Long Ford. RRX 141 at ¶ 17. Apparently Mr. Maxey's extensive recollections of labor unrest through the 1960's did not persuade him to close on Saturday because his affidavit recites that he was opposed to closing on Saturday until 1973. RRX 141 ¶ 26. In 1973, he "started receiving startling phone calls. Once they had threatened to blow up my house, at that point I had enough. . . . " RRX 141 at ¶ 26. The affidavit provides no other information about the phone calls and no indication about the identity of the callers beyond the word "they."

Robert Maxey's claim of exemption under the non-statutory labor exemption rests on the claim that he "followed" the hours in effect at most other dealerships "primarily because of fear of union force and violence . . . . " RRX 141 at ¶ 37. Like Messrs. Borst and Dusseau, Mr. Maxey bases his claim for the non-statutory exemption primarily on his perception of union violence. The primary difference between his claim and the claims of Messrs. Borst and Dusseau is the cryptic reference to "startling phone calls" and a threat from an unidentified source. Although startling or threatening phone calls are unfortunate,

we do not understand the respondents to be urging a coercion defense,[18] and as explained above, the non-statutory labor exemption requires proof of *bona fide* arm's length negotiations between employer and the employees or a union. Neither the original proposed findings with respect to Mr. Maxey and his dealership nor the supplemental materials filed on remand support a finding that the reduction in showroom hours was a product of negotiations with his employees or a union. We conclude that the non-statutory labor exemption does not apply to these respondents. In addition, there is no indication that Bob Maxey Lincoln-Mercury is currently party to a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Maxey and Bob Maxey Lincoln-Mercury.

G. Crest Lincoln-Mercury Sales, Inc., and William R. Ritchie

Mr. William Ritchie is the President and owner of Crest Lincoln-Mercury Sales, Inc., and was president and sales manager from 1968 to 1972. Tr. 1286-87, 1295-96. He acquired an ownership interest after 1972. Tr. 1303. When Mr. Ritchie took over the dealership in 1968, the showroom hours of operation were 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday, Friday and Saturday and 8:30 a.m. to 9:00 p.m. on Monday and Thursday. Tr. 1305.

When Mr. Ritchie took over Crest, the parts department employees and the mechanics were unionized. Tr. 1296. In 1971, the union struck his dealership. Tr. 1299. Mr. Ritchie testified that the 1971 strike involved violence. He said that he was run off the road "by a couple of cars" when driving home one night. Tr. 1303. The porch of a next door neighbor's house was bombed, and according to Ritchie, the police thought that his house had been the intended target. Tr. 1404. His family was threatened. Tr. 1304-04. Mr. Ritchie resolved the strike by telling the striking workers that he was going to reopen the dealership with replacement workers, and he made no concessions to resolve the strike. Tr. 1301. Ultimately, the striking employees returned to work. *Id.*

Mr. Ritchie testified that his sales employees continued to demand shorter working hours. He initially tried to shorten Saturday hours by opening one hour later and closing two hours earlier than on

[18] *See* Note 7, *supra* and accompanying text.

weekdays, but that did not satisfy his sales people. Tr. 1312. Mr. Ritchie testified that, in the late 1960's or early 1970's, he decided to close his showroom on Saturday in the summer in response to demands by the employees. Tr. 1313-14. Mr. Ritchie testified that other competing dealers closed on Saturday at the same time and that he had discussed the summer Saturday closing with his competitors. Tr. 1314-15. He said that the employees' demand was for uniform Saturday closing during the summer by all dealers, and his discussions with other dealers were in response to this demand for uniformity. Tr. 1315. Ritchie said that he did not simply close his dealership unilaterally, because that "is not what [the employees] wanted." He added: "They wanted the city closed. They wanted all dealerships closed." Tr. 1315. Mr. Ritchie said that he discussed with his sales employees the possibility of his unilaterally closing his dealership on Saturdays, but they did not think that he "was working for their better interest if I couldn't help them influence other dealerships to close." Tr. 1316. Mr. Ritchie testified that he did not want to see other dealers picketed because he wanted to avoid multi-employer bargaining (Tr. 1316), an arrangement by which "an authorized representative of a certain group of employees bargain [sic] for that whole industry." Tr. 1323. Multi-employer bargaining was a consistent demand by the ASA. ID ¶ 157.

Mr. Ritchie testified that, at the end of the summer, about three weeks before the dealership was to reopen on Saturdays for the winter, his employees began to demand that the Saturday closings be extended to be effective year-round. Tr. 1317-18. Mr. Ritchie opposed this and entered into a "dialogue" with his sales force over that demand. Tr. 1318. Nonetheless, the dealership reopened on Saturdays, and Mr. Ritchie testified that this resulted in his employees' "[t]otal dissatisfaction" and a "morale problem." *Id.* Mr. Ritchie stated that, in about 1971, he began closing on Saturdays year-round, but that he would not have eliminated Saturday operations year-round except for the demands of his sales force. Tr. 1319. He further testified that his concerns when making the decision to close were the same as those he had when he conceded to his employees' demands to close on Saturdays during the summer. *Id.*

Mr. Ritchie testified that he discussed his concerns about union activity with other dealers in Detroit, and other dealers shared the same concerns. Tr. 1317. He said that the discussions occurred at

line group meetings, association meetings and social functions. Tr. 1320. At the line group meetings, Mr. Ritchie opposed making concessions to employees on a dealer-by-dealer basis because "[w]e were going to get nothing but run our expenses up." Tr. 1325. He also expressed the view that uniform shorter hours would avoid unionization and bring labor peace. Tr. 1325-26.

Mr. Ritchie was a member of the Board of Directors of the Detroit Automobile Dealers Association from 1972 to 1976. Tr. 1351. He was also president of the Association. *Id.* When he was a director, the DADA Board discussed uniform hours of showroom operations. Tr. 1353. Mr. Ritchie said that he tried to persuade other dealers to close on Saturdays. Tr. 1354.

Mr. Ritchie testified in his supplemental affidavit that he tried to "appease my employees over the years" (RRX 142 ¶ 22), and that he made the "concession [to close on Saturdays] only after long negotiation with my employees" (RXX-142 ¶ 24), who demanded short hours not just for themselves, but for all Detroit dealerships. RXX 142 ¶ 23.

As a DADA board member and president, Mr. Ritchie played a lead role as an organizer with the dealers, and he adamantly opposed negotiations between individual dealers and their employees or their union. He testified that he opposed any dealer-by-dealer, unilateral concessions because that would merely "run our expenses up." He was concerned that piecemeal, unilateral concessions by individual dealers might lead to multi-employer bargaining and believed that any concessions to the unions or their members "absolutely had to be uniform." In addition, Mr. Ritchie's supplemental affidavit indicates that he would not have reduced hours absent the demands of the workforce and "my fear of union directed violence." RRX 142 ¶ 22.

Had Mr. Ritchie closed the dealership on Saturday as a direct result of negotiations with employees, his action would have been protected by the non-statutory labor exemption. This, however, was not the case. We conclude that Mr. Ritchie's closure of his dealership was not the product of an agreement with his employees but was the product of his conspiracy with the other competing dealers.

Put somewhat differently, whatever discussions occurred between Mr. Ritchie and his employees, they did not result in an agreement negotiated in good faith for Crest Lincoln-Mercury unilaterally to limit hours or to close on Saturdays. Indeed, according to the respondent, such an agreement on the part of the dealership would

not have been satisfactory to the employees. The agreement reached on this subject was the product of negotiation, but the negotiation was among the employers, not between the employers and their employees or representatives of their employees. There also is no claim that the dealership operates under any other bargaining agreement with an hours or maintenance of standards provision. We conclude, therefore, that the non-statutory labor exemption does not apply to these respondents, and that Part III of the order properly should apply to Mr. Ritchie and Crest Lincoln-Mercury Sales, Inc.

H. Stewart Chevrolet, Inc., and Gordon Stewart

Gordon Stewart was the dealer-operator of Stewart Chevrolet, Inc., from 1980 through 1983. Tr. 3433. He owns a company that retains a controlling interest in Stewart Chevrolet, but Mr. Melavid has been the dealer-operator since 1983. Tr. 3433. When Mr. Stewart first opened Stewart Chevrolet in October 1980, he opened from 8:30 a.m. to 9:00 p.m. on Monday and Thursday and 8:30 a.m. to 6:00 p.m. on Tuesday, Wednesday and Friday, which were the hours of operation adopted by the previous owner of the franchise. Tr. 3452.

Although Mr. Stewart became a Detroit automobile dealer after the agreed upon hours of operation had been firmly established for a number of years, he participated in many decisions by the Chevrolet line group to open or close on specific days. For example, the minutes of the March 17, 1982, Greater Detroit Chevrolet Dealers Association, at which he was present, reflect an agreement to open on the evenings of March 29, 30 and 31 because of the end of a rebate program. CX-361. The record contains a number of similar examples of collective decisions by the Detroit area Chevrolet dealers, including Mr. Stewart, to open or close on specific dates, such as the day preceding or following a major holiday. CX-362, CX-363, CX-364, CX-365, CX-370, CX-371.

The record does not reflect that the sales employees at Stewart Chevrolet were unionized or that Mr. Stewart ever negotiated a collective bargaining agreement with a union relating to the hours of operation of Stewart Chevrolet. Indeed, Mr. Stewart's testimony indicates a distaste for dealing with a union. When he purchased the dealership, the mechanics were unionized, and he did not want to purchase it until he received an assurance that he had a 95 percent

chance of eliminating the union after the transaction. Tr. 3450. In 1985, after the Commission initiated this proceeding, Teamsters Local 376 attempted to organize the sales employees at Stewart Chevrolet but were unsuccessful. Tr. 3458-59.

Mr. Stewart's supplemental affidavit recites his "awareness" of and recollection of incidents of union force and violence in the retail automobile business in Detroit. Most incidents discussed in the affidavit allegedly happened to other dealers during the 1960's and 1970's, although Mr. Stewart worked at Merollis Chevrolet during a violent strike. RRX 133 ¶ 20. Once when Mr. Stewart held a special sale on Saturday, a salesman from Dexter Chevrolet identified himself and told him that his business would suffer if he opened regularly on Saturday. Tr. 3455.

As discussed above, the nonstatutory labor exemption applies only to restraints arising from good faith, arm's length negotiation between an employer and his employees or their union, and there appears to be no basis on which to find that Stewart Chevrolet's hours of operation resulted from such good faith negotiations. The specific decisions to remain open or to close on the dates discussed above were made at the meetings of the Chevrolet line group, and there is no suggestion of negotiation with employees or a union. We conclude that the non-statutory labor exemption does not protect the activities of Mr. Stewart or Stewart Chevrolet. There is no claim of a current collective bargaining agreement with an hours provision or a maintenance of standards provision. Part III of the order, therefore, applies to Mr. Stewart and Stewart Chevrolet.

I. Woody Pontiac Sales, Inc., and Woodrow W. Woody

Woodrow Woody has been the owner and president of Woody Pontiac Sales since it went into business in 1940. RRX 151 ¶ 3,4. Woody Pontiac is currently open weekdays until 6:00 p.m., except Monday and Thursday when it is open until 8:00 p.m. RRX 151 at ¶ 2.

Mr. Woody represented Woody Pontiac at the Pontiac line group meeting in which a decision was reached to close on Saturday during the summer months, beginning in 1969. CX-209. Woody Pontiac was listed as a participating dealership in the Pontiac line group advertisement of June 13, 1969, announcing the summertime Saturday closing. CX-3308. Woody similarly participated in the

1970, 1971 and 1972 Saturday summer closing. CX-213, CX-3314, CX-216, CX-217, CX-3324, CX-219-20, CX-3332. Woodrow Woody represented his dealership at the November 27, 1973, line group meeting in which the members of the association considered permanent Saturday closing. CX-225. In the line group's published advertisement, Woody Pontiac was listed as one of the dealerships that would close permanently on Saturday, beginning on December 1, 1973. CX-3354.

Mr. Woody's supplemental affidavit recites that at the time that he closed the dealership on Saturday, "I remember thinking about the union and the violence they had perpetrated in the past." RRX 151 at ¶ 7. He decided that it was not worth it to stay open on Saturday. *Id.*

As discussed above, the non-statutory labor exemption requires proof of good faith bargaining between the employer and the union or employees regarding the hours. Mr. Woody's supplemental affidavit and proposed findings make no claim that such negotiations occurred. We conclude that the non-statutory labor exemption does not shield Woody Pontiac's or Woodrow Woody's participation in an agreement among Pontiac dealers to reduce hours of operation. Part III of the order, therefore, applies to Mr. Woody and Woody Pontiac.

J. Jack Demmer Ford and John E. Demmer

Jack Demmer Ford was established in 1957 as an Edsel and Studebaker dealer, and in December 1959, it became a Ford dealer. Tr. 2564. In 1963, the dealership was open until 9:00 p.m. on Monday, Tuesday, Thursday and Friday, and was open until 6:00 p.m. on Wednesday and Saturday. Tr. 2568.

After discussions at the Ford line group meetings, of complaints by sales employees about the long hours, the dealers closed at 6:00 p.m. on Friday. Tr. 2572. In 1966, when the ASA was trying to organize the dealerships, the Ford line group discussed closing Tuesday at 6:00 p.m. and decided that the Ford dealers would all close at one time. Tr. 2576-77.

After a representation election in December 1966, the ASA became the bargaining representative of the sales employees at Jack Demmer Ford. Tr. 2578. In 1967, John Demmer began negotiations with the union regarding a collective bargaining agreement. Tr. 2579. In 1968, there was a long strike at Jack Demmer Ford, and the strike involved violence and vandalism, including an attempted bombing of

the clean-up shop. Tr. 2586-87. Jack Demmer Ford offered to close the dealership on Saturday, but despite the violence, he refused to agree to the union's demand for a closed union shop and never signed a contract with the union. Tr. 2579, 2588. After the strike, the sales employees at Jack Demmer Ford voted to decertify the union in October 1968. Tr. 2595. The dealership remained open on Saturdays after the decertification election. Tr. 2597.

In late 1968, the Ford line group met to discuss the complaints of the sales employees, and according to Mr. Demmer, "we kind of reached an agreement that we asked everybody to go along with and that was to close [on Saturday] from July the 4th the following year, I believe it was, until Labor Day, which is a period of about eight weeks." Tr. 2598-99. The following year the dealers decided to close on Saturday from Memorial Day until Labor Day. Tr. 2600. They subsequently decided to close on Saturday year-round. Tr. 2600.

Mr. Demmer's supplemental affidavit recites that he was familiar with a number of incidents of union violence. RRX 135. His affidavit states that "[h]e would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 135 at ¶ 28.

As developed above, the non-statutory labor exemption requires a showing of negotiations with a union or employees. During the period in 1967 and 1968 when the ASA represented the sales employees at Jack Demmer Ford, Mr. Demmer did negotiate with the union about closing the dealership on Saturdays, and he closed during the strike. No collective bargaining agreement was ever reached, and after the employees voted to decertify the union, the dealership remained open on Saturdays. According to Mr. Demmer's own testimony, the subsequent decisions to close on Saturday were the product of an agreement among dealers, not a result of good faith negotiation with employees. We conclude that the non-statutory labor exemption does not apply to the conduct of these respondents. In addition, they have not claimed to have a current bargaining agreement with a union or their employees. Part III of the order, therefore, applies to Mr. Demmer and Jack Demmer Ford.

K. Al Long Ford, Inc.

Tarik Daoud is and has been since 1972 the president and majority shareholder of Al Long Ford, Inc. RRX 134. In the 1960's, Al Long Ford was open from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday and Thursday and from 8:30 a.m. to 6:00 p.m. on Wednesday, Friday and Saturday. RRX 134 at ¶ 6.

In May 1971, the Metropolitan Ford Dealers Association, of which Al Long Ford was a member, published advertisements, stating that "the majority" of metropolitan Ford Dealers would be closed on Saturday during the summer. CX-3326, 3327. On November 30, 1973, the Ford line group of which Al Long Ford was a member ran an advertisement stating that participating dealers would be closed on Saturdays, effective December 1, 1973. CX-3356. On December 2, 1973, Avis Ford ran an advertisement stating that the "Ford dealers of Metropolitan Detroit voted overwhelmingly to close" on Saturdays. CX-3358.

Mr. Daoud's supplemental affidavit recites that he was aware of various incidents of union violence at other dealerships. RRX 134. In addition to recollections about incidents that occurred elsewhere, Mr. Daoud also said that he witnessed violence during a strike at Al Long Ford in 1968 when he was the sales manager. RRX 134 at ¶¶ 12-13. According to his affidavit, rifle bullets were fired through the windows of the dealership, and cars on the lot were scratched and their windows broken. *Id.* He received threatening phone calls at home. *Id.*

Mr. Daoud's supplemental affidavit states that there were many discussions at the Metropolitan Detroit Ford Dealers Association regarding Saturday closing in 1972 and 1973. RRX 134 at ¶ 19. He states that the pressure from salespeople caused him to close. *Id.* His affidavit states that "I concluded and agreed to accommodate the sales personnel by instituting uniform hours and year round Saturday closing . . . to avoid unionization and similar violence against the Al Long Ford dealership." RRX 134 at ¶ 22. Although this sentence does not state with whom Mr. Daoud reached his agreement, the next sentence explains that the agreement was with the other dealers, not his employees. The next sentence in the affidavit is: "I would not have reduced the hours at the dealership or agreed with other dealers concerning the hours but for the demands of my employees and my apprehension of force and violence . . . ." RRX 134 ¶ 22.

Although Mr Daoud's affidavit refers to demands and pressure from th employees for shorter hours of work, he does not state that he entered negotiations or reached agreement with his employees or a union regarding hours of operation. Instead, it appears that whatever agreement was reached was among dealers. He candidly stated that one objective of the reduction in hours was to avoid unionization and violence. Al Long Ford survived a violent strike in the late 1960's, when Mr. Daoud was manager, without capitulating to the union and agreeing to eliminate Saturday work. Only in 1973 did the dealers agree among themselves to reduce hours as a means to avoid unionization. We reject the conclusion that the restraint on hours, which was adopted to forestall unionization was "imposed by a union," and find that the reduced hours were not the product of bargaining and agreement between the dealership and its employees. We conclude that the nonstatutory labor exemption does not apply to this respondent. There is no evidence of a current labor contract with a maintenance of standards or hours of operation clause. Part III of the order, therefore, applies to Al Long Ford.

L. Ed Schmid Ford, Inc., and Edward Schmid

Edward Schmid became the general manager of Ed Schmid Ford, Inc., in 1961 and purchased the dealership in 1962. Tr. 1891. When Mr. Schmid took over, the hours of operation were from 8:30 a.m. to 9:00 p.m. on Monday, Tuesday, Thursday and Friday and were 8:30 a.m. to 6:00 p.m. on Wednesday and Saturday. Tr. 1894. The service department was organized by the Teamsters. Tr. 1892. Mr. Schmid was opposed to unionization of his dealership and believed that the union hindered his ability to deliver high quality service to his customers. Tr. 1908.

The sales employees complained to Schmid about the long hours. Tr. 1897. During a time when a union was passing out literature to organize salesmen, the members of the Ford line group discussed early closing and picked Friday night to close early. Tr. 1899. The Ford line group's labor counsel recommended the early closing. Tr. 1900.

In 1967, the ASA won an organizing election at Ed Schmid Ford, and the dealership began the collective bargaining process with the union. Tr. 1914. The ASA demanded an end to all Saturday and night work, among other things. Tr. 1914-15. The dealership and

union reached an impasse in the bargaining, and the union went on strike in January 1968. Tr. 1915. There were incidents of vandalism at the dealership, and threats were made at the time of the strike. Tr. 1917. During the ASA strike of the sales employees, the employees of the parts and service department who were members of the Teamsters Union crossed the picket line and continued to work. Tr. 1915. Mr. Schmid said that the sales employees had not honored a Teamsters' picket line in 1964, and so the Teamsters refused to honor the ASA line. Tr. 1916. Mr. Schmid refused to sign a union contract, and the sales employees eventually gave up the strike and returned to work. Tr. 1918. According to his supplemental affidavit, when Mr. Schmid obtained an injunction against the picketing of his dealership, the strikers gave up, and no collective bargaining agreement was ever signed. RRX 137 at ¶ 26.

The dealers at the Ford line group meetings continued to discuss Saturday closing "to possibly head off union organizing." Tr. 1923. The summertime Saturday closing was discussed at the line group meetings, and the closing by other dealers influenced Mr. Schmid's decision to close on Saturday. Tr. 1928.

Mr. Schmid's supplemental affidavit recites the incidents of violence that occurred during the 1967-68 ASA strike at his dealership and his awareness of vandalism and violence at other dealerships. RRX 137. According to the affidavit, Mr. Schmid lived in fear of having both his sales and service departments organized by a union. RRX ¶ 15. He thought that would be "fatal" to a dealership in the event of a strike. *Id.* According to the affidavit, Mr. Schmid "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands of his employees and the employee unions and his apprehension of force and violence directed by the various unions which had demanded uniform hours reductions and who would enforce their demands through force and violence." RRX 137 at ¶ 36. The agreement among dealers to close year round was made in 1973, approximately five years after Mr. Schmid had succeeded in breaking the ASA strike. In light of the dealers, agreement and Mr. Schmid's willingness to wait out a long and violent strike in 1967 and 1968 until the union gave up, we do not find that, in 1973, when no strike was in progress, the restraint arose from *bona fide* collective bargaining for shorter hours or as a direct result of union directed violence and force for shorter showroom hours. 955 F.2d at 468. Although the sales employees favored a

shorter work week, the affidavit does not claim that the restraint was a product of good faith bargaining between the employer and his employees or a union. The agreement to which Mr. Schmid refers is among dealers, not with employees. As developed above, proof of good faith negotiation is an essential element of the non-statutory labor exemption. We conclude that the non-statutory labor exemption does not apply. The record does not show that these respondents currently have a bargaining agreement. Part III of the order, therefore, applies to Mr. Schmid and Ed Schmid Ford.

M. Ray Whitfield Ford, Inc., and Raymond Whitfield

Raymond Whitfield has been the president and owner of Ray Whitfield Ford, Inc., since 1961. CX-3867 at 8, 13. Like many other dealers, Ray Whitfield Ford eliminated its evening hours on Friday, Tuesday, and Wednesday in the 1960's, and in the late 1960's, it began to close on Saturday in the summer. *Id.* at 41. It closed on Saturday throughout the year in the early 1970's. *Id.*

According to Mr. Whitfield's deposition, he participated in discussions at the Metropolitan Ford Dealers Association concerning whether to eliminate Saturday hours. CX 3867 at 48. He had many conversations with other dealers about closing on Saturday. *Id* at 53. Whitfield said that his business was good on Saturday, and he did not want to close. *Id.* at 55. He was concerned about vandalism and wanted to avoid unionization of his dealership. *Id.*

Mr. Whitfield's supplemental affidavit recites that he was familiar with the incidents of violence at Demmer Ford and Al Long Ford. RRX 136. Mr. Whitfield's affidavit states that in the mid-1960's, the ASA tried to organize salespeople, and that an ASA union organizer, Mr. Van Zant, told him that the union would "use whatever means were necessary" to close auto dealers on Saturday. *Id.* at ¶ 8. Shortly thereafter, some cars at his dealership were vandalized, and he found bullet holes in his showroom windows. *Id.* at ¶¶ 9-10. In the late 1960's, the Seafarers Union and a Teamsters local attempted unsuccessfully to organize his dealership. RRX 136 at ¶¶ 13-14.

Mr. Whitfield's remand affidavit states that he closed his dealership on Saturdays through the year in 1973, after threats that the union would use "any and all means, including violence, to shut" down all dealers and that he "would not have reduced his hours or agreed with other dealers concerning his hours but for the demands

of the employee unions and his apprehension of force and violence directed by the union." RRX 136 at ¶ 20. Neither the supplemental affidavit nor Mr. Whitfield's deposition, which was entered as an exhibit at trial, indicates that he reduced his hours of operation pursuant to an agreement reached after good faith negotiations with his employees or their union. The non-statutory labor exemption requires that the restraint be the result of good faith bargaining with the union or the employees.

Mr. Whitfield claims that concern about union violence motivated his decision to reach agreement with other dealers regarding hours rather than that he bargained in good faith with his employees or acted as a direct result of union directed violence. Indeed, according to the affidavit, the threat to use any means necessary and the vandalism occurred in the mid- or late-1960's, and the agreement among dealers to close Saturdays throughout the year was not reached until late 1973. The timing confirms that the restraint on hours resulted from the agreement among dealers, and not bargaining or other clash between Whitfield and his employees or a union representing the employees of Ray Whitfield Ford. Accordingly, we conclude that the exemption does not apply to these respondents. There is no claim that the employees of this dealership are covered by a collective bargaining agreement with an hours provision or a maintenance of standards clause. Part III of the order, therefore, applies to Mr. Whitfield and Ray Whitfield Ford.

In summary, we find that the respondents who participated in the remand proceeding did not restrict their hours of operation as a result of *bona fide*, arm's-length bargaining with employees or a union and are not exempt under the non-statutory labor exemption.[19] Although the respondents produced some evidence of violent incidents and threats of violence, the non-statutory labor exemption requires a showing of bargaining with employees or a union representing employees, not an agreement with competitors to limit hours because of violence or perceptions of violence. The record shows that some of the dealers who suffered the worst incidents of violence and threats did not concede, at the time of those incidents, to demands to restrict hours and appear to have been willing to endure the risks and losses in order to defeat the union. Such fortitude seems inconsistent with a claim that they were compelled at other points in time to join a conspiracy against their will.

[19] But *see supra* at 15 and Note 13.

Overall, the evidence shows that the automobile dealers in Detroit were unwilling to bargain with their employees over hours of operation. Instead, they reserved hours of operation for resolution with their competitors.

IV. THE SCOPE OF RELIEF

Apart from the interpretation of the non-statutory labor exemption, the Court of Appeals expressed "concern" about two aspects of the remedy imposed by the Commission.

First, the Court of Appeals directed the Commission to consider whether the thirty-day time period in Part VII.D of the order was sufficiently long. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part VII.D to specify a sixty-day period, as provided in the accompanying order.

Second, Part III of the Commission's original order required the dealers to remain open for a minimum of 64 hours per week for a one-year period. The Commission found that a simple cease and desist order would not adequately remedy the violation of Section 5, and it imposed the requirement that dealerships remain open for 64 hours per week in an effort to "encourage competitive forces to operate." 111 FTC at 506.

The Court of Appeals stated:

> We suggest that the Commission consider giving dealers an option to maintain showroom hours for at least an average of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time for the one year period.

955 F.2d at 472. After due consideration and in accordance with the suggestion of the court, the Commission modifies Part III of the order to give the respondents the option of electing, for the one year remedial period, either: (1) to maintain a minimum sixty-four hours of operation per week for the sale and lease of motor vehicles; or (2) to maintain a minimum hours of operation for the sale and lease of motor vehicles of an average of ten and a half hours per day during weekdays plus a minimum of eight hours on Saturday.

CONCLUSION

In accordance with the direction of the Court of Appeals, the Commission has reviewed the record, findings and supplemental evidentiary material submitted by the twenty-two respondents who participated in this remand proceeding. For the reasons stated above, the Commission concludes that the respondents entered agreements with competitors to reduce their hours of operation in violation of Section 5 of the Federal Trade Commission Act and concludes that these agreements are not exempt under the non-statutory labor exemption. The Commission further concludes that Part III of the order does not apply to Thompson Chrysler-Plymouth, Inc., or Joseph P. Thompson, provided there continues in effect a collective bargaining agreement containing a maintenance of standards provision like that in effect from September 14, 1989, through March 31, 1994, or that otherwise provides a basis for the exemption.[20]

In accordance with the direction of the Court of Appeals, the Commission hereby modifies Part III of the order to give the respondents the option to open for ten and one half hours per day on weekdays and ten hours per day on Saturdays and modifies Part VII.D to substitute a sixty-day period for the thirty-day period.

[20] *See* Note 13, *supra.*

IN THE MATTER OF

DAVID GREEN, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3589. Complaint, June 23, 1995--Decision, June 23, 1995

This consent order prohibits, among other things, an individual doing business as The Varicose Vein Center from making various representations about any vein treatment or cosmetic surgery procedure he markets in the future unless he possesses competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Sondra L. Mills* and *Richard F. Kelly.*
For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that David Green, M.D., an individual doing business as The Varicose Vein Center, a sole proprietorship (hereinafter "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 David Green, M.D. ("Dr. Green") is an individual doing business as The Varicose Vein Center, a sole proprietorship ("VVC"). Respondent operates a VVC clinic located at 4800 Montgomery Lane, Suite M50, Bethesda, MD.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of sclerotherapy treatments for venous disease, including varicose veins and spider veins. Sclerotherapy involves the injection of a solution with a fine needle directly into the vein. The vein turns into scar tissue that fades from view. A variety of solutions, called sclerosing agents, may be used for this procedure. These include, but are not limited to, hypertonic saline, Sotradecol (sodium tetradecyl sulfate), Polidocanol (aethoxysklerol), and sodium morrhuate. In addition to sclerotherapy, other methods are used to

treat varicose and spider veins. These include, but are not limited to, surgical procedures, laser treatments and electrocautery treatments.

Respondent's regimen for treating venous disease involves the injection of solutions of Sotradecol into the veins followed by compression of the surrounding tissue with bandages and wraps and post-procedure ambulation by the patient. In the past, respondent has also used hypertonic saline and Polidocanol as sclerosing agents when administering his sclerotherapy treatments.

As part of his treatment regimen, respondent refers certain patients with varicose veins to surgeons to perform a surgical procedure prior to injecting the veins with a sclerosing agent. These include patients whom respondent has diagnosed as having truncal varicosities with incompetence at the saphenofemoral or saphenopopliteal junction. Respondent refers such patients to a surgeon for surgical division and ligation of these veins before performing his sclerotherapy treatments.

PAR. 3. In the course and conduct of Dr. Green's business, respondent has disseminated or caused to be disseminated advertisements and promotional materials for the purpose of promoting the sale of sclerotherapy services, which include the use of the drug Sotradecol. Sotradecol is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondent has placed, or caused to be placed, advertisements in various periodicals that are in general circulation to the public to promote VVC's treatments of varicose and spider veins to prospective patients. Respondent further advertises and promotes VVC's sclerotherapy services through the use of brochures and pamphlets that are provided to patients and prospective patients.

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

PAR. 5. Respondent's advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A through D.

PAR. 6. Respondent's advertisements and promotional materials contain the following statements:

(a) "My only mistake was not coming to The Varicose Vain Center first."

. . . .

- Spider and Varicose Veins Permanently Eliminated
- Painless, Safe, Non-Surgical
(Exhibit A);

(b) ** The Varicose Vein Center Presents **
Great Legs for Summer
. . . . .
If varicose or spider veins are the problem, these unsightly veins can be permanently removed by a simple, non-surgical procedure.
(Exhibit B);

(c) "My only mistake was not coming to The Varicose Vein Center first."
Don't let the disappointment of other vein treatments keep you from discovering the one that works. With a success rate greater than 95%, our non-surgical, in-office procedure is safe, painless . . . . Find out how easy and affordable it is to get rid of spider or varicose veins, often with just one treatment.
(Exhibit C) ; and

(d) The Varicose Vein Center
. . . .
What You Should Know About Varicose Veins, Spider Veins and Sclerotherapy
. . . .
WHAT IS SCLEROTHERAPY?
Sclerotherapy is the *non-surgical* procedure used to *permanently* remove spider and varicose veins from the legs and thighs.
IF I HAVE MY VEINS TREATED, CAN THEY REAPPEAR?
Once these spider or varicose veins are treated successfully they disappear permanently. However, this treatment does not prevent new veins, that would otherwise have developed, from appearing.
(Exhibit D).

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, C and D, respondent has represented, directly or by implication, that:

(a) Spider veins and varicose veins treated by respondent are permanently eliminated;

(b) Greater than 95% of the spider veins and varicose veins treated by respondent are eliminated for at least a significant period of time.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A, B, C and D, respondent has represented, directly or by implication, that at the time he made the representations set forth in paragraph seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time respondent made the representations referred to in paragraph seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation contained in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A and C, respondent has represented, directly or by implication, that patients do not experience any pain in connection with respondent's regimen for treating their varicose and spider veins.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A and C, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph ten, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 12. In truth and in fact, at the time respondent made the representation referred to in paragraph ten, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation contained in paragraph eleven was, and is, false and misleading.

PAR. 13. The acts and practices of 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.

EXHIBIT A

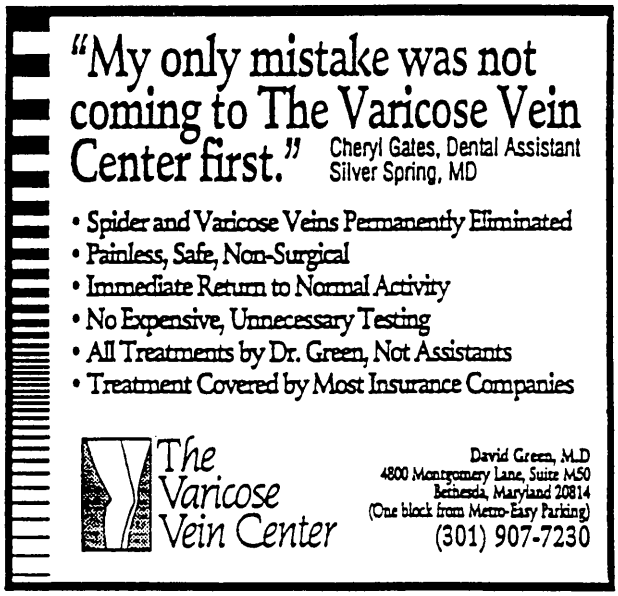
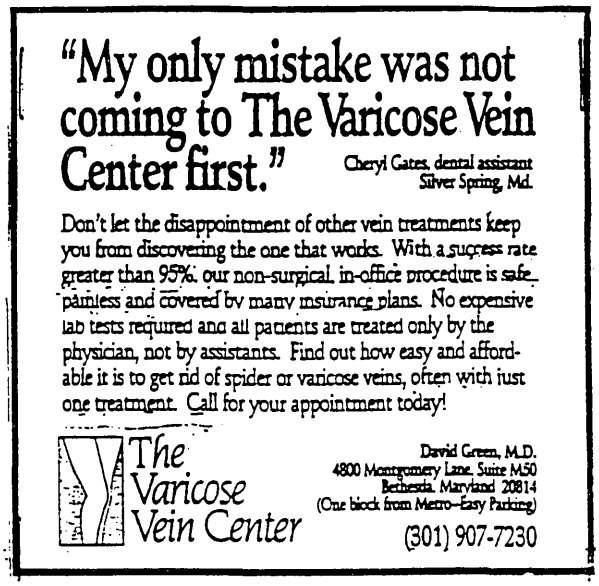

"My only mistake was not coming to The Varicose Vein Center first."
Cheryl Gates, Dental Assistant
Silver Spring, MD
• Spider and Varicose Veins Permanently Eliminated
• Painless, Safe, Non-Surgical
• Immediate Return to Normal Activity
• No Expensive, Unnecessary Testing
• All Treatments by Dr. Green, Not Assistants
• Treatment Covered by Most Insurance Companies
The Varicose Vein Center
David Green, M.D
4800 Montgomery Lane, Suite M50
Bethesda, Maryland 20814
(One block from Metro-Easy Parking)
(301) 907-7230

EXHIBIT B


★★ The Varicose Vein Center Presents ★★
Great Legs For Summer
When was the last time you wore shorts or a bathing suit without embarrassment?
If varicose or spider veins are the problem. these unsightly veins can be permanently removed by a simple. non-surgical procedure.
Call now for an appointment and your veins can be gone by summer!
The Varicose Vein Center
David Green. M.D.
4800 Montgomery Lane. Suite M50
Bethesda. Maryland 20814
One block from Metro-Easy Parking
(301) 907-7230

EXHIBIT C


"My only mistake was not coming to The Varicose Vein Center first."
Cheryl Gates, dental assistant
Silver Spring, Md.
Don't let the disappointment of other vein treatments keep you from discovering the one that works. With a success rate greater than 95%, our non-surgical, in-office procedure is safe, painless and covered by many insurance plans. No expensive lab tests required and all patients are treated only by the physician, not by assistants. Find out how easy and affordable it is to get rid of spider or varicose veins, often with just one treatment. Call for your appointment today!
The Varicose Vein Center
David Green, M.D.
4800 Montgomery Lane, Suite M50
Bethesda, Maryland 20814
(One block from Metro–Easy Parking)
(301) 907-7230

David Green, M.D., Director
3 *Washington Circle, N.W. #303*
Washington, D.C. 20037
(202) 785-0333

What You Should Know About Varicose Veins, Spider Veins and Sclerotherapy

Exhibit D

EXHIBIT D

WHAT ARE VARICOSE VEINS?

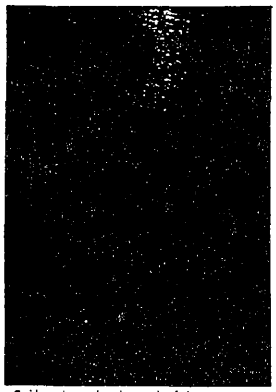
Varicose veins are dilated blood vessels that become enlarged because of a weakness in the wall of the vein. They are most common in the legs and thighs. Spider veins refers to smaller varicose veins that usually appear in patches close to the skin surface.

WHY DO PEOPLE DEVELOP VARICOSE VEINS?

The tendency for having varicose veins is usually hereditary and can begin in adolescence or early adulthood. However, pregnancy, oral contraceptives, and injuries often contribute to the problem. In addition, large varicose veins can give rise to smallers ones. Once formed, these dilated vessels do not disappear without treatment.

WHAT IS SCLEROTHERAPY?

Sclerotherapy is the *non-surgical* procedure used to *permanently* remove spider and varicose veins from the legs and thighs.



Spider veins and varicose veins before treatment.

Spider veins and varicose veins 3 months after treatment.

HOW LONG HAS THIS PROCEDURE BEEN USED BY PHYSICIANS?

Sclerotherapy for varicose veins has been performed for more than 100 years. Spider veins have been treated for more than 50 years. But the smallest spider veins have been effectively treated for only the past 10 years, when needles were developed that were small enough to inject them.

HOW IS THE PROCEDURE DONE?

A sterile salt solution (a saline solution, or sodium chloride in water) is injected into the veins to be removed. This solution is called the sclerosing solution. Injecting directly into the vein insures that only the vein is removed.

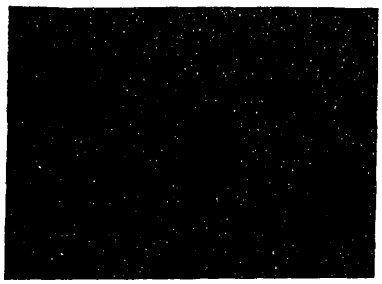
HOW DOES THE PROCEDURE WORK?

The saline solution, being very concentrated, irritates the injected veins. This irritation damages the veins and closes them off. The body recognizes that the veins are no longer working and dissolves them the same way it would dissolve a bruise in the skin.

IS THE PROCEDURE SAFE?

The procedure is *safe* and *effective*. Complications were more common in the past. But with the use of safer sclerosing agents and the availability of very fine sterile needles, complications today are quite uncommon.

EXHIBIT D



Small spider veins before treatment.

Small spider veins 2 months after treatment.

HOW EFFECTIVE IS THIS PROCEDURE?

Sclerotherapy is effective in at least 90% of patients at improving the veins that are treated. Some veins may require more than one treatment.

IS THERE DISCOMFORT ASSOCIATED WITH SCLEROTHERAPY?

There may be mild discomfort at the site of injection when the procedure is performed. This is caused by the solution and may feel like a stinging or burning sensation. The needle itself is small so there is minimal, if any, discomfort. Some people develop a muscle cramp in the leg or thigh near the veins that are being treated. This is due to the sodium in the saline solution. If a cramp develops, it subsides within minutes after the injection.

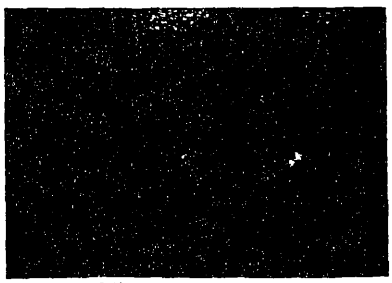
IS IT NECESSARY TO TREAT EVERY VEIN IF I HAVE HUNDREDS OF VEINS?

Usually in any area where there are multiple spider veins or varicose veins, these veins are interconnected. When one vein is injected, the solution gets into the adjacent veins and helps eliminate them. Therefore, it is unnecessary to inject each vein in order to have complete clearing.

WHERE IS SCLEROTHERAPY PERFORMED?

The procedure is done in the doctor's office. After a treatment session you may go back to work or resume normal activities. There is no recuperation period and no need for bed rest.

Spider veins before treatment.



Spider veins 3 months after treatment.

EXHIBIT D

HOW MANY TREATMENT VISITS ARE REQUIRED?

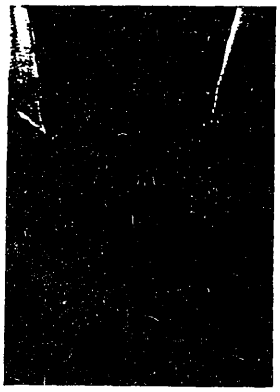
The number of visits depends upon the number of varicose and spider veins that you have. Sometimes only one treatment is needed. However, if there are a great number of veins, several treatment sessions may be required. This can be determined during the first consultation. You should be seen one month after your first treatment to assess the degree of improvement. At that time, if additional veins are present another treatment may be done.

HOW LONG DOES THE PROCEDURE TAKE?

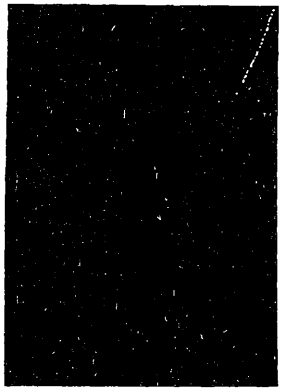
Each session lasts 20 to 30 minutes.

WHAT WILL MY LEGS LOOK LIKE AFTER TREATMENT?

Immediately after a treatment, the skin may be red and there my be some bruising. This color usually disappears within a few days. The treated veins may be firm to the touch until they are absorbed by the body. This process of absorption can take several weeks to several months depending upon the vein size. Before leaving the office, the treated leg or thigh is wrapped with an elastic bandage.



Varicose veins before treatment.



Varicose veins 3 months after treatment.

WILL I HAVE DISCOMFORT AFTER THE PROCEDURE?

Once you leave the office, there is usually no discomfort. However, the elastic bandage may be bothersome because it fits tightly. It remains on for 3 to 7 days, depending on the vein size and location.

ARE THERE ANY LIMITATIONS AFTER THE PROCEDURE OR ANY SPECIAL CARE I MUST PROVIDE?

The elastic bandages may be removed to take a bath or shower but should otherwise be kept on, including at bedtime. Hosiery may be worn over the bandage during the daytime. Some women are prone to swelling of the legs due to fluid retention. If this is a problem the elastic bandage may cause this to be somewhat worse. However, swelling may be seen below the bandages in anyone. This swelling disappears about one day after the bandages are removed. For the first 24 hours after the treatment, it is recommended that no strenuous activity take place, such as running or aerobic exercise. After the first day you may resume all types of activity. Immediately after sclerotherapy you may perform your usual non-strenuous activity, such as going to work.

DO I NEED SOMEONE TO DRIVE ME HOME AFTER A TREATMENT?

No. You should be able to get along well and can even drive yourself.

EXHIBIT D

AFTER A TREATMENT, HOW LONG WILL IT TAKE BEFORE THE VEINS DISAPPEAR?

Spider veins slowly disappear several weeks after the treatment. Large varicose veins may take longer to disappear, sometimes several months. While the veins are fading, there may be some faint redness.

CAN MY LEGS BE EXPOSED TO SUNLIGHT AFTER TREATMENT?

It is recommended that you avoid getting much sunlight to the treated site. If you plan on being outdoors within the first month after the elastic bandage is removed, you should apply at least a #25 SPF sunscreen on the skin over the treated veins.

IF I HAVE MY VEINS TREATED, CAN THEY REAPPEAR?

Once these spider or varicose veins are treated successfully they disappear permanently. However, this treatment does not prevent new veins, that would otherwise have developed, from appearing.

IS THERE ANY HARM DONE IN REMOVING THESE UNSIGHTLY VEINS?

No. These veins are just abnormal veins which have no useful purpose. Their removal is not dangerous since your body doesn't rely on these veins for any useful circulation. By removing them, we don't cause new ones to appear elsewhere on your legs.

WILL TREATING THE VEINS THAT I ALREADY HAVE MAKE IT LESS LIKELY NEW VEINS WILL APPEAR?

Yes. Most spider veins occur in patches connected to one another. These patches slowly enlarge by new veins sprouting out from the original patch. If a patch is treated, then new branches cannot develop. Therefore, treating a site can prevent new veins from developing.

IS THERE ANY TIME OF THE YEAR THAT IS BEST TO HAVE THIS PROCEDURE?

This procedure can be performed any time of the year. However, since there may be a slight bruising and redness to the treated site for a few days to a couple of weeks, you may not want to begin treatment just before taking a vacation or going to the beach.

ARE THERE ANY MEDICAL CONDITIONS WHICH WOULD MAKE ME A POOR CANDIDATE FOR SCLEROTHERAPY?

If you have a history of phlebitis, or blood clot of the legs, this procedure may not be recommended. Before beginning therapy you should inform Dr. Green of any medical problems that you have and all of the medications that you take. Although there is no harmful chemical injected with this procedure, we prefer not to treat women who are pregnant or nursing, since varicose and spider veins that worsen during pregnancy often become smaller or resolve after delivery.

HOW DOES THIS PROCEDURE COMPARE WITH TREATMENT USING A LASER OR AN ELECTRIC NEEDLE?

Laser and electric needle treatments for spider veins scar the overlying skin. The advantage of sclerotherapy is that the needle is placed under the skin directly into the vein. Thus, the likelihood of damaging the skin is greatly reduced.

HOW ABOUT VEIN STRIPPING FOR VARICOSE VEINS?

Only in rare cases is the stripping of large varicose veins, an extensive surgical procedure, required. However, sclerotherapy will usually remove large varicose veins without resorting to surgery. Vein stripping always causes scarring of the legs and thighs.

EXHIBIT D

WHAT OTHER ADVANTAGES DOES SCLEROTHERAPY HAVE OVER SURGERY?

Sclerotherapy is an outpatient procedure done in the office. It doesn't require hospitalization, anesthesia, or loss of time away from work. It costs a fraction of what surgery would cost with less risk of complications. It is the safest method for vein removal available.

ARE THERE ANY RISKS OR SIDE EFFECTS OF SCLEROTHERAPY?

Temporary or permanent discoloration may result from sclerotherapy after the veins have disappeared. This discoloration may parallel the course of the treated vein. However, such discoloration is usually less unsightly than the veins. Scarring of the skin, although rare, is a potential complication. This results from leakage of the saline solution from the vein into the overlying skin. Such scars are usually very small and are much less obvious than scars that invariably result from surgical vein stripping.

HOW SHOULD I PREPARE FOR MY SCLEROTHERAPY OFFICE VISITS?

On the day of your procedure, you should not apply any moisturizer or use any bath oil on your legs or thighs. It would also be helpful if you bring along a pair of shorts to put on in the office since most women find this more comfortable than a gown.

WHO IS QUALIFIED TO PERFORM SCLEROTHERAPY?

Since this technique is a medical procedure it should only be performed by a qualified physician. In particular, the physician should be one who has a great deal of experience in sclerotherapy.

WHAT QUALIFICATIONS DOES DR. GREEN HAVE?

Dr. Green specializes in sclerotherapy and has been performing it for ten years. He lectures nationally and has written scientific articles about sclerotherapy in well recognized medical books and journals. Dr. Green is recognized by his peers as an authority on sclerotherapy.

Also, Dr. Green is *Certified by the American Board of Dermatology*; a *Fellow of the American Academy of Dermatology*; a *Fellow of the American Academy of Facial Plastic and Reconstructive Surgery*; a *Fellow of the American Society for Dermatologic Surgery*; and a *Member of the North American Society of Phlebology*.

DO INSURANCE COMPANIES PAY FOR SCLEROTHERAPY?

Since health insurance plans vary in their benefits, consult your insurance carrier to determine whether sclerotherapy is covered by your policy.

DECISION AND ORDER

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

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, 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 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. Respondent David Green, M.D. ("Dr. Green") is an individual doing business as The Varicose Vein Center, a sole proprietorship ("VVC"). Respondent's principal place of business is located at 4800 Montgomery Lane, Suite M50, Bethesda, Maryland.

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

ORDER

DEFINITIONS

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

1. *"Sclerotherapy"* means the treatment of venous disease by injecting a solution into a vein with a needle.

2. *"Venous disease treatment procedure"* includes, but is not limited to sclerotherapy, laser treatments, electrocautery and surgery.

3. *"Competent and reliable scientific evidence"* means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent David Green, M.D., an individual doing business as The Varicose Vein Center, a sole proprietorship, his successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any venous disease treatment procedure including, but not limited to, sclerotherapy, or of any other cosmetic or plastic surgery procedure, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That spider veins and varicose veins are permanently eliminated following treatment by respondent, or otherwise making any representation regarding the duration of results following treatment by any cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

B. That respondent's treatments succeed in eliminating varicose and spider veins at a rate greater than 95%, or otherwise making any representation regarding the success rate for, or the rate at which a condition is likely to recur or return following treatment by, any

cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

C. That patients do not experience any pain in connection with respondent's regimen for treating their varicose and spider veins, or otherwise making any representation regarding the nature, duration or intensity of pain associated with any cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

D. Otherwise making any representation regarding the efficacy of, or the risks, side-effects, or recovery period associated with, any cosmetic or plastic surgery procedure, including any venous disease treatment procedure;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or his successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

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

III.

It is further ordered, That respondent shall distribute's copy of this order to each of his agents, representatives, and employees, and shall secure from such person a signed statement acknowledging receipt of this order.

IV.

It is further ordered, That, for a period of five (5) years from the date of entry of this order, the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the requirements of this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

EUROPEAN BODY CONCEPTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3590. Complaint, June 23, 1995--Decision, June 23, 1995

This consent order prohibits, among other things, the corporation and its president from making false and unsubstantiated claims that their body wrap causes weight-loss; eliminates cellulite; and is completely safe for all users. In addition, it requires that prominent safety warnings be given to customers.

Appearances

For the Commission: *Nancy S. Warder.*

For the respondents: *Edward Carnot, Carnot, Zapor & Klassen,* Rockville, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, and James Marino, individually and as an officer of said corporations ("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 European Body Concepts, Inc., a Maryland corporation, had its office and principal place of business at 1 Central Plaza, Suite 907, 11300 Rockville Pike, Rockville, Maryland. Respondent European Body Concepts, Inc., a Virginia corporation, had its office and principal place of business at 6564 Loisdale Court, Suite 420, Springfield, Virginia. Respondent European Body Concepts, Inc., a North Carolina corporation, had its office and principal place of business located at 1515 Mockingbird Lane, Suite 410, Charlotte, North Carolina.

Respondent James Marino is the single shareholder and sole officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His office and principal place of business is located at 11940 Alpharetta Highway, Suite 907, Alpharetta, Georgia.

PAR. 2. Respondents have advertised, offered for sale, and sold weight loss and weight maintenance services and products that they have made available at corporately owned European Body Concepts outlets. These products and services include treatments using medical bandages that are soaked in a solution and wrapped around the bodies of users who are then clothed in vinyl body suits ("European Body Wrap treatment"). The European Body Wrap treatment involves the use of drugs and/or devices as "drug" and "device" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

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 for their European Body Wrap treatment including, but not necessarily limited to, the advertisements attached hereto as Exhibits A through J. These advertisements contain the following statements:

A. ANNOUNCER: Have you looked at yourself in the mirror lately?

WOMAN [in complaining voice]: All these bumps and bulges and ugly cellulite.

ANNOUNCER: If you're tired of the way you look, tired of the way you feel, call European Body Concepts. We'll rid you of those unwanted inches, bumps and bulges without strict diets or strenuous exercise. We'll wrap you in our all natural mineral solution. We guarantee you'll lose 6 to 30 inches on your first visit or it's free. And it only takes an hour. Right now your introductory visit is $19.95. This is a limited time offer so call today and watch those inches disappear.

["Wrap it up" lyrics and music continue until end of ad]

European Body Concepts, with 3 convenient locations. In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . What have you got to lose, but inches. (Exhibit A, radio ad)

B. ANNOUNCER: It's almost that time of year again and the beaches are waiting. It's time to get ready for your bathing suit. Look great without those extra pounds, inches and cellulite with European Body Concepts. The only program that guarantees you'll lose a total of 6 to 30 inches on your first visit or it's free. Men

and women clients agree it really works. Just follow the plan and with each visit watch the pounds and inches disappear. Call now and for a limited time your first visit is only $19.95. There are no hidden costs such as special foods, vitamins or pills and our staff will assist you in every way. A smaller bathing suit size is awaiting you.

["Wrap it up" lyrics and music played briefly]

So call today and watch those inches start disappearing before you head to the beach. European Body Concepts wraps you in our unique mineral solution while you just relax. Call today.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit B, radio ad)

C. ANNOUNCER: The winds of autumn are coming and before you know it, the holiday parties with all their tempting morsels will be threatening your waistline. Don't wait 'til things get out of control this year, let European Body Concepts help you get a handle on extra pounds and inches. Amazingly, if you call now your first visit is still only $19.95. Check around, nowhere else will you find a safer, more effective weight control program at a better price. European Body Concepts can wrap you all over or just your problem areas. And we guarantee you'll lose 6 to 30 inches on your first visit. Come in now for your European Body Concepts mineral body wrap and watch those inches disappear in just one hour. How can you lose? European Body Concepts with 3 convenient locations. Call us now.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit C, radio ad)

D. ANNOUNCER: Wait a minute! Will you have this much fun this summer with those extra pounds and inches?

WOMAN [in complaining voice]: Oh, my swim suit didn't look like this last year.

ANNOUNCER: Increase your summer fun factor this year with European Body Concepts. Thousands of our clients have taken-off inches just in time for the summer and you can too. There's still time to look great for the beach season with a European Body Concepts revolutionary body wrap system at an affordable price. Only $19.95 for your first visit if you call now. Hurry, this offer won't last much longer. The European Body Concepts program is fast, easy and affordable. And we guarantee you'll see results on your first visit. Lose 6 to 30 inches or it's free.

["Wrap it up" lyrics and music until end of ad]

Call now. In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit D, radio ad)

E. ANNOUNCER: Now's the time to join the thousands of people who are losing inches fast. European Body Concepts, now with 3 Washington locations, celebrates the grand opening of their new Springfield location with a special offer. European Body Concepts guarantees you'll lose 6 to 30 inches on your first visit, or it's free.

MALE CONSUMER: I've lost 60 inches.

FEMALE CONSUMER: I've lost 91 and 3/4 inches.

ANNOUNCER: These are actual European Body Concepts clients. Your results may vary.

FEMALE CONSUMER: I like that it works and that the inches stay off.

ANNOUNCER: We'll wrap you in our special mineral solution and in only one hour you'll lose 6 to 30 inches. Call today for a limited time introductory offer of just $14.95 for your first visit. You have nothing to lose, but inches.

FEMALE CONSUMER: I have recommended it to many friends.

MALE CONSUMER: I feel good.

ANNOUNCER: European Body Concepts, now with a new Springfield location. Call 313-WRAP. That's 313-W-R-A-P . . . . (Exhibit E, radio ad)

F. ANNOUNCER: What can European Body Concepts do for you?

FEMALE CONSUMER: I lost 9 inches my first visit.

ANNOUNCER: Help you lose unwanted inches and pounds easily. Here's your chance to join thousands of successful European Body Concepts clients.

MALE CONSUMER: I feel great. I like it. I enjoy it. I look forward to it. I look forward to going. It's relaxing. I enjoy the weigh in. It's the best. It's marvelous.

ANNOUNCER: Right now for a limited time your first visit is only $19.95. Plus, we guarantee you'll lose 6 to 30 inches in the first hour or it's free.

MALE CONSUMER: I was plannin' on losing weight but I didn't think I'd take that much, that many pounds off, but I did.

ANNOUNCER: These are actual clients. Your results may vary. You've got nothing to lose but inches. Call European Body Concepts right now and take advantage of our special $19.95 offer. Lose 6 to 30 inches in the first hour or it's free. In Tysons call 758-WRAP, 758-W-R-A-P. . . .

MALE CONSUMER: I'm living proof that it has worked.

ANNOUNCER: So what are you waiting for? Wrap it up with European Body Concepts. (Exhibit F, radio ad)

G. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

CORINNE [shown speaking]: With this system, you don't get hungry, you don't have to do all these tremendous exercise routines, you don't wear yourself out, you eat the foods that you want to eat, that's the bottom line, it works. It really works.

[full screen video: Corinne Hathaway lost 26 inches and 15 pounds in only 5 visits]

ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. . . . (Exhibit G, television ad)

H. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 itches on your first visit to European Body Concepts or it's free!

RICHARD [shown speaking]: I've gone down three sizes in my pants size. I've lost 58 pounds.

[full screen video: Richard Shaughnessy lost 44 ½ Inches & 58 Pounds]

RICHARD: I've tried other plans prior to European Body Concepts but the weight would come off, the inches would come off and come right back on. This time, the inches and weight have gone off, stayed off.

ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. . . . (Exhibit H, television ad)

I. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

DIANE [shown speaking]: I've lost 5 dress sizes and it's the first program that I really have stuck to and felt very comfortable with.

[full screen video: Diane Boyle lost 116 ½ inches]

DIANE: European Body Concepts is not hard to do, the weight came off very easily, the inches. Each time I went it would be a couple more inches and they would start adding up.

ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. . . . (Exhibit I, television ad)

J. IS THE BODY WRAP HARMFUL?

No. The treatments have proven perfectly safe and non-allergenic. If you have a serious medical problem, we would ask that you consult your physician for our own peace of mind. We will not wrap women during pregnancy, clients who have had recent surgery and have unhealed incisions, or clients with large abrasions or rashes for obvious reasons. Many of our clients have heart trouble, diabetes, kidney or liver problems, varicose veins, asthma, etc. We have not found any condition that the body wrap will aggravate or hurt.

. . . .

BENEFITS AND ADVANTAGES TO YOU

- 100% safe and effective (Exhibit J, brochure)

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

A. The European Body Wrap treatment causes users to lose significant numbers of inches from their body measurements;

B. The European Body Wrap treatment causes significant weight loss;

C. The European Body Wrap treatment causes significant inch and weight loss without diet or exercise;

D. The European Body Wrap treatment causes fast and easy inch and weight loss;

E. The European Body Wrap treatment eliminates cellulite;

F. The European Body Wrap treatment causes weight loss at or reduction in the size of specific areas of the body;

G. Users of the European Body Wrap treatment are successful in maintaining their weight and inch loss; and

H. The European Body Wrap treatment is completely safe for all users.

PAR. 6. In truth and in fact:

A. The European Body Wrap treatment does not cause users to lose significant numbers of inches from their body measurements;

B. The European Body Wrap treatment does not cause significant weight loss;

C. The European Body Wrap treatment does not cause significant inch or weight loss without diet or exercise;

D. The European Body Wrap treatment does not cause fast or easy inch or weight loss;

E. The European Body Wrap treatment does not eliminate cellulite;

F. The European Body Wrap treatment does not cause weight loss at or reduction in the size of specific areas of the body;

G. Users of the European Body Wrap treatment are not successful in maintaining their weight and inch loss; and

H. The European Body Wrap treatment is not completely safe for all users.

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

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached hereto as Exhibits A through J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. 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 seven was, and is, false and misleading.

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits E through I, respondents have represented, directly or by implication, that the testimonials from consumers appearing in advertisements for the European Body Wrap treatment reflect the typical or ordinary experience of members of the public who have used the treatment.

PAR. 10. In truth and in fact, the testimonials from consumers appearing in advertisements for the European Body Wrap treatment

do not reflect the typical or ordinary experience of members of the public who have used the treatment. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. In their advertising and sale of the European Body Wrap treatment, respondents have represented that the European Body Wrap treatment is completely safe for all users. Respondents have failed to disclose that the European Body Wrap treatment may be dangerous to the health of people with certain medical conditions, including heart disease, high or low blood pressure, or diabetes. This fact would be material to consumers in their purchase or use decisions regarding the treatment. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

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

Chairman Pitofsky not participating.

EXHIBIT A

"BUMPS AND BULGES"

ANNOUNCER: Have you looked at yourself in the mirror lately?
WOMAN [in complaining voice]: All these bumps and bulges and ugly cellulite.
ANNOUNCER: If you're tired of the way you look, tired of the way you feel, call European Body Concepts. We'll rid you of those unwanted inches, bumps and bulges without strict diets or strenuous exercise. We'll wrap you in our all natural mineral solution. We guarantee you'll lose 6 to 30 inches on your first visit or it's free. And it only takes an hour. Right now your introductory visit is $19.95. This is a limited time offer so call today and watch those inches disappear.
["Wrap it up" lyrics and music continue until end of ad]
European Body Concepts, with 3 convenient locations. In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P. What have you got to lose, but inches.

EXHIBIT B

"BEACHES ARE WAITING"

ANNOUNCER: It's almost that time of year again and the beaches are waiting. It's time to get ready for your bathing suit. Look great without those extra pounds, inches and cellulite with European Body Concepts. The only program that guarantees you'll lose a total of 6 to 30 inches on your first visit or it's free. Men and women clients agree it really works. Just follow the plan and with each visit watch the pounds and inches disappear. Call now and for a limited time your first visit is only $19.95. There are no hidden costs such as special foods, vitamins or pills and our staff will assist you in every way. A smaller bathing suit size is awaiting you.
["Wrap it up" lyrics and music played briefly]
So call today and watch those inches start disappearing before you head to the beach. European Body Concepts wraps you in our unique mineral solution while you just relax. Call today.
In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

EXHIBIT C

"HOLIDAY PARTIES"

ANNOUNCER: The winds of autumn are coming and before you know it, the holiday parties with all their tempting morsels will be threatening your waistline. Don't wait 'til things get out of control this year, let European Body Concepts help you get a handle on extra pounds and inches.
Amazingly, if you call now your first visit is still only $19.95. Check around, nowhere else will you find a safer, more effective weight control program at a better price. European Body Concepts can wrap you all over or just your problem areas. And we guarantee you'll lose 6 to 30 inches on your first visit. Come in now for your European Body Concepts mineral body wrap and watch those inches disappear in just one hour. How can you lose? European Body Concepts with 3 convenient locations. Call us now.
In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

EXHIBIT D

"SUMMER FUN"

ANNOUNCER: Wait a minute! Will you have this much fun this summer with those extra pounds and inches?
WOMAN [in complaining voice]: Oh, my swim suit didn't look like this last year.
ANNOUNCER: Increase your summer fun factor this year with European Body Concepts. Thousands of our clients have taken off inches just in time for the summer and you can too. There's still time to look great for the beach season with a European Body Concepts revolutionary body wrap system at an affordable price. Only $19.95 for your first visit if you call now. Hurry, this offer won't last much longer. The European Body Concepts program is fast, easy and affordable. And we guarantee you'll see results on your first visit. Lose 6 to 30 inches or it's free.
["Wrap it up" lyrics and music until end of ad]
Call now. In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

EXHIBIT E

"THOUSANDS OF PEOPLE"

ANNOUNCER: Now's the time to join the thousands of people who are losing inches fast. European Body Concepts, now with 3 Washington locations, celebrates the grand opening of their new Springfield location with a special offer. European Body Concepts guarantees you'll lose 6 to 30 inches on your first visit, or it's free.
MALE CONSUMER: I've lost 60 inches.
FEMALE CONSUMER: I've lost 91 and 3/4 inches.
ANNOUNCER: These are actual European Body Concepts clients. Your results may vary.
FEMALE CONSUMER: I like that it works and that the inches stay off.
ANNOUNCER: We'll wrap you in our special mineral solution and in only one hour you'll lose 6 to 30 inches. Call today for a limited time introductory offer of just $14.95 for your first visit. You have nothing to lose, but inches.
FEMALE CONSUMER: I have recommended it to many friends.
MALE CONSUMER: I feel good.
ANNOUNCER: European Body Concepts, now with a new Springfield location. Call 313-WRAP. That's 313-W-R-A-P, or in Rockville, call 468-WRAP. And in Tysons call 758-WRAP. European Body Concepts. The new number in Springfield is 313-WRAP.

EXHIBIT F

"WRAP IT UP"

ANNOUNCER: What can European Body Concepts do for you?
FEMALE CONSUMER: I lost 9 inches my first visit.
ANNOUNCER: Help you lose unwanted inches and pounds easily. Here's your chance to join thousands of successful European Body Concepts clients.
MALE CONSUMER: I feel great. I like it. I enjoy it. I look forward to it. I look forward to going. It's relaxing. I enjoy the weigh in. It's the best. It's marvelous.
ANNOUNCER: Right now for a limited time your first visit is only $19.95. Plus, we guarantee you'll lose 6 to 30 inches in the first hour or it's free.
MALE CONSUMER: I was plannin' on losing weight but I didn't think I'd take that much, that many pounds off, but I did.
ANNOUNCER: These are actual clients. Your results may vary. You've got nothing to lose but inches. Call European Body Concepts right now and take advantage of our special $19.95 offer. Lose 6 to 30 inches in the first hour or it's free. In Tysons call 758-WRAP, 758-W-R-A-P. Rockville call 468-WRAP, 468-W-R-A-P. Springfield call 313-WRAP, 313-W-R-A-P.
MALE CONSUMER: I'm living proof that it has worked.
ANNOUNCER: So what are you waiting for? Wrap it up with European Body Concepts.

EXHIBIT G

"CORINNE H."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!
CORINNE [shown speaking]: With this system, you don't get hungry, you don't have to do all these tremendous exercise routines, you don't wear yourself out, you eat the foods that you want to eat, that's the bottom line, it works. It really, works.
[full screen video: Corinne Hathaway lost 26 inches and 15 pounds in only 5 visits]
ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.
[full screen video: Your introductory visit to European Body Concepts is only $19.95!
European Body Concepts
In Springfield call 313-WRAP
9 7 2 7
In Tysons call 758-WRAP
9 7 2 7
In Rockville call 468-WRAP
9 7 2 7]

EXHIBIT H

"RICHARD S."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!
RICHARD [shown speaking]: I've gone down three sizes in my pants size. I've lost 58 pounds.
[full screen video: Richard Shaughnessy lost 44 ½ Inches & 58 Pounds]
RICHARD: I've tried other plans prior to European Body Concepts but the weight would come off, the inches would come off and come right back on. This time, the inches and weight have gone off, stayed off.
ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.
[full screen video: Your introductory visit to European Body Concepts is only $19.95!
European Body Concepts
In Springfield call 313-WRAP
9 7 2 7
In Tysons call 758-WRAP
9 7 2 7
In Rockville call 468-WRAP
9 7 2 7]

EXHIBIT I

"DIANE B."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!
DIANE [shown speaking]: I've lost 5 dress sizes and its the first program that I really have stuck to and felt very comfortable with.
[full screen video: Diane Boyle lost 116 ½ inches]
DIANE: European Body Concepts is not hard to do, the weight came off very easily, the inches. Each time I went it would be a couple more inches and they would start adding up.
ANNOUNCER: Your introductory visit to European Body Concepts is only $19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.
[full screen video: Your introductory visit to European Body Concepts is only $19.95!
European Body Concepts
In Springfield call 313-WRAP
9 7 2 7
In Tysons call 758-WRAP
9 7 2 7
In Rockville call 468-WRAP
9 7 2 7]

BENEFITS AND ADVANTAGES TO YOU

- Noticeable difference in one visit
- Works for men & women
- No special foods to buy
- No pills or shots
- No exhausting exercise or perspiration
- 100% safe and effective
- Skin feels tighter, cleaner & silky soft
- Great maintenance program

AND BEST OF ALL A SLIMMER AND TRIMMER LOOKING YOU STARTING TODAY

Sounds incredible but we prove it every hour of the day with our thousands of clients that have been to European Body Concepts.

EUROPEAN BODY CONCEPTS, INC

8260 Greensboro Drive
Suite 550
McLean, VA 22102
703-758-9727

6564 Loisdale Ct.
Suite 420
Springfield, VA 22150
703-313-9727

11300 Rockville Pike
Suite 907
Rockville, MD 20852
301-468-9727

YOU WERE MEANT TO BE BEAUTIFUL

EUROPEAN BODY CONCEPTS, INC.

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 send 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 consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Maryland, with its office and principal place of business formerly located at 1 Central Plaza, Suite 507, 11300 Rockville Pike in the City of Rockville, State of Maryland.

Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Virginia, with its office and principal place of business formerly located at 6564 Loisdale Court, Suite 420 in the City of Springfield, State of Virginia.

Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of North Carolina, with its office and principal place of business formerly located at 1515 Mockingbird Lane, Suite 410 in the City of Charlotte, State of North Carolina.

Respondent James Marino is an officer of said corporations. He formulated, directed, and controlled the policies and practices of said corporations, and his principal office and place of business is located at 11940 Alpharetta Highway, Suite 709 in the City of Alpharetta, State of Georgia.

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

For purposes of this order:

1. *"Clearly and prominently"* means as follows:

A. In a television or videotape advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement the disclosure shall be in at least twelve (12) point type, in print that contrasts with the background against which it appears, and in a location that is sufficiently noticeable that the ordinary consumer will see and read it.

2. *"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.

3. *"European Body Wrap treatment"* means the treatment used at European Body Concepts centers during which clients are wrapped in medical bandages and placed in vinyl body suits.

I.

It is ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the European Body Wrap treatment or any substantially similar treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such treatment causes weight loss;

B. Such treatment causes weight loss without diet or exercise;

C. Such treatment causes fast or easy weight loss;

D. Such treatment eliminates cellulite;

E. Such treatment causes weight loss at specific areas of the body;

F. Users of such treatment are successful in maintaining their weight loss;

G. Users of such treatment are successful in maintaining their inch loss; or

H. Such treatment is completely safe for all users.

II.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division

or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any body wrap treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Such treatment causes users to lose inches from their body measurements;

B. Such treatment causes inch loss without diet or exercise;

C. Such treatment causes fast or easy inch loss; or

D. Such treatment causes reduction in the size of specific areas of the body;

unless, (1) such representation is true, and at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; and (2) respondents disclose, clearly and prominently, that: (a) any inch loss or reduction in body size will be temporary; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that any such inch loss or reduction in body size will not be temporary; and (b) such treatment does not cause weight loss; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such treatment causes weight loss.

III.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the European Body Wrap treatment or any substantially similar treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of any such treatment, unless respondents disclose, clearly and prominently, and in close proximity to such representation that the treatment may be dangerous to the health of people with heart disease, high or low blood pressure, or diabetes and that any such person should consult a doctor before using the treatment;

B. Failing to disclose prior to purchase the warning set forth below to each prospective user of any such treatment:

(i) By including the warning in the program description brochure delivered to each such person, with the warning printed in bold on the front panel in ten (10) point type surrounded by a bold two (2) point rule, in print that contrasts with the background against which it appears; or

(ii) If respondents cease to provide prospective users with a program description brochure, by delivering to each such person a five (5) by eight (8) inch card on which the warning and nothing else is printed in twelve (12) point type:

"CAUTION: If you suffer from heart disease, high or low blood pressure, or diabetes, you should consult your physician before using this treatment to determine whether it poses a risk to your health;" and

C. Failing to post in a conspicuous place where it is likely to be noticed by, and is legible to, prospective users, in the reception area of any location where any such treatment is offered for sale, sold, or used, a sign containing the warning in subpart B and nothing else printed in letters one inch high.

IV.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division

or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any weight control or weight reduction treatment, program, product, or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such treatment, program, product, or service has any effect on weight or body size, unless they disclose, clearly and prominently, and in close proximity to such representation that diet and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the treatment, program, product, or service is effective without either dieting or increasing exercise.

V.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as the sole officer and director of said corporations; and respondents, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any weight control or weight reduction treatment, program, product, or service 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, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) represents the typical or ordinary experience of members of the public who use such treatment, program, product, or service.

VI.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any treatment, program, product, or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that:

A. Such treatment, program, product, or service has any weight control, weight loss or weight maintenance benefit;

B. Such treatment, program, product, or service has any effect on cellulite;

C. Such treatment, program, product, or service has any effect on users' body measurements; or

D. Using any such treatment, program, product, or service designed or used to prevent weight gain or produce weight loss, reduce or eliminate fat or cellulite, or reduce body measurements is safe or without risk;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VII.

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

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IX.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, and European Body Concepts, Inc., a North Carolina corporation, shall:

A. Within thirty (30) days after service of the order, provide a copy of this order to each of respondents' 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 issuance of this order, provide a copy of this order to each of respondents' future 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 assumes his or her responsibilities.

X.

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

A. Copies of all advertisements which contain any such representation, including tape recordings of all broadcast advertisements;

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

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including but not limited to, complaints from consumers and complaints or inquiries from government organizations.

XI.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, 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, or any other corporate change that may affect compliance obligations arising out of this order.

XII.

It is further ordered, That respondent James Marino shall for a period of five (5) years from the date of issuance of the order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them 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 they have complied with this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

MATTEL, INC.

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

Docket C-3591. Complaint, June 23, 1995--Decision, June 23, 1995

This consent order prohibits, among other things, a California-based corporation from representing that any aerosol product it sells offers any environmental benefit, unless it can substantiate the claim.

Appearances

For the Commission: *Michael Dershowitz, Kevin Bank* and *Michael Ostheimer.*

For the respondent: *James M. Johnstone, Wiley, Rein & Fielding*, Washington, D.C.

COMPLAINT

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

PARAGRAPH 1. Respondent Mattel, Inc. ("Mattel"), is a Delaware corporation with its principal office or place of business at 333 Continental Blvd., El Segundo, CA.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed foam soap products including Barbie Bath Blast Fashion Foam Soap, and other products to the public. Barbie Bath Blast Fashion Foam Soap contains hydrochlorofluorocarbons -- chlorodifluoroethane (HCFC-142b) and chlorodifluoromethane (HCFC-22).

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Barbie Bath Blast Fashion Foam Soap, including but not necessarily limited to the attached Exhibit A.

The aforesaid product labeling (Exhibit A) includes the following statements:

Contains no
Chlorofluorocarbons (CFC's)
Non-Irritant Non-Toxic

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product labeling attached as Exhibit A, respondent has represented, directly or by implication, that because Barbie Bath Blast Fashion Foam Soap contains no chlorofluorocarbons, it will not deplete the earth's ozone layer or otherwise harm or damage the atmosphere.

PAR. 6. In truth and in fact, Barbie Bath Blast Fashion Foam Soap contains the harmful ozone-depleting ingredients chlorodifluoroethane (HCFC-142b) and chlorodifluoromethane (HCFC-22), which harm or cause damage to the atmosphere by contributing to the depletion of the earth's ozone layer. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

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

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

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

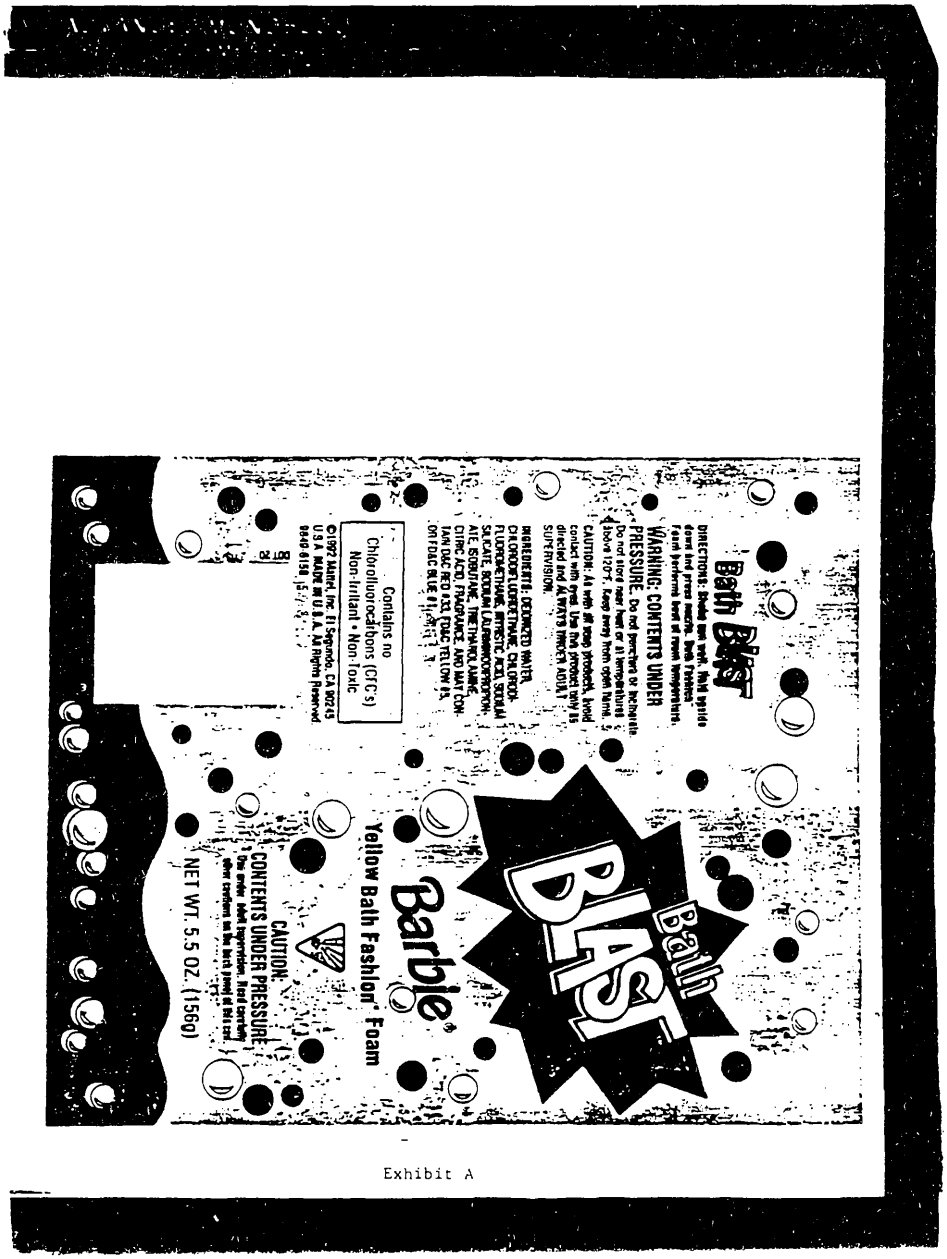


Exhibit A

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 violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mattel, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 Continental Blvd., El Segundo, California.

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

ORDER

DEFINITIONS

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

placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

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

VI.

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

Chairman Pitofsky not participating.

Re: The proposal to adopt and enforce certain accrediting standards on tuition and fees would not violate antitrust laws. [*Accrediting Commission on Career Schools and Colleges of Technology, P944015*]

January 19, 1995

Dear Mr. Pelesh:

This letter responds to your request on behalf of the Accrediting Commission on Career Schools and Colleges of Technology for an advisory opinion on the permissible means, under the antitrust laws, of adopting and enforcing an accrediting standard on tuition and fees, as the Higher Education Amendments of 1992 require. You have proposed three possible standards by which your organization might assess tuition and fees, and asked us to provide guidance on the permissibility of each.

On the basis of information you provided, the Commission has no present objection to an accreditation program along the lines of your third proposal, but believes your first and second proposals raise substantial antitrust concerns.

I. BACKGROUND OF THE REQUEST

According to the request for advisory opinion, the Accrediting Commission on Career Schools and Colleges of Technology ("ACCSCT") is a private, nonprofit organization that adopts and enforces standards for accrediting and evaluating educational institutions with trade and technical objectives. The United States Department of Education ("DOE" or "Department") recognizes ACCSCT under the Higher Education Act of 1965 as a reliable authority on the quality of its accredited institutions, education and training. To participate in federal student financial assistance programs, a post-secondary institution of higher education must maintain accreditation from a recognized organization such as ACCSCT. ACCSCT is a membership organization, composed of the accredited schools. Five of its eleven Commissioners have no affiliation with any of the schools accredited by ACCSCT, while six are owners or executives of accredited schools.

In 1992, Congress re-authorized the student financial assistance programs of the Higher Education Act with the Higher Education Amendments of 1992. Through this re-authorization, Congress specified in great detail the requirements that accrediting agencies like ACCSCT must meet in order to receive DOE recognition. One requirement is that their accrediting standards assess the institutional "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." 20 U.S.C. 1099b(a)(5). ACCSCT will be eligible for re-recognition in Fall of 1995, at which time DOE expects it to have adopted new accreditation standards on tuition and fees.

The Department of Education's Notice of Proposed Rulemaking ("NPRM") included a commentary in which the Department proposed that accrediting organizations use one of three ratios comparing tuition to expected earnings to determine whether tuition and fees are excessive. DOE stated that it could recognize an accrediting agency even if its standards departed from these proposals, but that the agency would bear the burden of justifying different standards. 59 Fed. Reg. at 22,273. The DOE rules implementing the statutory requirements for accrediting standards repeat the statutory provisions, without including the ratios in the NPRM commentary. 34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994).

II. EFFECT OF THE 1992 HIGHER EDUCATION AMENDMENTS

ACCSCT has raised the possibility that Congress impliedly exempted educational accrediting bodies from the antitrust laws when it required them to adopt a standard assessing tuition and fees in order to be recognized by DOE. It is well-established, however, that, where antitrust immunity is not express, it is disfavored and to be implied only where "necessary to make the . . . [a]ct work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see also United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945). Indeed, except for industries in which Congress has committed pricing to agency regulation rather than to normal market forces, *see e.g., Keogh v. Chicago & Northwestern Railroad*, 260 U.S. 156 (1922) (Interstate Commerce Commission rates), the courts have found

implied repeal very rarely and then only under extremely limited circumstances.

The courts have found an implied repeal where Congress has established a substantial regulatory scheme and there is a clear repugnancy between that scheme and the application of the antitrust laws to the conduct in question. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (statute provided for Securities and Exchange Commission review of exchange's self-regulation of commission rates so that application of antitrust laws conflicted with SEC's vigorous supervision of such rates); *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975) (finding price-fixing on inter-dealer sales of mutual fund shares immune because of conflict between antitrust laws and regulatory scheme; Congress had given agency power over such sales and agency had accepted practice over long period); *Behagen v. Amateur Basketball Association of the U.S.*, 884 F.2d 524, 529 (10th Cir. 1989) (court found an implied repeal in rejecting the claim that the antitrust laws prohibited an amateur athlete's exclusion from defendant Association; Amateur Sports Act required the establishment of gatekeeping, governance organizations to determine amateur eligibility); *see also Thill v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970) (remanding for determination whether restriction on sharing commissions was necessary to meet the goals of the Securities Exchange Act).

Absent a clear repugnancy between the antitrust laws and the regulatory scheme, however, the courts have rejected the implied repeal claim. *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985) (no implied repeal because no conflict between antitrust laws and Commodities Futures Trading Commission's oversight); *Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 981 (1985) (Robinson-Patman Act not preempted by regulations promulgated under the Emergency Petroleum Allocation Act because no conflict between statutes); *Huron Valley Hospital v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981) (no implied repeal where no direct conflict between antitrust laws and National Health Planning Act); *Essential Communications Systems v. AT&T*, 610 F.2d 1114 (3d Cir. 1979) (no implied repeal because no conflict between antitrust laws and Federal Communication Commission's regulatory activities).

The courts have refused to imply a repeal when the regulatory scheme did not protect consumer interests by supervising the challenged conduct. In rejecting a claim that the securities regulatory scheme conflicted with the antitrust laws and thus implied antitrust immunity, the Supreme Court noted that:

> By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of * * * [improper collective action] over which the Commission has no authority . . . ." . . . . Since the antitrust laws serve, among other things, to protect competitive freedom . . . it follows that the antitrust laws are peculiarly appropriate as a check on the anticompetitive acts of exchanges . . . . Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.

Silver, 373 U.S. at 357 (no implied exemption because exchange's rule that excluded non-members from access to exchange without a hearing not necessary to make securities act work), quoting *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 460.

The Commission believes the 1992 Higher Education Act amendments do not impliedly repeal the antitrust laws as they apply to the technical school industry. Congress has not authorized the Department of Education to supervise or review accrediting agency self-policing of tuition and fees. The most persuasive argument for an implied repeal is that Congress, in requiring that accrediting agencies have a standard for assessing tuition, intended for them to exclude any school with a tuition that is unreasonable in light of expected earnings. Indeed, the tuition assessment standard seems superficially similar to the eligibility standard at issue in the Behagen case. There, the Amateur Sports Act authorized the U.S. Olympic Committee to recognize and monitor a governance organization in each sport to determine amateur eligibility and provide a mechanism to assure compliance with the Act. 884 F.2d at 528. In dismissing a group boycott claim against a governance organization for its refusal to reinstate an athlete's amateur status, the Tenth Circuit held that the defendant Association's "actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics." *Id.* at 527. The court noted that the Association's "monolithic control exerted . . . over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports

Act." *Id.* at 528. The court added that the Association "could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." *Id.* at 529.

Unlike Behagen, the 1992 Higher Education Act Amendments do not require accrediting agencies to fix tuition levels; they merely require that accrediting agencies have a standard for assessing tuition as one of many standards for determining accreditation. (ACCSCT's submission of a less restrictive accreditation standard, requiring only disclosure, indicates that setting tuition levels is not necessary to achieve the statute's mandate to curb school loan abuse. Indeed, as noted above, the Department stated that it would recognize an accrediting agency even if its standards departed from DOE's suggested tuition-to-expected-earnings ratios.) Thus, there is no broad or inherent conflict between the antitrust laws and the regulatory regime. *Cf. Behagen*, 884 F.2d at 529 ("Behagen complains of exactly that action which the Act directs"); *see also Gordon*, 422 U.S. at 692 (Stewart, J., concurring) ("The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants").

III. ANALYSIS OF ACCSCT'S PROPOSED STANDARDS

A. First Proposed Standard

Under ACCSCT's first proposed standard, ACCSCT would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard by withdrawing accreditation. The standard might use one of the following three measures to cap tuition at a certain level: (1) a percentage of annualized minimum wage, (2) a percentage of graduates' earnings for their first year of employment, or (3) a percentage of average annualized wages. ACCSCT believes that adopting this standard would require it to collect tuition data from its members, define acceptable tuition limits, and enforce its standard by potentially withdrawing accreditation. Thus, ACCSCT members would in effect be agreeing to charge no more than the ACCSCT standard would allow.

As ACCSCT recognizes, such a standard, like any system for collective competitor regulation of prices, raises grave antitrust concerns. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum price fixing is *per se* illegal); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (maximum price fixing is *per se* illegal); McLean County Chiropractic Association, 59 Fed. Reg. 22163 (April 29, 1994) (consent order settling FTC charges that chiropractor association members fixed maximum prices); *see also* American Medical Association (FTC Advisory Opinion, February 14, 1994) (adopting fee peer review program with disciplinary sanctions would present serious antitrust concerns, because it would allow competitors to set the maximum fees of their rivals) ("AMA Opinion").

Even under a rule of reason approach similar to the Third Circuit's approach in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), ACCSCT's first proposal would pose significant antitrust risks. An accrediting criterion based an tuition and fee level would be inherently suspect because it sets prices and impedes the ordinary functioning of the free market. *Brown University*, 5 F.3d at 674; *see generally Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988).

Further, the only efficiency justification that ACCSCT could coffer would be that the standard "protects" consumers, because unfettered competition over tuition levels is unwise or dangerous. The Courts have consistently rejected this argument as "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *see also FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 463 (1986); *Brown University*, 5 F.3d at 676-77. Moreover, even if consumer protection justified regulation of tuition levels, the first proposed standard is not reasonably necessary to achieve this objective. Courts often rule that such overbroad restraints are unreasonable and in violation of the antitrust laws. *See Brown University*, 5 F.3d at 678-79; *Bhan v. NME Hospitals*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 151-52 n.18 (3d Cir. 1981). The fact that ACCSCT has proffered less restrictive alternatives that it believes can achieve the statutory goal of assessing tuition and fees for trade school consumers indicates that the proposed standard is not reasonably necessary.

B. Second Proposed Standard

Under the second proposed standard, ACCSCT would collect and analyze tuition information from accredited schools to compare the tuition charged for a given program at a particular school with that charged for similar programs and schools. Any tuition in the ninetieth percentile or above of similar programs would trigger requirements that the school explain why its tuition was so high and provide this information to students and prospective students.

This approach appears to be less restrictive than the first, primarily because, rather than denying accreditation, it would require that a school disclose and justify its relative tuition. Nonetheless, because it targets for attention institutions charging prices of a certain top percentage or level, the standard may have the same effect as the first proposed standard. Hence there is a substantial danger that implementation of this standard may violate the antitrust laws. *See Maricopa*, 457 U.S. at 332.

In evaluating the reasonableness of the standard, the Commission would find the following factors particularly relevant. First, targeting would identify high tuition schools, opening them up to pressure to conform. Indeed, that appears to be the very purpose of the standard.

Second, the Commission in reviewing association fee peer review programs has emphasized the increased potential for antitrust problems where participation is mandatory. *See AMA Opinion,* at 6*; Iowa Dental Association*, 99 FTC 648 (1982) (advising association not to discipline members who refuse to use peer review process or accept its guidance). Here, the mandatory nature of ACCSCT's proposed standard compounds the antitrust concerns.

Third, the potential for antitrust concern is reduced when peer review programs involve mediation of specific fee disputes. A peer review program based on tuition or fees runs a more serious antitrust risk when it involves review of all schools' tuition levels, particularly in the form of a systematic exchange of data and identification of schools with high tuition. *See Iowa Dental Association*, 99 FTC at 649 ("Competition will be best protected if all concerned parties view fee peer review as a means of mediating specific fee disputes, rather than a process for the collective sanctioning of fee levels or particular practices").

Finally, as discussed above, the antitrust laws do not condone a restraint that is not reasonably necessary to achieve its stated

procompetitive objective. *See Brown University*, 5 F.3d at 678-79; *Fleer Corp.*, 658 F.2d at 151-52 n.18. Thus, the availability of a less restrictive plan (ACCSCT's third proposed standard) suggests that its second proposed standard would fail to meet this test.

C. Third Proposed Standard

As a third alternative for assessing tuition and fees, ACCSCT proposes a standard requiring schools to inform students in the catalog, enrollment agreement, and other publications that they may obtain information about tuition charges for comparable programs from ACCSCT. ACCSCT would collect tuition information from accredited schools and make it available to students who could use the information to compare the cost of similar programs at other institutions.

Based upon the information ACCSCT has provided, there appears to be little cause for concern that the information exchange contemplated by ACCSCT will have any anticompetitive effects. The school tuition information ACCSCT proposes to collect already is widely available and easily accessible to the industry, alleviating the concern that members would use the exchange to set prices. *Cf. United States v. Container Corp of America*, 393 U.S. 333, 335 (1969) (striking down exchange among competitors of information that "was not available from another source"); *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 605 (1925) (when information is publicly available, court will not infer purpose to fix prices).

The procompetitive effects of increasing consumers' access to information about relative trade school tuition levels could outweigh any potential anticompetitive concerns raised by the collection of tuition data. *See Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925) (association survey of members' prices held not unlawful under rule of reason). To the extent ACCSCT's proposal will provide information useful to trade school consumers, it is likely to promote competition. *See AMA Opinion,* at 3. Indeed, ACCSCT could require other disclosures, *e.g.*, how the tuition level compares to graduates' earnings for their first year of employment, as a condition of accreditation without injuring consumers or violating the antitrust laws.

Thus, insofar as ACCSCT merely collects tuition information and disseminates that information to students, it would not be likely to run into any antitrust risks. ACCSCT, however, could violate the antitrust laws if it combined its data collection activities with any sort of coercion or admonishment of its members to adhere to certain tuition levels. *See Maple Flooring Manufacturers Association*, 268 U.S. at 563; cf. *American Column & Lumber Co. v. United States,* 257 U.S. 377 (1921).

IV. CONCLUSION

Accordingly, the Commission does not presently object to ACCSCT's third proposed standard to assess tuition, insofar as it calls for ACCSCT merely to collect and disseminate tuition information. The Commission believes that the first and second proposals, because they involve ACCSCT acting against members due to their tuition levels, may involve a significant risk of violating the antitrust laws.

This advisory opinion, like all those that the Commission issues, is limited to the proposed conduct that your request describes. It does not constitute approval for specific aspects of the proposal that may become the subject of litigation before the Commission or any court, since application of the proposal in particular situations may injure competition and consumers and violate the Federal Trade Commission Act. The Commission reserves the right to reconsider the questions involved, and with notice to the requesting parties in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion in the event that implementation of the third proposal results in significant anticompetitive effects, should the purposes of the proposal be found not to be legitimate, or should the public interest so require.

Letter of Request

August 4, 1994

Dear Mr. Clark:

On behalf of the Accrediting Commission of Career Schools and Colleges of Technology ("ACCSCT" or the "Commission"), I hereby request an advisory opinion on the permissibility under the antitrust laws of ACCSCT's adoption and enforcement of an accrediting standard on tuition and fees. In order to ensure that this request is considered by the Department or agency with appropriate jurisdiction, we have also filed a request for a business review letter on the same subject with the Antitrust Division of the Department of Justice. We respectfully ask that the FTC and Antitrust Division coordinate a response to these requests.

Description of ACCSCT. The Commission is a private nonprofit organization with exclusively educational purposes. It adopts and applies standards for the accreditation and evaluation of educational institutions with trade and technical objectives. The Commission is recognized by the U.S. Department of Education under the Higher Education Act of 1965 an a reliable authority as to the quality of education and training offered by its accredited institutions. (Pub. L. No. 89-329, 79 Stat. 1219, codified as amended in scattered sections of 20 U.S.C.). As a result of this recognition, accreditation by the Commission, together with licensure by a state and certification by the Department, make a post-secondary institution of higher education eligible to participate in the student financial assistance programs authorized by the Act. (20 U.S.C. 1088). The Commission currently accredits approximately 950 schools located in all 50 states, the District of Columbia and Puerto Rico. These schools educate and train 450,000 students and employ 16,000 instructors.

The Commission is a membership corporation. The Commissioners serve as the board of directors; five of the Commissioners are public members (*i.e.*, they have no affiliation with any of the schools accredited by the Commission), and six of the Commissioners are school members (*i.e.*, they are owners or executives of accredited schools). The members of the corporation are the accredited schools; membership status is coterminous with accreditation. Further, the rights of the members are restricted: They

elect the school-affiliated Commissioners and two of five members of a nominating committee, receive various informational reports, and approve (but may not initiate) amendments to the articles of incorporation and bylaws, mergers and other fundamental transactions, and dues and assessments. The Commission is unaffiliated with any trade association. It has applied for tax-exempt status under Section 501(c) (3) of the Internal Revenue Code.

Higher Education Amendments of 1992. In 1992, Congress reauthorized the student financial assistance programs of the Higher Education Act by enacting the Higher Education Amendments of 1992. (Pub. L. No. 102-325, 106 Stat. 448, codified in scattered Sections of 20 U.S.C.). This reauthorization formally provided for a "Program Integrity Triad" of accrediting agencies, the states and the Department of Education to control access to the student financial assistance programs. Although such a Triad effectively had existed prior to the 1992 reauthorization, abusive practices of some institutions of higher education impelled Congress to specify in greater detail the gatekeeping responsibilities of each leg of this Triad.

Thus, the statute specifies numerous requirements that accrediting agencies like the Commission must meet in order to be recognized by the Department of Education. One of these requirements is that an agency's accrediting standards must assess 12 areas, including "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." (20 U.S.C. 1099b(a)(5)).

The Department of Education has now completed the rulemaking to implement the statutory requirements for the recognition of accrediting agencies. In regard to accrediting standards, the regulations simply repeat the statutory provisions. (34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994)). In the commentary accompanying the regulations, the Department noted that its original proposals, which elaborated on the statute, had prompted substantial adverse comment. Nonetheless, the Department's commentary stated that those proposals provided a "sound framework" for an assessment of the 12 areas, and summarized them. The summary for program length and tuition and fees was as follows:

An accrediting agency's standard for assessing this area should generally address the appropriateness of an institution's program length and tuition and fees, taking into account such factors as program objectives and content, the types and locations of instructional delivery, the knowledge and skills necessary for students to reach competence in the field being taught, and generally accepted practices in higher education.

(*Id.* at 22,273).

The Notice of Proposed Rulemaking ("NPRM") more extensively addressed how to judge the "appropriateness" of tuition and fees. It specified that, in developing a standard for tuition and fees, an accrediting agency should take into account the factors quoted above and "[f]or any pre-baccalaureate vocational education program, consideration of the remuneration that can reasonably be expected by students who complete the program." (59 Fed. Reg. 3,578, 3,597 (January 24, 1994)). In the commentary accompanying the proposed regulations, the Department explained that the basis for this proposal was its concern that tuition and fees for pre-baccalaureate vocational education programs may be "excessive." (*Id.* at 3,586). The commentary also suggested three possible approaches under which annualized tuition and fees for a program could not exceed: (1) a percentage of the annualized minimum wage; (2) a percentage of graduates' earnings for their first year of employment; and (3) a percentage of average annualized wages. (*Id.* at 3,587). The NPRM provided no specifics on these various maximum percentage levels. Although the Department stated that an agency could still be recognized even if its standards departed from the original proposals, it also stated that the agency would bear a burden of justifying the appropriateness of different standards. (59 Fed. Reg. at 22,273).

Development of ACCSCT Standard. In order to comply with the statutory and regulatory requirements described above, ACCSCT will have to adopt and apply an accrediting standard that assesses tuition and fees. It has created a committee of Commissioners to study the issue and develop a proposal. In addition to the inherent difficulty of the task, the Commission is concerned that any standard it adopts not be violative of the antitrust laws.

As explained above, the Commission is a private body consisting in substantial part of school-affiliated Commissioners who could be viewed as competitors. Further, the Commission is legally classifiable as a form of association, although it is not a trade association in the conventional sense that seeks to advocate and

advance the interests of its members. (*See Parsons College v. North Central Ass'n. of Colleges and Sch.*, 271 F. Supp. 65, 70 (N.D. Ill. 1967); *Transport Careers v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986)). Thus, the Commission would appear to be a combination subject to Section 1 of the Sherman Act. (15 U.S.C. 1).

Association activities which limit or set maximum prices are vulnerable to attack as price-fixing. (*Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982); *McLean County Chiropractic Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶23, 524 (FTC Consent Order to Cease and Desist Complaint, Dkt-3491, April 7, 1994)). The nonprofit and educational nature of the Commission does not necessarily exempt it from such antitrust liability. (*See United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) (colleges and universities not immune from antitrust laws for price-fixing); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (no "learned professions" exemption); *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (nonprofit nature of organization does not shield it from antitrust liability)). Moreover, paternalistic aims, such as protection of students, which unduly restrict competition are not a defense to such liability. (*See National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)).

Of particular importance to this request, the FTC recently issued an advisory opinion which found violative of the antitrust laws a physician fee review program proposed by the American Medical Association and state and local medical societies which provided for the imposition of disciplinary sanctions for "fee gouging" or fees that were deemed by peer review panels to be "excessive." (*American Medical Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶ 23,602 at 23,284-87, (FTC Advisory Opinion, Feb. 14, 1994). In contrast, the FTC found permissible sanctions for abusive conduct in connection with fees, such as misrepresentation, deception, or the exertion of undue influence. (*Id.* at 23,284). Private, non-binding advice on fee levels, not based upon benchmarking of fees, and requirements, for disclosure of fee-related information were also found to be permissible. (*Id.* at 23,283; *accord, Iowa Dental Ass'n.*, 99 FTC 648 (FTC Advisory Opinion, April 3, 1982)).

In view of the regulations promulgated by the Department of Education, the Commission appears to be obliged to consider adoption of an accrediting standard under which it would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard potentially by withdrawing accreditation. Such a standard might use one or more of the three approaches suggested in the NPRM with tuition capped at a percentage of expected earnings. Yet, such action by the Commission could be viewed as price fixing under the antitrust laws since the Commission is arguably a combination which would be limiting the pricing discretion of competitors.

It might be argued that Congress impliedly exempted accrediting bodies like the Commission from the antitrust laws when it conditioned recognition of accrediting agencies upon the adoption of a standard for the assessment of tuition and fees. (*See Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989) (private governing board for amateur basketball exempt when it set and enforced player qualifications pursuant to Amateur Sports Act)). However, this is an uncertain basis for actions which could have extremely severe consequences. Congress did not speak directly to the issue, and such exemptions are disfavored. (*Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

The Third Circuit's holding in Brown University indicates that the rule of reason would be applied to evaluate a tuition and fees standard. Under the rule of reason, it might be argued that the standard is designed not to inhibit competition but to protect students who lack the knowledge and sophistication to make informed choices. However, such a paternalistic justification was rejected by the Supreme Court in National Society of Professional Engineers and Indiana Federation of Dentists. Further, less restrictive means may be available to achieve the pro-competitive aims of correcting information deficiencies in the market. (*See* Brown University, *supra*).

Alternatively, the Commission might collect tuition information from its accredited schools and analyze this information to determine how the tuition charged for a given program at a particular school compares to similar programs and schools. If the tuition were in the top tenth percentile of all similar programs, for example, the Commission might then require the school to explain why its tuition was so high and to provide this information to students and

prospective students. Under this approach, the school would retain its pricing discretion and remain free to charge the tuition that it wished. A standard establishing this procedure would provide students with useful information on which to base a decision to attend an institution and improve the functioning of the market.

Even this approach may present difficulties under the antitrust laws. In its advisory opinions on the fee review proposals in American Medical Ass'n. and Iowa Dental Ass'n., the FTC cautioned that the associations should not systematically collect fee data, develop any explicit or implicit "benchmarking" scheme, or publicly disclose their review of particular fees. The alternative approach described above could be viewed as inconsistent with these conditions. The heart of the accrediting standard would be the systematic collection of tuition data and the disclosure to students of information comparing and explaining the school's tuition in relation to other schools. Since schools may wish to avoid this disclosure because it could inhibit students' decisions to attend, the standard could be regarded as an implicit form of benchmarking, with the benchmark as the range of tuition levels where disclosure would not be mandated by the Commission.

A final possibility would be an accrediting standard which required schools to inform students in the catalog, enrollment agreement and other publications that they may obtain information about tuition charges for comparable programs from the Commission. The Commission would again collect tuition information from accredited schools about their programs, and assemble this information in a data base. Students could access this information to determine the cost of similar programs at other institutions. The data base might also contain other information useful to consumer choice, such as geographic location, size of the institution, and other programs and services offered at the school.

This approach would avoid any benchmarking of acceptable tuition levels. Schools would retain full discretion to price their services. The accrediting standard would be formulated to address directly the underlying problem of lack of consumer information by providing students with the data necessary to make informed choices. By assembling, categorizing and providing context to the data, the commission would still meet the requirements of the Higher Education Amendments of 1992 since it would be "assessing" the tuition and fees of schools. The Antitrust Division recently released

a business review letter stating that a similar type of fee survey should not be subject to challenge under the antitrust laws. (Trade Regulation Reports (CCH), No. 322 at 3 (July 6, 1994)).

Request for Guidance. The Commission respectfully requests guidance on the permissibility under the antitrust laws of the approaches to an accrediting standard on tuition and fees outlined above. The Commission will in the near future begin the process to renew its recognition by the Department of Education. As part of that process, the Commission will have to demonstrate its compliance with the statutory and regulatory recognition criteria, including the requirement for a standard to assess tuition and fees. Your review of the approaches under consideration by the Commission will be of substantial assistance as it seeks to continue to demonstrate that it is a reliable authority as to the quality of the education and training offered by its accredited institutions. Accordingly, we respectfully urge expedited consideration of this request.

Sincerely,

Mark L. Pelesh
Counsel to ACCSCT

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