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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Zygon International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office or principal place of business located at 18368 Redmond Way, Redmond, WA.

Respondent Dane Spotts is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his office or 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 proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, 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, advertising, 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 the use of such product or program can or will have any effect on the user's:

A. Health or bodily structure or function, including but not limited to sleep; weight, bodyfat content, or body shape or tone; immune system; eyesight or night vision; stress; or jet lag; or

B. Smoking behavior,

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

II.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, 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, advertising, 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 the use of such product or program can or will have any effect on the user's cognitive or mental functions or skills, including but not limited to reading, vocabulary, learning, foreign language, verbal or math skills; intelligence or I.Q. or that of the user's children; attention or concentration levels; or memory, 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 Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, 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, advertising, 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 making any representation, in any manner, directly or by implication:

A. Regarding the performance, benefits, efficacy, or safety of any food, drug, or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, or dietary supplement, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation.

B. Regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Part III.A herein), 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 respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane

Spotts, 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, advertising, 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, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, 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, advertising, 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, shall 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 Part V.B herein;

B. 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 the consumer complies with the conditions for receiving a refund that are stated clearly and prominently in the advertisement or solicitation. For purposes of this Part, a "reasonable period of time" shall be:

1. That period of time specified in respondents' advertisement or solicitation if such period is clearly and prominently disclosed in the advertisement or solicitation; or

2. If no period of time is clearly and prominently disclosed in the advertisement or solicitation, a period of thirty (30) days following the date that the consumer complies with the conditions for receiving

a refund that are stated clearly and prominently in the advertisement or solicitation.

VI.

It is further ordered, That respondents Zygon International, Inc., a corporation, its successors and assigns, and its officers, and Dane Spotts, individually and as an officer of said corporation, are jointly and severally liable for consumer redress as provided herein:

A. Not later that the date this order becomes final, respondents shall deposit into an escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this order ("first escrow account"), the sum of $150,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the first escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to any consumers:

1. Who, between the dates of October 15, 1995, and the date this order becomes final, have returned or return any product(s) purchased from respondents to respondents for a refund within thirty days of their receipt of the product(s); and
2. Who have not previously received either a full refund or a full credit from a credit card issuer for the purchase of the product(s).

B. Any funds remaining in the first escrow account after refunds have been paid to consumers under Part VI.A herein, in the discretion of the Commission:

1. Shall be used to provide redress to purchasers of the Learning Machine who request a refund not later than sixty (60) days after the date this order becomes final and have not previously received either a refund pursuant to Part VI.A herein, a full refund from respondents, or a full credit from a credit card issuer for the purchase of the product(s);
2. Shall be used to provide redress to purchasers who, prior to October 15, 1995, returned, or contacted respondents for authorization to return, any product(s) purchased from respondents to respondents for a refund within thirty (30) days of their receipt of the product(s); have not previously received either a full refund or a full

credit from a credit card issuer for the purchase of the product(s); and whose identities become known to respondents or the Commission within sixty (60) days after the date this order becomes final;

3. Shall be used to pay any attendant costs of administration; and/or

4. Shall be paid to the United States Treasury.

C. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the first escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the first escrow account and refund program provided herein, if any, shall be paid from funds in the first escrow account.

D. Respondents relinquish all dominion, control and title to the funds paid into the first escrow account, and all legal and equitable title to the funds shall vest in the Treasurer of the United States and in the designated purchasers. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of respondents, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

E. Not later than the date this order becomes final, respondents shall deposit into a second escrow account to be established by the Commission for the purpose of receiving payments due under the provisions of this order ("second escrow account"), the sum of $45,000. These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be used by the Commission or its representative to provide refunds to consumers if refunds owed to consumers pursuant to Parts VI.A and VI.B herein exceed the amount of money in the first escrow account.

F. At any time after this order becomes final, the Commission may direct the escrow agent to transfer funds from the second escrow account, including accrued interest, to the Commission to be distributed as herein provided. Respondents shall be notified as to

how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Agreement. The Commission, or its representative, shall in its sole discretion select the escrow agent. Costs associated with the administration of the second escrow account and refund program provided herein, if any, shall be paid from funds in the second escrow account. Any funds remaining in the second escrow account after all consumers have received refunds pursuant to Part VI.A, VI.B.1, VI.B.2, and VI.E herein shall be returned to respondents. If no funds from the second escrow account are needed to provide redress to consumers as provided herein, the funds in the second escrow account, together with accrued interest, shall be returned to respondents within seventy-five (75) days after the date this order becomes final. If funds from the second escrow account are needed to provide refunds to consumers as provided herein, the funds remaining in the second escrow account, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and redress program herein, shall be returned to respondents within one hundred twenty (120) days after the date this order becomes final.

VII.

It is further ordered, That within three (3) days after the date this order becomes final, respondents shall, to the extent available, provide to the Commission, in computer readable form (standard MS-DOS diskettes or IBM-mainframe compatible tape) and in computer print-out form, a list of:

A. The name and address of all consumers in the United States who purchased the Learning Machine;

B. The name, address, and date of refund of all consumers in the United States who purchased the Learning Machine and received a full refund from respondents;

C. The name, address, and date of credit of all consumers in the United States who purchased the Learning Machine and received a full credit from a credit card issuer for the purchase of the product(s); and

D. The name, address, and date of refund of all consumers in the United States who purchased any product(s) from respondents and

received a full refund between October 15, 1993 and October 15, 1995.

VIII.

It is further ordered, That for three (3) years after this order becomes final, respondents, and their successors and assigns, shall maintain and upon request make available to the Commission within three (3) business days:

A. Documents and records demonstrating the manner and form of respondents' compliance with Part VI of this order; and

B. Copies of all correspondence and memorializations of other communications to or from any consumer regarding refunds or requests for refunds for any product(s) purchased from respondents.

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 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 upon which respondents relied for such representation, including but not limited to, including complaints from consumers, and complaints or inquiries from governmental organizations.

X.

It is further ordered, That respondent Zygon International, Inc., 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 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 commences his or her responsibilities.

XI.

It is further ordered, That respondent Zygon International, Inc., 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.

XII.

It is further ordered, That respondent Dane Spotts 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 involving the advertising, offering for sale, sale, or distribution of any consumer product or service. 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.

This order will terminate on September 24, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

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

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

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

XIV.

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

HOME SHOPPING NETWORK, INC., ET AL.

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

Docket 9272. Complaint, March 2, 1995--Decision, Sept. 26, 1996

This consent order requires, among other things, the Florida-based corporation and two of its subsidiaries to possess scientific evidence to support any claims: that a food, food or dietary supplement, or drug cures, treats or prevents any disease or has any effect on the structure or function of the human body; and about the performance or benefits of efficacy of any smoking-cessation program, product or service.

Appearances

For the Commission: *Lisa Kopchik.*

For the respondents: *Basil Mezines, Glenn A. Mitchell* and *David U. Fierst, Stein, Mitchell & Mezines,* Washington D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, hereinafter sometimes referred to as 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 Home Shopping Network, Inc. ("HSN") is a Delaware corporation, with its offices and principal place of business at 11831 30th Court North, St. Petersburg, Florida. HSN is a holding company for numerous subsidiaries, including Home Shopping Club, Inc. and HSN Lifeway Health Products, Inc. HSN, through its subsidiaries, is principally engaged in the marketing of a variety of consumer products by means of live, customer-interactive, televised sales programs and through mail-order brochures and other literature.

Respondent Home Shopping Club, Inc. ("HSC") is a Delaware corporation, with its offices and principal place of business at 11831

30th Court North, St. Petersburg, Florida. HSC is a wholly-owned subsidiary of HSN. HSC produces and disseminates advertising in the form of television programming, including "Spotlight on Ruta Lee," that is disseminated through cable channels, HSN's broadcast stations, and satellite dish receivers. This programming directly markets consumer products to viewers.

Respondent HSN Lifeway Health Products, Inc. ("Lifeway") is a Delaware corporation, with its offices and principal place of business at 11831 30th Court North, St. Petersburg, Florida. Lifeway is a wholly-owned second-tier subsidiary of HSN, and has advertised, offered for sale, and sold vitamins and health-related products ("Lifeway products") through television advertising, including "Spotlight on Ruta Lee."

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed spray vitamin products, including Life Way Vitamin C and Zinc Spray, Life Way Antioxidant Spray, and Life Way Vitamin B-12 Spray; and a smoking-cessation aid, Smoke-Less Nutrient Spray. These products are foods and/or drugs, 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 for Lifeway products, including but not necessarily limited to the attached Exhibit A, a transcription of a television advertisement entitled "Spotlight on Ruta Lee." This advertisement contains the following statements:

(a) Ruta Lee: "And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body....

....Now, let me tell you about the three different two-packs that we have at $19.95.... Instead of flushing that down the toilet, you are getting it into your body. Now, I think that is remarkable. That just by spraying. [She sprays into her mouth.] There I am. I've taken my vitamins. . . I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube." [Exhibit A, page ii-iii]

(b) Ruta Lee: "Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. . . . So,

Vitamin C and Zinc. You can avoid colds for the rest of your life." [Exhibit A, pages iii-iv]

(c) Ruta Lee: "I get calls from dentists who say 'tell everybody that's listening, Ruta, if they have a mouth lesion or something' -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth].
I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.
You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious." [Exhibit A, page iv]

(d) Ruta Lee: "But, you know every once in a while--"
Show host: "You need a boost."
Ruta Lee: "Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt."
Show host: "Plus you end up with the highs and lows when you're getting your fixes--"
Ruta Lee: "Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks."
Show host: "Right, right."
Ruta Lee: "Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal." [Exhibit A, pages iv-v]

(e) Ruta Lee: "Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.
It's the greatest thing for a hangover. It's absolutely fabulous." [Exhibit A, page v]

(f) Ruta Lee: "We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been shown, and are now widely believed to be the things that keep your immune system working. . . . You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes." [Exhibit A, page vi]
[sic]

(h) Ruta Lee: "Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle

your fancy. . . . Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients." [Exhibit A, page x]

(i) Ruta Lee: "I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. . . . And you can do it. In an easy, simple way. Let's take a call.

. . . .

. . . Hi, Sally. . . . Are you a smoker?"
Caller: "No. I quit three years ago with your sprays."
Ruta Lee: "Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?"
Caller: "Yeah --"
Ruta Lee: "Three years --"
Caller: "I know if you sell anything, it's bound to work."
Ruta Lee: "Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smoke-less spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?"
Caller: "Three packs a day."
Ruta Lee: "Whoo!"
Caller: "For thirty years."
Ruta Lee: "Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?"
Caller: "A month."
Ruta Lee: "A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?"
Caller: "Yeah -- very easy."

. . . .

Ruta Lee: "Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day." [Exhibit A, pp. xi-xii]

(j) Ruta Lee: "Because you're [the caller is] a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray. "
Caller: "Oh, I lost weight when I used yours."
Ruta Lee: "Hooray! You lost weight." [Exhibit A, page xiii]

(k) Ruta Lee: "It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want to stop smoking. . . . Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth." [Exhibit A, page xiv]

PAR. 5. Through the use of the 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) The vitamins in Life Way Spray Vitamins are more fully absorbed by the human body than vitamins taken in pill form;

(b) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, heals lesions in the mouth, cold sores on the mouth, and cracking of the corners of the lips for users generally;

(c) Life Way Vitamin C and Zinc Spray, sprayed directly in the mouth at the dosages recommended, prevents common colds;

(d) Life Way Vitamin B-12 Spray, at the dosages recommended, effectively treats symptoms related to hangovers;

(e) Life Way B-12 Vitamin Spray, at the dosages recommended, increases energy for users generally;

(f) Life Way Anti-Oxidant Spray, at the dosages recommended, ensures the proper functioning of the immune system;

(g) Life Way Anti-Oxidant Spray, at the dosages recommended, reduces the risk of contracting infectious diseases;

(h) Life Way Anti-Oxidant Spray, at the dosages recommended, prevents facial lines;

(i) Life Way Smoke-Less Nutrient Spray enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily; and

(j) Life Way Smoke-Less Nutrient Spray satisfies the physiological urge to smoke a cigarette and eliminates the quivering, anxiety and weight gain attendant with quitting smoking.

PAR. 6. Through the use of the 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 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. 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 su

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 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

TRANSCRIPT OF SPOTLIGHT ON RUTA LEE

Show host:	How are you?
Ruta Lee:	Ho Ho Ho!
Show host:	That was so original, wasn't it?
Ruta Lee:	That was so original, and honey, the whole point is that the Christmas season is here. We've already done ourselves in on Halloween by eating everything that the kids brought home.
Show host:	I know.
Ruta Lee:	And now we've got the -- whole Christmas season coming up.
Show host:	And Thanksgiving .
Ruta Lee:	And you know it is such a tension-ridden season.
Show host:	Right, right.
Ruta Lee:	It's suppose to be jolly and warm and wonderful and mellow.
Show host:	Hum hum.
Ruta Lee:	And instead it's ahhh! [shaking both hands in the air] It's because you haven't got it put together.
Show host:	That's right. We all do this too. And you think you've got a year -- but you know, you still, something --
Ruta Lee:	Right. Well, I start shopping. I mean I shop on Home Shopping Network all the time. And when I see the real bargains, I get like twelve of something, or six of something, and then just put them aside, and then whenever a birthday or a holiday comes along, I've got something that I can give.
Show host:	You're prepared that way.
Ruta Lee:	Generic gifts. Not very thoughtful, but smart on the pocketbooks.
Show host:	That's right.
Ruta Lee:	And that's the thing to do here. Now listen. We're talking about stress, dear ones. I live a very stressful life. Lord knows, you live a very stressful life. And you know what, we're not rare. Everybody out there is in stress. Just getting out of your driveway into the traffic is stressful. I've got the answer to your prayers, dear ones. Stress does one thing beyond anything else. And that is it depletes your body of every vitamin and mineral that you've got in it. And you know what you've got in it? Not very much. Because if you really stop and think about how we live such hectic lives, we depend on convenience foods, we depend a lot on fast foods. Even if we're good homemakers, you

know that the grains are stored in silos in preservatives so that they shouldn't rot. Then they put them in the grounds that are also filled with chemicals. The little vegetable sticks its little plant root up out of the ground and ssshhh, you hit it with spray to get the bugs off of it. Right? Then you take it to the marketplace, you put it in a preservative. You keep it on a shelf in a preservative and then you get it home and you zap it in the microwave over, right? What kind of minerals and vitamins are we getting. Absolutely nothing. So, I know a lot of us are smart enough to take our vitamin pills. And if you are taking some that are great, more power to you. I can't swallow pills. I don't know about you, but --

Show host: No, I can't either.

Ruta Lee: I think you're very sensitive about swallowing. And if I get it down, it sort of chokes half way down. And then it gunks and I'm coughing and gagging. If it finally makes it down to my stomach, then it sits there and it stews for a while. And I'm burping that awful taste.

Show host: Right, right.

Ruta Lee: And it repeats on me all day long. It feels like its burning a hole in my stomach. And you know how much of that vitamin pill I am absorbing? If I'm exceedingly lucky, five percent. The rest of that vitamin pill gets squashed through me and gets flushed down the toilet the first time I go piddle. So, 95% of my money is wasted going down the toilet. 95% of my vitamin is not even getting into my body. Sweeties, I've got the greatest vitamin product this world has ever seen. Regis Philbin says it's the only civilized way to take vitamins. Look, all I do is open wide. [She sprays vitamins into her mouth from a tube.] That's it. I've taken my vitamins. Now you're probably thinking, oh, that must taste pukey. Its fabulous. It's mouth-refreshing. It's pleasant. And look what's happened. I've got my vitamins. Now you do this four times a day. And you have a month's supply in every tube. We're bringing them to you in two-packs because that's the way you asked for them. And they're $18.95 which really throws me because they used to me $19.95.

Show host: Exactly.

Ruta Lee: I think we're being very nice because it's the holiday season coming up or something.

Show host: Right.

Ruta Lee: Grab them while you can. This is my last visit for this month. Please, dear ones, think about these for your children and for yourself. Now, let me tell you about the three different two-packs that we have at $19.95. And just think, instead of flushing $19.00 -- well, let's see. What would 95% of $19.95 be? Ahh -- $17.00 or something or other. Instead of flushing that down the toilet, you are getting it into your body. Now, I think that is remarkable. That just by spraying. [She sprays into her mouth.] There I am. I've taken my vitamins. Four times a day. You've got

a month's supply in every tube. Let me tell you first about the Vitamin C and Zinc. As you're probably noticing, I am a little nasal. I've got a sinus condition. That could very easily develop into a nasty throat infection.

Show host: Right, the draining. Ah -- it's such a horrible feeling.

Ruta Lee: You know. When you're dripping the stuff down your throat. The drainage camps there. It creates a beautiful bed of mucous for all the bacteria to sit in. Vitamin C and Zinc. Just spray directly on your throat. Spray in your mouth. Kills rhinovirus on contact. You can avoid colds forever. If you feel one coming on, you'd have to take two bottles of Vitamin C and Zinc and it would burn a hole in your stomach. Especially if have a sensitive stomach. And if you're on any other medication, you don't want to swallow more stuff. This way, it doesn't interfere with any other medication you're taking. So, Vitamin C and Zinc. You can avoid colds for the rest of your life. I get calls from dentists who say "tell everybody that's listening, Ruta, if they have a mouth lesion or something" -- Christie, our makeup lady, just had her big molars pulled back here [pointing to the back of her mouth] --

Show host: Right, yes.

Ruta Lee: I gave her some Vitamin C and Zinc to spray directly on the lesion, the whole inner mouth. Zinc is a healer, and we forget how good it is.

Show host: A healer, right. That is so important.

Ruta Lee: You get cold sores, spray it directly on. You get cracks in the corners of your mouth, spray it directly on. It's delicious.

Show host: And immediately it dissolves. It's different from some of the product creams.

Ruta Lee: That's it. That's it. Its right there and its doing its magic. So, that is enough about Vitamin C and Zinc except that we live in closed-in environments. You know? You can't open a hotel room window. Through the office, you can't open a window. If anybody's got a cold, it gets passed around through the ventilation system.

Show host: Right.

Ruta Lee: Have this on hand all the time. [Holding up a tube of Vitamin C and Zinc.] Carry it with you and spray.

Ruta Lee: Now, Vitamin B-12. That, to me, is my mother's milk. Its the source of life for me. I'm a high-energy lady. This sweet lady, Bobbi, is even more energetic than I am, if that is possible.

Show host: No, no, no, no.

Ruta Lee: But, you know every once in a while --

Show host: You need a boost.

Ruta Lee: Sure. Your butt starts to drag and you say Oh, God, I need a cup of coffee, or, Gee, I think I need a candy bar or I need a coke. You don't need any of that which goes to nothing but stuff on your big, lard butt.

Show host: Plus you end up with the highs and lows when you're getting your fixes --

Ruta Lee: Yeah. A sugar high is a phony high. It raises you up and then it drops you like a ton of bricks.

Show host: Right, right.

Ruta Lee: Vitamin B-12. All you do is spray, and honey, it's like two martinis. Hits you, oh -- happy time. Its absolutely phenomenal. And you're not doing yourself in with alcohol and sugars and the sat-fat that are phoney and bad for you. Alcohol, by the way, depletes B-12 just like that [she snaps her fingers]. If you're going to be sipping during the holidays, and we all are, and I'm not saying you should deny yourself a cocktail or a little Christmas grog, take your Vitamin B-12. Great for hangovers on New Year's Eve.

Show host: I never thought of that.

Ruta Lee: It's the greatest thing for a hangover. It's absolutely fabulous. Now look, this is also a great way to get vitamins into your kids. Our -- Terri Toner, our --

Show host: Jonelle loves them too.

Ruta Lee: You know, I know she does. Terri Toner's pediatrician said this is the greatest thing that came down the pike for kids because we are a pill-popping society. We take pills for vitamins. We have a headache, we take a pill. We're feeling blue, we take a pill. We're feeling too up and we can't sleep, we take a pill. And we get our kids so used to taking pills, especially with vitamins, that when someone comes along in the school yard and says 'Hey, kid. You want a blue? Hey, kid. You want a yellow?' He says that this is a great way to get vitamins into your kids and get them out of the pill-popping mode.

Show host: Away from the pills. Exactly. A terrific way.

Ruta Lee: Exactly. Now, last but not least, and girls you can listen while you are on the phone. We are going to be running out of time so shortly. It's my last visit until next month. Do not kick yourself in your behind for the rest of the month saying 'why didn't I listen? Why didn't I do it?' We've got the magic one of them all. The one you've been hearing about and reading about in every newspaper, in every health periodical, in every beauty periodical. You have been reading about the antioxidants. They are the buzz-words of the 90s when it comes to health and beauty. And believe me, I don't care how much makeup you put on, your beauty starts from inside. The antioxidants are the things that keep your immune system working well. It is firmly believed by most medical authorities, and everybody in research, that Vitamins A, C and E are the key to keeping your immune system working. Why does your immune system have to work? I'll tell you why. Because whether it is a cold or whether it is any of the life-threatening diseases that are all around us -- that's what happens. You pick them up if your immune system isn't working for you. A, C and E are the vitamins that have been

shown, and are now widely believed to be the things that keep your immune system working. What happens with oxidants is that they attack the oxygen-free radicals that our own bodies create because of the air we breath, because of the pollutants we take in, like tobacco and alcohol and etc. They naturally metabolize and they are nasty little things like termites that romp through your body randomly and attack healthy, live cells that keep you young and keep you healthy. And when they bite into one cell, it attacks another one like a domino theory. The oxygen-free radicals are put out of your body by the oxygenators. The A, C and E are just like a fire hose coming in and putting out the fire. Its a miracle. You want to stay young and gorgeous without 52 facelifts? God promises us in the bible 120 years. Honey, I intend to go into my coffin looking damn good. Why? Because I'm going to spray my fabulous A, C and E. It's going to keep me young. I'm not going to get the lines. I'm going to keep the sparkle in my eyes. Let's take a call.

Show host: Get to the phone calls, ladies and gentlemen. We have only a very short period of time. Hi, you're on the air with Ruta. And what is your name please?

Caller: Sally.

Ruta Lee: Valerie, did you say?

Caller: Sally.

Show host: Sally.

Ruta Lee: Oh, Sally. I'm sorry. I've got to turn up my speaker back here. I'm reaching back here. I'm not scratching. I'm turning you up. Sally, where are you calling from?

Caller: I'm calling from Noridge, New York. I used the Vitamin C last year, and I worked all winter long and I didn't have a cold.

Ruta Lee: Whoo! [clapping loudly] You hear that? Isn't it a miracle? You know, I think our body tells us when we are starting to feel a little puny. And if we will just pay attention to it and give it what it needs. And a blast of Vitamin C and Zinc can surely prevent a lot of troubles. And you used it all winter?

Caller: Yes. And I didn't have any colds at all. I've started using it again this winter.

Ruta Lee: Good for you, sweetheart. I hope you're trying these marvelous antioxidants as well.

Caller: Yeah. I have them too.

Ruta Lee: Now, I want you to tell everybody how these vitamins taste?

Caller: Tastes almost like mint.

Ruta Lee: They are nice, aren't they?

Caller: Very nice.

Ruta Lee: 'Cause I'm sure people think, 'Ooh'. I know how nasty vitamins taste when you swallow them, and how they repeat on you. And these are like a mouth freshener, aren't they?

Caller: Um hum.

Ruta Lee: Well, Sally, honey, I'm so glad that you're going into this cold and flu season taking good care of yourself.

Caller: Yes, and that's another thing. My doctor knows that I have an awful reaction to the flu shots.

Ruta Lee: Oh, yes.

Caller: And she lets me use Vitamin C and Zinc all winter instead.

Ruta Lee: That's fabulous. So, you showed this to your doctor and she said 'spray away,' didn't she?

Caller: Yeah.

Ruta Lee: You know, that's another thing you brought up, Sally, that I want to mention. You can't overdose. We suggest -- the label says spray four times for the daily requirements. I think that sometimes our bodies need more than the daily requirement, so I spray more. Now, I don't want this to get into my throat, so I'm spraying all the time directly onto my throat. And, it's going to do the job. Thank you for calling, sweetheart. Have a wonderful Thanksgiving.

Caller: You too.

Ruta Lee: And I urge everybody out there to listen to our darling sister Sally. Get on the phone. Order now. If you're a new buyer, hang on. Don't get discouraged because you have to hold on. The lines are so busy. This is the time. Now look, I also want to mention something else. I have gotten calls from the nursing staff and professions and the people who work in the medical service industry. And the nurses in the nursing homes for the aged say 'Ruta, you don't know what a boom this is for our senior citizens. Because as they get older, they seem to lose their appetite. Nothing tastes as good, and if they are not feeling well or if they are on medication of some kind, all I do is say 'Open wide' and spray this. It tastes good and it gives them a pickup. It puts a sparkle back in their life. The nurses down at HMS Anderson that take care of the little babies who have leukemia and who are on radiation and chemotherapy called to say 'you don't know how -- when you are on radiation and chemotherapy' -- and we have so many people out there who are, thank God, getting rid of cancer. But they have to go through the process. You get nauseous and pukey and puny and you don't want to eat. But you have got to keep your strength up. This is the way to do it. Just spray this in. Get it into your system and not flush 95% of it down the toilet.

Show host: So, please. Just stay on the phone lines, ladies and gentlemen. We are going to continue to take the calls coming through on the vitamins. But, we have to offer you the chance to have, yes, your holder. But more important than that, as we talk about the impact of the holidays, a lot of people are going to be grabbing the cigarette and smoking more than they normally do due to stress. So, for people out there -- and this is Ruta's last day here. I mean this is the time to make the call. If you were with us yesterday, or the day before and you've heard about it, make the call today. Let's take a look right now, in a two-pack, which allows you the chance to either have two for yourself or use one

for a friend, the smoke-less spray. Two packs today at only $18.95. And the holder. I can't believe we have any left. A few hundred left of this incredible holder.

Ruta Lee: Very --

Show host: A constant reminder of the importance of using these products.

Ruta Lee: And you know its also such a beautiful gift.

Show host: That's a great idea.

Ruta Lee: You know it comes in this wonderful, little velvet pouch. And, come over here so I can show you. Can you see -- oops -- here is -- there it is --

Show host: There you go.

Ruta Lee: It comes in a beautiful little drawstring velvet pouch. The point is, don't keep it in the pouch. Put it around your neck like this. And one of the girls called me -- I've got to share this with you. She said 'Ruta, you've changed my life. Not only am I happy and healthy. But I was spraying my vitamins as I was going down in the elevator one day because my butt was dragging and I thought, gee, I'm tired. I need some of my vitamins.' And she said a cute guy was standing next to me and he said 'what are you doing?' And she said, 'well, I'm spraying my vitamins.' And they got to talking and, to cut a long story short, he took her out for drinks and they are now married. So you see, it's a great conversation-starter as well. Dear ones, let me tell you about this smoke-less spray. The same process works. All you do is open wide, spray. And it satisfies your need for a cigarette. Somehow a message goes from the brain to the body that says 'stop quivering. You've satisfied a need.' And you haven't done it with a drug. You've done it with vitamins, minerals, herbs and spices that tickle your tongue and tickle your fancy. Now, I promise you, these things used to be available in a fancy catalogue for about $28.00, $29.00 a piece. I'm not talking about the holder. I'm talking about just the spray itself. We bring you two of them, because I made a pledge that I would never bring you anything that I didn't believe it, down to the tips of my toes and what is the best available at the very lowest price. Sweeties, there they are. Two for $18.95 and the holder for $14.95. What a treat. Either for yourself or maybe a smoker in your family. Now, listen to me. You know you've got to quit smoking. But this is a very stressful season and you're going to be reaching for a cigarette all the time. Somehow smoking and drinking seem to go together. Its cocktail time. Its Christmas party time. Its celebration time. And they seem to go together. It would be quite wonderful if you could carry this with you the way I do with this beautiful piece of jewelry and spray every time you think you want a cigarette. Now, if you're a smoker, you know here in your mind and in your soul that you should quit smoking. And its very hard to do. I promise you this works. You get our money-back guarantee. It works with just the natural vitamin and mineral and herb and spice ingredients. Money-back

guarantee. Does any other product promise you a money-back guarantee? Does the patch, which just feeds you more nicotine? Does the nicorette gum, which feeds just more nicotine? Do you know that all of the products out there on the marketplace that you might go to out of panic all say if you are on heart medication, do not use. If you are pregnant, do not use. If you are on high blood pressure medicine, do not use. If you overdose, go to your nearest poison center. I don't want you to put that crap in your body. I want you to spray natural, God-given vitamins and minerals. And you know what happens? A message goes to your body that says quit shaking. You can make it for another ten minutes without a cigarette. You can make it for another 1/2 hour without a cigarette. I've had smokers call to tell me they have been smoking for 20, 30, 40 years and that they are able to quit smoking in five days, able to quit cold-turkey. I always say it takes a month to make a habit, it takes a month to break one. So, think about doing this as a Christmas gift to your family. Open this up in front of your family and say 'Family, as a Christmas gift to all of you because you love me, I 'm going to quit smoking. I promise you.' And you can do it. In an easy, simple way. Let's take a call.

Show host: Hi, you're on the air with Ruta. And what is your name, please?

Caller: Sally.

Ruta Lee: Sally?

Caller: Yes. She just talked to me.

Ruta Lee: Yes. Hi, Sally. Are you back again? Are you a smoker?

Caller: No. I quit three years ago with your sprays.

Ruta Lee: Oh! Hallelujah, Sally! Well, Sally, you obviously have been with me right since the beginning, haven't you honey?

Caller: Yeah --

Ruta Lee: Three years --

Caller: I know if you sell anything, it's bound to work.

Ruta Lee: Oh, bless you. You know -- you're bringing up a good point. You prove a point. I am starting my fifth year on the air with my products. The diet sprays, the vitamin sprays, and the smoke-less spray. Sally can attest to this. I wouldn't have lasted for five minutes, five weeks, if it didn't work. Because we guarantee you your money back. Sally, how much did you smoke?

Caller: Three packs a day.

Ruta Lee: Whoo!

Caller: For thirty years.

Ruta Lee: Thirty years, three packs a day. And, I don't remember now, how long did it take you to quit?

Caller: A month.

Ruta Lee: A month. Like I said, thirty days. Make a habit, thirty days to break one. And Sally, it was fairly easy, wasn't it?

Caller: Yeah -- very easy.

Ruta Lee: It didn't kill you.

Caller: Yeah. You just had to put that with your cigarettes. And instead of using your cigarettes, you --

Ruta Lee: When you got it, we didn't even have the holder then. You know how easy it is now to have this thing because every time it hits you between your boobies, it reminds you. But I always say if you don't get the holder, it doesn't matter. Take the spray, put it in your car -- pack of cigarettes, wrap a rubber band around it, and then just before you reach for a cigarette, spray. Course, I like having a holder because then I can say, put your cigarettes upstairs, and when you're downstairs you don't want to run up the stairs. And, Sally, you know better than anybody that $18.95 is about what a carton of cigarettes cost. And --

Caller: I don't know what they are now.

Ruta Lee: Well now with Mr. Clinton's sin tax --

Caller: I just go by the counter and look down at them and say 'I'm so glad I don't have to buy them.'

Ruta Lee: Hallelujah! Are you hearing this, ladies and gentlemen? Sally, who three years ago quit smoking in about a month's time, and she had smoked for thirty years, three packs a day. Do you know, Sally, that in thirty years -- how much money did you burn up? I mean, we're talking probably about $50,000. That you burned up. And now, you are saving -- if -- if two pack a day is -- what is it honey, we figured it out. Three packs a day. You've got to do it. Two packs is $150.00 a month. Three packs would be about $2 --a little more -- $225.00 a month. That you're saving.

Caller: Yeah.

Ruta Lee: Think about that. And not only are you saving that. But, you know what? You're not gonna have to spend money on a fancy funeral because you're gonna outlive everybody.

Caller: But I feel a lot better than I have in years.

Ruta Lee: God bless you for being my friend, Sally. I once again wish you a very, very, happy, happy Thanksgiving Day. A very blessed Christmas. Call me during the Christmas holidays. You know? When I get back here in the middle of December, and let me know how you're doing, okay?

Caller: Okay.

Ruta Lee: Because you're a source of inspiration to an awful lot of people out there who are sitting back on their rusty-dusty saying 'Oh, I don't know. I tried to quit smoking, but I gained weight.' I've had so many callers tell me that they don't gain weight when they use this spray.

Caller: Oh, I lost weight when I used yours.

Ruta Lee: Hooray! You lost weight.

Caller: And I got my girlfriend started on it this summer, so I'm hoping she's stopped. She's in Florida, so I haven't heard yet.

Ruta Lee: Well, God love you. And let me know what she says, okay?

Caller: Okay.

Ruta Lee: A great big hug and kiss, Sally. Bye, bye, angel.

Caller: Bye, bye.

Show host: Now, we have only one minute and 42 seconds left. This is the time to make the call. As Ruta has said, this is her last time here --

Ruta Lee: That's right.

Show host: And the next time will be after Thanksgiving.

Ruta Lee: Now look. This is for you. If you're not a smoker, isn't there somebody in your life that you love dearly who smokes? And if you are the smoker, remember this, that you're not just killing yourself. You're killing everybody around you with your secondary smoke. You're killing your children, your grandchildren. You're killing your pets, dear ones. It makes me crazy when I see young families out in restaurants. And the mother and father are smoking and they're saying 'eat your broccoli, dear, it's good for you. Eat your carrots, dear, it's good for you.' Children, you're killing your children. Not only are you killing them, you smell like a compost heap on fire. You know the grand kids come in and say 'I don't want to kiss grandma. She stinks.' It's guaranteed to work. It doesn't put chemicals into your body. All natural given, vitamins, minerals, herbs and spices. You won't be shaky with anxiety. Just spray every time you want a cigarette. But, most of all, get to the phone. Call now. Think about this as a Christmas gift for somebody that you want to stop smoking. Maybe young college people. Maybe someone that has suddenly starting smoking because they think it is chic. I got a call from a lady last month. And she said 'Ruta,' and she had called me a year or two ago and she said 'Ruta, we worked so hard, my husband and I, to save our money, put our kids through school. We thought we would go into our golden retirement years travelling and enjoying the money that we earned.' Do you know what she said? 'Do you know where I'm travelling? To the nursing home where my husband is strapped to a machine that does his breathing for him.' She called me last month to say 'Darling Ruta. I wish this had been around five years ago and ten years ago when it would have made a difference in his lungs. My husband died.' She said 'Thank God, I have stopped. But, I could have had a lovely, long life with my husband thanks to your product. If it had just been around a few years before.' Don't wait. Don't wait until the doctor says you're gonna die if you don't stop smoking. Use your brains that God gave you. God gave you one body to last you a lifetime. Don't spit in His eye by smoking. Dear ones, what can I do but say hallelujah for this product. It works. But it won't work unless you get up off your duff, get to the telephone, use your finger to dial, and then use your finger to spray before you put that cigarette in your mouth. Just promise me that you'll do it. Try it. You have nothing to lose but a rotten, crappy habit that is not just killing you, but everybody around you. And, if you're not the smoker, get it for somebody you love who does smoke.

Show host:	Ruta, thank you so much for being here.
Ruta Lee:	You're an angel.
Show host:	It's always great. Wonderful health.
Ruta Lee:	Thank you for sharing your time.
Ruta Lee:	Dear ones, hang on the phone. We'll take the call, but hang on the phone. Get in there and do it now.
Show host:	So, do not hang up. Stay there. We'll continue to take all the calls coming through.

DECISION AND ORDER

The Federal Trade Commission having issued its complaint charging the respondents named in the caption hereof with violation of Sections 5(a) and 12 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 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 complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the complaint issued by the Commission.

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, 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 Home Shopping Network, Inc. is a Delaware corporation, with its principal office or place of business at 11831 30th Court North, St. Petersburg, Florida.

2. Respondent Home Shopping Club, Inc. is a Delaware corporation, with its principal office or place of business at 11831 30th Court North, St. Petersburg, Florida. Home Shopping Club, Inc. is a wholly-owned subsidiary of Home Shopping Network, Inc.

3. Respondent HSN Lifeway Health Products, Inc. is a Delaware corporation, with its principal office or place of business at 11831

30th Court North, St. Petersburg, Florida. HSN Lifeway Health Products, Inc. is a wholly-owned second-tier subsidiary of Home Shopping Network, Inc.

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, *"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 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 respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, their successors and assigns, by and through their officers, 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 Life Way Vitamin C and Zinc Spray, Life Way Antioxidant Spray, Life Way Vitamin B-12 Spray, or any other food, food or dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, 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 such product:

1. Is more fully absorbed by the human body than any other product;
2. Heals lesions in the mouth, cold sores on the mouth, or cracking of the corners of the lips;

3. Prevents common colds;
4. Effectively treats symptoms related to hangovers;
5. Increases energy;
6. Ensures the proper functioning of the immune system;
7. Reduces the risk of contracting infectious diseases;
8. Prevents facial lines; or

B. That use of the product can or will cure, treat, or prevent any disease, or have any effect on the structure or function of the human body,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, their successors and assigns, by and through their officers, 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 Life Way Smoke-Less Nutrient Spray or any other smoking cessation product, program, 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:

A. That such product, program, or service enables smokers, regardless of how long they have smoked or how much they smoke, to stop smoking easily;

B. That such product, program, or service satisfies the physiological urge to smoke a cigarette, or eliminates the quivering, anxiety and weight gain attendant with quitting smoking; or

C. Regarding the performance, benefits or efficacy of any such product, program, or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

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

IV.

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.

V.

It is further ordered, That, for three (3) years after the last date of dissemination of any representation covered by this order, respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of all advertisements which contain any such representation, including videotape recordings of all such broadcast advertisements.

VI.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, 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.

VII.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., corporations, shall, 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.

VIII.

It is further ordered, That the respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in the acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which the respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondents Home Shopping Network, Inc., Home Shopping Club, Inc., and HSN Lifeway Health Products, Inc., 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.

X.

This order will terminate on September 26, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

IN THE MATTER OF

KONINKLIJKE AHOLD NV, 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-3687. Complaint, Sept. 30, 1996--Decision, Sept. 30, 1996

This consent order requires, among other things, a Georgia-based supermarket chain to divest a total of 30 supermarkets or supermarket properties, within 30 days, to Commission-approved acquirers. If the transactions are not completed as required, the Commission may appoint a trustee to divest the properties.

Appearances

For the Commission: *Marimichael Skubel, Ronald Rowe* and *William Baer.*

For the respondents: *Robert Paul* and *Mark Gidley, White & Case*, 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 Koninklijke Ahold nv, and respondent Ahold USA, Inc. (collectively referred to as "Ahold"), corporations subject to the jurisdiction of the Commission, have acquired certain voting securities of The Stop & Shop Companies, Inc. ("Stop & Shop") 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 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 non-food items such as soaps, detergents, paper goods, and other household products.

KONINKLIJKE AHOLD NV

2. Respondent Koninklijke Ahold nv ("Royal Ahold") is a corporation organized, existing and doing business under and by virtue of the laws of The Netherlands, with its executive offices located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

3. Respondent Royal Ahold owns and operates five regional supermarket chains in the United States. Royal Ahold owns a chain of supermarkets that operate under the trade name "Edwards" in Connecticut, Rhode Island, and Massachusetts.

4. Respondent Royal Ahold 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.

AHOLD USA, INC.

5. Respondent Ahold USA, Inc. ("Ahold USA"), a wholly-owned subsidiary of Royal Ahold, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its executive offices at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA.

6. Respondent Ahold USA 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

7. On or about March 27, 1996, Ahold and Stop & Shop entered into an agreement whereby Ahold agreed to purchase the voting stock of Stop & Shop.

TRADE AND COMMERCE

8. The 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.

9. The relevant sections of the country in which to analyze the acquisition described herein are the areas in and around the following incorporated cities and towns:

a) New Milford, Connecticut;

b) Windham and Mansfield, Connecticut;

c) Wallingford and Meriden, Connecticut;

d) Waterbury, Watertown, and Naugatuck, Connecticut;

e) "The greater Hartford, Connecticut, area," which includes Hartford, New Britain, Newington, Wethersfield, Farmington, West Hartford, Bloomfield, Windsor, South Windsor, East Hartford, Manchester, Glastonbury, and Vernon, Connecticut;

f) Avon and Simsbury, Connecticut;

g) Enfield, Somers, East Windsor, Suffield, and Windsor Locks, Connecticut;

h) Southington and Plainville, Connecticut;

i) Milford, Orange, West Haven, and New Haven, Connecticut;

j) East Haven, Branford, Guilford, Madison, Clinton, and Old Saybrook, Connecticut;

k) Fairfield, Stratford, Bridgeport, Trumbull, and Shelton, Connecticut;

l) South Kingstown and Narragansett, Rhode Island;

m) "The greater Providence, Rhode Island, area," which includes East Providence, Providence, Pawtucket, Warwick, Cranston, Central Falls, Lincoln, Smithfield, Barrington, Bristol, Cumberland, North Providence, Johnston, West Warwick, East Greenwich, and Coventry, Rhode Island; and Attleboro and Seekonk, Massachusetts; and

n) Chicopee, Massachusetts

MARKET STRUCTURE

10. 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

11. 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, Ahold and Stop & Shop were actual competitors in the relevant line of commerce in the relevant 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 Ahold and supermarkets owned or controlled by Stop & Shop,

b. By increasing the likelihood that Ahold 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

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

15. The acquisition as described in paragraph seven, 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 having initiated an investigation of the proposed acquisition by Koninklijke Ahold nv and Ahold USA, Inc. (hereinafter collectively "respondents") of the voting securities of The Stop & Shop Companies, Inc. ("Stop & Shop"), 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, 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 Koninklijke Ahold nv ("Royal Ahold") is a corporation organized, existing and doing business under and by virtue of the laws of The Netherlands, with its executive offices located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands.

2. Respondent Ahold USA, Inc. ("Ahold USA"), a wholly-owned subsidiary of Royal Ahold, is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its executive offices at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA.

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

ORDER

I.

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

A. *"Royal Ahold"* means Koninklijke Ahold nv, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Koninklijke Ahold nv, their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

C. *"Respondents"* means Royal Ahold and Ahold USA.

D. *"Assets to be Divested"* means the supermarkets identified in paragraph II.A of this order as well as the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at those locations, but need not include the "Stop & Shop" or "Edwards" trade names, trade dress, trade marks, service marks, and such other intangible assets that respondents also utilize in their business at locations other than those identified in paragraph II.A of this order.

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

F. *"Acquisition"* means Royal Ahold's proposed purchase of all the voting stock of Stop & Shop pursuant to an agreement dated on or about March 27, 1996.

G. *"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 non-food items such as soaps, detergents, paper goods, and other household products.

H. *"Overlap Areas"* means the following incorporated towns and cities:

a) New Milford, Connecticut;

b) Windham and Mansfield, Connecticut;

c) Wallingford and Meriden, Connecticut;

d) Waterbury, Watertown, and Naugatuck, Connecticut;

e) "The greater Hartford, Connecticut, area," which includes Hartford, New Britain, Newington, Wethersfield, Farmington, West Hartford, Bloomfield, Windsor, South Windsor, East Hartford, Manchester, Glastonbury, and Vernon, Connecticut;

f) Avon and Simsbury, Connecticut;

g) Enfield, Somers, East Windsor, Suffield, and Windsor Locks, Connecticut;

h) Southington and Plainville, Connecticut;

i) Milford, Orange, West Haven, and New Haven, Connecticut;

j) East Haven, Branford, Guilford, Madison, Clinton, and Old Saybrook, Connecticut;

k) Fairfield, Stratford, Bridgeport, Trumbull, and Shelton, Connecticut;

l) South Kingstown and Narragansett, Rhode Island;

m) "The greater Providence, Rhode Island, area," which includes East Providence, Providence, Pawtucket, Warwick, Cranston, Central Falls, Lincoln, Smithfield, Barrington, Bristol, Cumberland, North Providence, Johnston, West Warwick, East Greenwich, and Coventry, Rhode Island; and Attleboro and Seekonk, Massachusetts; and

n) "the greater Springfield, Massachusetts, area," which includes Springfield, West Springfield, South Hadley, Chicopee, Westfield, Holyoke, Agawam, Southwick, Longmeadow, and East Longmeadow, Massachusetts.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, within thirty (30) days from the date this order becomes final:

1) To Star Markets Company in a manner approved by the Commission:

a) Edwards supermarket number 821 located at 295 Armistice Boulevard, Pawtucket, RI;
b) Edwards supermarket number 751 located at 200 Niantic Avenue, Providence, RI;
c) Edwards supermarket number 815 located at 1810 Plainfield Pike, Cranston, RI;
d) Edwards supermarket number 817 located at 418 Kingstown Road, Wakefield, RI;
e) Edwards supermarket number 779 located at 1401 Bald Hill Road, Warwick, RI;
f) Edwards supermarket number 820 located at 1000 Division Street, East Greenwich, RI; and
g) Stop & Shop supermarket number 458 located at Route 6 & 1 Commercial Way, Seekonk, MA.

2) To Bozzuto's Inc. in a manner approved by the Commission:

a) Edwards supermarket number 295 located at 207 Hartford Turnpike, Vernon, CT;
b) Edwards supermarket number 362 located at Newbrite Plaza, 60 East Main Street, New Britain, CT;
c) Edwards supermarket number 748 located at 333 North Main Street, West Hartford, CT; and
d) Edwards supermarket number 768 located at 750 Queen Street, Southington, CT.

3) To Shaw's Supermarkets, Inc., pursuant to a purchase and sale agreement dated September 20, 1996:

a) Edwards supermarket number 725 located at 40 Hazard Avenue, Enfield, CT;

b) Edwards supermarket number 742 located at 953 Wolcott Road, Waterbury, CT;

c) Edwards supermarket number 758 located at 538 Boston Post Road, Orange, CT;

d) Edwards supermarket number 773 located at 875 Bridgeport Avenue, Shelton, CT;

e) Stop & Shop supermarket number 665 located at 55 Welles Street, Glastonbury, CT;

f) Edwards lease agreement for premises located in the former Rich's Department Store, Wakefield Mall, Tower Hill Road, South Kingstown, RI;

g) Edwards supermarket number 312 located at 1100 Barnum Avenue, Stratford, CT;

h) Edwards lease agreement for the former Grand Union store site located at 800 Barnum Avenue, Stratford, CT;

i) Edwards supermarket number 200 located at 1975 Black Rock Turnpike, Fairfield, CT;

j) Edwards supermarket number 299 located at 1167 Main Street, Watertown, CT;

k) Edwards supermarket number 823 located at 266 East Main Street, Clinton, CT;

l) Edwards supermarket number 749 located at 60 Cantor Drive, Willimantic, CT;

m) Edwards supermarket number 783 located at 245 Kane Street, West Hartford, CT; and

n) Edwards supermarket number 317 located at 976 North Colony Road, Wallingford, CT.

4) To Big Y Foods, Inc., pursuant to a purchase and sale agreement dated September 26, 1996:

a) Edwards supermarket number 728 located at 830 Boston Post Road, Guilford, CT;

b) Edwards supermarket number 722 located at 650 Memorial Drive, Chicopee, MA;

c) Edwards supermarket number 704 located at West Main Route 44, Avon, CT;

d) Edwards supermarket number 368 located at 3 Kent Road, New Milford, CT; and

e) Edwards supermarket number 329 located at 265 Ellington Road, East Hartford, CT.

B. If respondents have not divested the Assets to be Divested pursuant to paragraph II.A, respondents shall divest the Assets to be Divested within thirty (30) days from the date this order becomes final 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.

C. 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 any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested absolutely and in good faith the Assets to be Divested pursuant to paragraph II of this order, the Commission may appoint a trustee to divest the Assets to be Divested. In the event that the Commission 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 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 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 receipt of 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 the Assets to be Divested.

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 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 (12) 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 for up to six (6) months each time.

5. The trustee shall have full and complete access to the Assets to be Divested and to the personnel, books, records and facilities related to the Assets to be Divested or to any other relevant information, as the trustee may reasonably request. 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 divestiture. 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 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. In the event that the trustee receives *bona fide* offers from more than one acquiring entity, the trustee shall submit all such bids to the Commission, and if the

Commission determines to approve more than one such acquiring entity for the Assets to be Divested, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. In the event the trustee determines that he or she is unable to divest the Assets to be Divested as described in paragraph II in a manner consistent with the terms of this order, the trustee may on his or her own initiative, or at the direction of the Commission, divest any additional or substitute supermarkets of the respondents located in the respective overlap areas and effect such arrangements as are necessary to satisfy the requirements of this order.

8. 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, and at reasonable fees, 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 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, and may include an incentive arrangement relating to price.

9. 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, 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.

10. 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.

11. 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 reasonably necessary or appropriate to accomplish the divestiture required by this order.

12. The trustee shall have no obligation or authority to operate or maintain the Assets to be Divested.

13. The trustee shall report in writing to respondents and the Commission every forty-five (45) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets to be Divested, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets to be Divested consistent 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.

B. Respondents 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.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to 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 Overlap Areas; or

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 Overlap Areas.

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

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 referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for the Notification. The Notification shall be filed with the Secretary of the Commission and need not be made to the United States Department of Justice. The Notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That respondents shall be bound by the terms and obligations of the Consent Order issued by the Commission in The Stop & Shop Companies, Inc., et al., Docket No. C-3649.

VII.

It is further ordered, That:

A. Within forty-five (45) days after the date this order becomes final and every forty-five (45) 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 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 proposals for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties 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.

VIII.

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 corporation to respondents, or the creation or dissolution of subsidiaries or any other change in respondents 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, 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 respondents relating to any matters contained in this order; and

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

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Koninklijke Ahold nv ("Royal Ahold"), a corporation organized, existing, and doing business under and by virtue of the laws of The Netherlands, with its office and principal place of business located at Albert Heijnweg 1, 1507 EH Zaandam, The Netherlands; Ahold USA, Inc. ("Ahold USA"), a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at One Atlanta Plaza, 950 East Paces Ferry Road, Suite 2575, Atlanta, GA; 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, Royal Ahold and Ahold USA, pursuant to an agreement dated on or about March 27, 1996, agreed to acquire the voting stock of The Stop & Shop Companies, Inc. ("the Acquisition"); and

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

Whereas, if the Commission accepts the attached Agreement Containing Consent Order, 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 the attached Agreement Containing Consent Order ("Assets") during the period prior to their divestitures, 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 or acquirers, 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 divestitures to the acquirer or acquirers approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

Whereas, Royal Ahold and Ahold USA entering into this Agreement shall in no way be construed as an admission by Royal Ahold or Ahold USA that the Acquisition is illegal; and

Whereas, Royal Ahold and Ahold USA 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, 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, the Parties agree as follows:

TERMS OF AGREEMENT

1. Royal Ahold and Ahold USA agree 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, Royal Ahold and Ahold USA will be free of close the Acquisition after July 15, 1996.

3. Royal Ahold and Ahold USA agree that from the date this Agreement is singed until the earlier of the dates listed in subparagraphs 3.a - 3.b, they 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 divestitures set out in the Consent Order have been completed.

4. From the time Royal Ahold and Ahold USA acquire The Stop & Shop Companies, Inc., until the divestiture set out in the Consent Order has been completed, Royal Ahold and Ahold USA shall maintain the viability and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they sell, transfer, encumber or otherwise impair their marketability or viability.

5. From the time Royal Ahold and Ahold USA acquire The Stop & Shop Companies, Inc., until the divestiture set out in the Consent Order has been completed, Royal Ahold and Ahold USA shall maintain the competitiveness of the Assets. This includes but is not limited to the maintaining of promotions and discount policies (*e.g.*, double and triple coupon policies and store coupon promotional as well as the continuation of specific store services (*e.g.*, hours of operation and operation of specific departments).

6. Should the Commission seek in any proceeding to compel Royal Ahold and Ahold USA to divest themselves of the Assets or to seek any other injunctive or equitable relief, Royal Ahold and Ahold USA 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. Royal Ahold and Ahold USA also waive all rights to contest the validity of this Agreement.

7. 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 Royal Ahold or Ahold USA and to their principal offices, Royal Ahold and Ahold USA shall permit any duly authorized representative or representatives of the Commission:

a. Upon three (3) days' notice to Royal Ahold or Ahold USA, access during the office hours of Royal Ahold or Ahold USA, 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 Royal Ahold or Ahold USA relating to compliance with this Agreement; and

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

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

IN THE MATTER OF

PENDLETON WOOLEN MILLS, INC.

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

Docket C-2985. Consent Order, July 31, 1979--Modifying Order, Sept. 30, 1996

This order reopens a 1979 consent order -- that prohibited the Oregon manufacturer from fixing, maintaining or enforcing resale prices for its products -- and this order modifies the consent order by permitting Pendleton to institute lawful price restrictive cooperative programs that are not a part of a resale price maintenance scheme.

ORDER GRANTING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JULY 31, 1979

On April 1, 1996, Pendleton Woolen Mills, Inc. ("Pendleton"), filed its "Request To Reopen" ("Petition") in Docket No. C-2985, 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 ("Rules"). Pendleton asks the Commission to reopen and modify the consent order issued by the Commission on July 31, 1979 ("order"), in *Pendleton Woolen Mills, Inc.*, 94 FTC 229 (1979).

In its Petition, Pendleton asks the Commission to reopen the order and modify provisions that limit Pendleton's ability to restrict the prices advertised by its dealers for Pendleton apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, Pendleton maintains that reopening and modification is warranted by changed conditions of fact and the public interest. Pendleton's Petition was placed on the public record for thirty days; no comments were received.

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); *see* Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[1]

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 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

[1] *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.").

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

Pendleton asserts in its Petition that its inability under the order to establish and maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods has impeded its ability to compete. Because of restrictions in the order, Pendleton maintains, it is unable to choose freely those with whom it will deal and unable to terminate business relationships with retailers that advertise and price Pendleton products in a matter inconsistent with Pendleton's image and quality and with Pendleton's marketing strategies. In addition, Pendleton claims that it is unable under the order unilaterally to impose restrictions on cooperative advertising or to specify sales break dates.

According to Pendleton, "both the retail and manufacturing side of the apparel industry have undergone tremendous changes over the last 15 years." Petition at 3.[2] The changes identified by Pendleton include increased competition from imports,[3] unprecedented restructuring in the retail industry, including a proliferation of discount, warehouse and factory outlets, and increased retail discounting.[4] Petition at 3-4. According to Pendleton, the growth of discount, warehouse and factory outlets has eroded the market share of Pendleton's customers, traditional department stores and specialty stores,[5] which "have faced serious financial problems in the last

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[2] Because the Commission has determined that the order should be reopened and modified in the public interest, it need not and does not consider whether Pendleton has shown changed conditions that would require reopening the order.

[3] More than 60 percent of all apparel sold in the United States is now manufactured abroad, according to the Petition at 4.

[4] Similar changes in retailing were cited in Levi Strauss & Co., Docket No. 9081, Order Reopening and Modifying Order Issued on July 12, 1978 (December 20, 1994) (apparel manufacturers integrating into retailing to showcase their products, market their complete lines and demonstrate to their retailer-customers the benefits of promoting the manufacturer's products). *See also* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 5 ("discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers.").

[5] Pendleton does not offer its products to discount or warehouse operations. *See* Affidavit of Dick Poth, President of Pendleton Woolen Mills, Inc. (August 14, 1995) ¶ 7 ("Poth Affidavit").

decade."[6] Petition at 4. Pendleton claims that the increased discounting and its inability under the order to respond unilaterally to the discounting have resulted in decreased sales by Pendleton to its traditional department store and specialty store customers and decreased promotion and emphasis on Pendleton products by those retailers.[7]

Pendleton states that the order has put it "at a substantial disadvantage in competing with foreign and other domestic clothing manufacturers." Petition at 5. Unlike its competitors, Pendleton cannot unilaterally impose "marketing controls"[8] and is reluctant to suggest that its customers refrain from "excessive or inappropriate promotion of its products" that "ultimately results in decreased profitability" for its customers. Petition at 7. Pendleton believes that the use of these marketing controls would increase its sales and increase the profitability of the line for its customers. Poth Affidavit ¶¶ 12-15; Stine Affidavit ¶¶ 6-7 & 9. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices would encourage service-oriented stores to compete with the discount stores with respect to these brands, according to Pendleton. Finally, Pendleton asserts that the requested modifications would enable it to compete more effectively for sales to retailers that stress quality over price and that provide a high level of service to consumers.[9] Pendleton has found that such retailers do best with Pendleton merchandise. Petition at 6.

Pendleton has shown that the public interest warrants reopening the order to consider whether it should be modified. Pendleton has shown that the order prohibits conduct that by itself may not be unlawful and that the prohibition inhibits its ability to compete with firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs and that are free to choose those with whom they will deal.

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[6] Pendleton reports that from 1988 through 1994, it lost more than 100 accounts because of bankruptcy or other financial problems, approximately 640 accounts because of store closures or going out of business and approximately 40 accounts for other reasons. Poth Affidavit ¶ 11.

[7] Poth Affidavit ¶ 13; Affidavit of Jon Stine (June 26, 1995), ¶ 6 ("Stine Affidavit").

[8] Petition at 7. Specifically, Pendleton claims that the order prevents it from choosing its customers, from restricting cooperative advertising or specifying sale breakdates, and from choosing to stop selling to a retailer because of that retailer's pricing, practices that Pendleton claims are available to its competitors. Poth Affidavit ¶¶ 12-13. *See also* Stine Affidavit ¶¶ 2-5; Affidavits of Lauren Bensen (June 6, 1995), ¶¶ 1-4; and Karen Decasperis (May 31, 1995), ¶¶ 1-2.

[9] Pendleton traditionally has sold its products through retailers that have a "quality image and who provide a high level of service to the consumer." Poth Affidavit ¶ 2.

III. THE ORDER SHOULD BE MODIFIED

Pendleton requests that the order be modified to permit Pendleton to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Pendleton products at Pendleton's previously announced resale prices. For these purposes, Pendleton 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. Price restrictive cooperative advertising is not *per se* unlawful and does not prevent a dealer from selling at discount prices or from advertising discount prices at the retailer's own expense. *See Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).[10] The Commission has said that "[t]he fact that a distributional restraint may have an incidental effect on resale price is not by itself enough to condemn the practice as *per se* unlawful." *Id.* The Commission also 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.[11]

Modification of the order to permit Pendleton 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

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[10] *See also* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket No. C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; *The Magnavox Co.*, 113 FTC 255 (1990).

[11] In Advertising Checking Bureau, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Cooperative 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).

reasonable in many circumstances.[12] Pendleton's use of price restrictive cooperative advertising programs, absent further agreement on price or price levels to be charged by the retailers, is not likely to restrict interbrand competition or to reduce output. Of course, any cooperative advertising program implemented by Pendleton 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 Pendleton 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." Accordingly, the Commission has determined to add the proviso quoted above to paragraph I of the order. The modification would permit Pendleton to engage in conduct that is lawful if not a part of a resale price maintenance scheme.

IV. ADDITIONAL MODIFICATION OF THE ORDER

Pendleton has requested additional modifications of the order to remove language that Pendleton maintains is inconsistent with the new proviso to paragraph I of the order. Each of these requests is considered below.

Paragraph I.1. -- According to Pendleton, the words "advertise, promote" in paragraph I.1 of the order[13] would be confusing as to Pendleton's ability to "take any lawful steps vis-a-vis its accounts' pricing practices." Petition at 9. Pendleton requests that the Commission delete these words from paragraph I.1 of the order.

The language of the proviso added to paragraph I of the order is sufficient to permit Pendleton to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from paragraph I.1, however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Pendleton has not requested or

[12] *See* In re Nissan Antitrust Litigation, 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).

[13] Paragraph I.1 prohibits Pendleton from:

Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from paragraph I.1 of the order is denied.

Paragraph I.4. -- Pendleton has requested that the words "or terminating" be deleted from paragraph I.4 of the order.[14] According to Pendleton, these words directly contradict the proviso added to paragraph I of the order and would cause confusion as to Pendleton's right, for example, unilaterally to terminate a retailer after receiving complaints from other retailers about the first retailer's pricing. The words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer" should be deleted from paragraph I.4 of the order.[15] Deleting these words is consistent with the decision of the Commission in *Lenox, Inc.*, 111 FTC 612, 617-18 & 620 (1989). In Lenox, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring Lenox from requesting its dealers to report any retailer that did not observe the resale prices suggested by Lenox. The conduct prohibited by the deleted words in Lenox included termination of a dealer. As the Supreme Court explained in Monsanto, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763-64. To the extent that this portion of paragraph I.4 may inhibit Pendleton from legitimate unilateral conduct, it may cause competitive injury. Any conduct that would be unlawful under this part of paragraph I.4 would be prohibited by other provisions of the order.

Paragraph I.5. -- Pendleton asks the Commission to delete the words "advertising" and "or advertised" from paragraph I.5 of the

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[14] Paragraph I.4 prohibits Pendleton from:
Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer.

[15] *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (*per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price or price levels).

order.[16] Pendleton claims that inclusion of these words in paragraph I.5, notwithstanding the paragraph I proviso, may interfere with its ability to address legitimate concerns about the advertising and marketing of its products. The words should be deleted from paragraph I.5. The references to "advertising" in paragraph I.5 of the order could hinder Pendleton's ability to institute a lawful, price restrictive cooperative advertising program. Deleting these words makes clear that Pendleton can impose price restrictions on its dealers in connection with a lawful cooperative advertising program, consistent with the Commission's conclusion that price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. *See* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Paragraph I.6. -- Pendleton has asked the Commission to delete paragraph I.6 in its entirety, or, in the alternative, delete the words "Terminating or" from paragraph I.6 of the order.[17] Pendleton believes that this provision, but especially the word "Terminating," prohibits Pendleton from unilaterally terminating "a dealer because of the dealer's pricing practices . . . ." Petition at 12. According to Pendleton, such conduct is "clearly . . . lawful action." *Id.*

The prohibition in paragraph I.6 against "terminating . . . any dealer" restricts Pendleton from unilaterally terminating such a dealer even if the termination is consistent with the Colgate doctrine. Deleting the word "terminating" from paragraph I.6 will make the order consistent with the proviso language that restores Pendleton's Colgate rights. Unilateral termination of a dealer for discounting is not in itself unlawful. *See* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10. The request to delete the word "terminating" from paragraph I.6 of

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[16] Paragraph I.5 prohibits Pendleton from:
Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold or advertised.

[17] Paragraph I.6 prohibits Pendleton from:
Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

the order is granted.[18] For clarity, the words "(other than termination)" should be added to the paragraph following the word "action."

Paragraph II -- Pendleton requests that the Commission delete paragraph II from the order.[19] Pendleton states that "if [Pendleton] remains subject to paragraph II, it will be reluctant to take lawful action which might be construed as contrary to representations required by that provision." Petition at 12.

Paragraph II relates to Pendleton's use of suggested retail prices. Under the order, Pendleton could not suggest retail prices for a period that expired in 1982. The remaining provisions of paragraph II restrict the use of suggested retail prices. Specifically, Pendleton must "[c]learly and conspicuously state on any material on which such suggested price is stated that such price is suggested only," order ¶ II.a, and notify its customers that they are not obligated to adhere to suggested retail prices and that "such suggested retail price is advisory only." Order ¶ II.b. The Commission considered modification of a similar provision in Clinique[20] and set the provision aside in the public interest. The Commission concluded that the provision in the Clinique order addressed conduct (suggested prices) that by itself may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, paragraph II should be set aside.

V. CONCLUSION

Pendleton has shown that reopening the order is in the public interest and that the order should be modified as described above. The order as modified bars Pendleton from engaging in resale price

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[18] Paragraph I.6, as modified, would bar Pendleton from threatening to terminate dealers 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. Pendleton may, consistent with the order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its 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." *See* Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995), at 10.

[19] Paragraph II of the order prohibits:

Publishing, disseminating, circulating, providing or communicating, orally or in writing or by any other means, any suggested retail price from the date of service of this order until April 20, 1982; provided, however, that if, after April 20, 1982, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

[20] Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

maintenance and permits Pendleton to engage in otherwise lawful conduct.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order in Docket No. C-2985 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 is modified by deleting the words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer," as follows:

Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product.

(c) Paragraph I.5 is modified to delete the words "advertising" and "or advertised," as follows:

Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold.

(d) Paragraph I.6 is modified by deleting the words "Terminating or" and "other" and adding "(other than termination)," as follows:

Taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

(e) Paragraph II is set aside.

(f) Pendleton's request to modify paragraph I.1 to delete the words "advertise, promote" is denied.

Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

I concur in the Commission's decision to reopen and modify the order in this matter. Respondent Pendleton Woolen Mills, Inc. has shown that the order prohibits conduct that by itself may not be unlawful, and that the prohibition inhibits its ability to compete with firms that are free to (and do) engage in price-restrictive advertising programs and can freely choose with whom they will deal.

As I have stated elsewhere, however, I cannot concur fully in the reasoning expressed in today's order because I do not share in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the order" when a petition to reopen is judged under the public interest standard. Order Granting in Part Request to Reopen and Modify Order, Docket No. C-2985, at 2. Neither the statute[1] nor the Commission rule[2] governing our consideration of petitions to reopen provides for an "affirmative need" requirement that a petitioner must meet. I would therefore prefer that such language be deleted from this and future Commission rulings granting or denying petitions to reopen existing orders.

[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

[2] Rule 2.51(b) of the Commission's Rules of Practice, 16 CFR 2.51(b).

IN THE MATTER OF

HOME OXYGEN & MEDICAL EQUIPMENT CO., ET AL.

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

Docket C-3530. Consent Order, Sept. 14, 1994--Modifying Order, Oct. 4, 1996

This order reopens a 1994 consent order -- that prohibited, among other things, the California suppliers of oxygen systems from acquiring or granting an ownership interest in a firm that sells or leases oxygen systems in the relevant geographic market -- and this order modifies the consent order by relieving John E. Sailer, M.D. of all obligations under the consent order as it applies to him, since he is now retired.

ORDER REOPENING AND MODIFYING ORDER

On April 16, 1996, Dr. John E. Sailer, one of the respondents named in the consent order issued by the Commission on September 14, 1994, in Docket No. C-3530 ("order"), filed his first annual report of compliance with that order in which he explained that he had retired from the practice of medicine and believed, therefore, that he no longer was subject to the order's annual reporting obligation. On June 17, 1996, Dr. Sailer filed a verified statement confirming that he is retired and that he has neither acquired nor intends to acquire any interest proscribed by the order. In addition to the annual reporting requirement of paragraph V.B, as a respondent, Dr. Sailer continues to be subject to paragraphs II and III of the order. Paragraph II prohibits each respondent from specified grants or acquisitions of interests in oxygen systems in the relevant geographic market if, after such a grant or acquisition, more than twenty-five percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity. Paragraph III requires each respondent to notify the Commission within thirty days of making certain specified acquisitions.

Dr. Sailer's letter and verified statement together have been treated as a Petition To Reopen and Modify Consent Order ("Petition") in this matter. Dr. Sailer requests that the Commission reopen and modify the 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 and Procedure, 16 CFR 2.51, to set aside the order as it applies to him. The thirty-day public comment

period on Dr. Sailer's Petition ended on August 11, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant Dr. Sailer's Petition.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4.[1]

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.[2] If the Commission determines that the

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[1] *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

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

petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[3]

As required by Section 2.51(b), Dr. Sailer has submitted an affidavit affirming that he is permanently retired from the practice of medicine and that he neither now or in the future plans to acquire any interest in any medically related venture including durable medical goods. The complaint in this matter alleged that Dr. Sailer, in partnership with the other named respondent pulmonologists, through their partnership interest in respondent Home Oxygen & Medical Equipment Company, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged anticompetitive effects resulted from the respondents, as a significant percentage of pulmonary doctors practicing in the relevant market, referring patients to their pulmonary equipment company. Dr. Sailer no longer has patients to refer to a medically related company and no longer owns an interest in any such company. Moreover, even a subsequent acquisition of such an interest either currently proscribed by the order or for which the order requires notice would lack competitive significance because Dr. Sailer is retired and, consequently, has no patients to refer to such a company.

Dr. Sailer has, therefore, made a satisfactory showing that conditions of fact have changed. Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, Dr. Sailer's retirement is an exit from the market and is a sufficient changed circumstance to support setting aside the entire order as to him. The respondent in Union Carbide Corporation, Order Reopening and Modifying Consent Order Issued on September 28, 1977, 108 FTC 184 (1986) requested that the Commission reopen and modify that order to delete welding products and gas welding apparatus as covered products because it sold all such assets and intended to stay out of the welding business.[4] The Commission modified the Union Carbide order because respondent had clearly exited a business covered by the order

[3] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[4] 108 FTC at 188. *Cf.* National Tea Company, Order Reopening and Setting Aside Order Issued on July 23, 1980, 111 FTC 109 (1988).

and had demonstrated that it had no intention of re-entering the business. So in this instance, Dr. Sailer has submitted an affidavit stating that he is permanently retired from the practice of medicine and that he neither now nor in the future plans to acquire any interest in any medically related venture, including durable medical goods. Dr. Sailer has clearly exited a business covered by the order and has demonstrated that he has no intention of re-entering the business, either through the practice of pulmonary medicine or through acquisitions covered by order paragraphs II and III. These changed circumstances, therefore, warrant relieving him from being subjected to the proscriptions of these paragraphs and from the annual reporting requirement of paragraph V.B. As these three paragraphs are the only remaining operative paragraphs of the order, the order as to Dr. Sailer should be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and that the Commission's order issued on September 14, 1994, be, and it hereby is, set aside as to Dr. John E. Sailer as of the effective date of this order.

SEPARATE STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Because I have consistently questioned the Commission's basis for even issuing the consent orders in this matter as well as in Certain Home Oxygen Pulmonologists, Docket No. C-3531, and Homecare Oxygen and Medical Equipment Co., Docket No. C-3532,[1] I would have preferred to view Dr. Sailer's petition as an occasion for reexamining all three orders and, ideally, for determining that they should be vacated. The Commission, however, has chosen to confine its scrutiny to Dr. Sailer's situation under the Home Oxygen order. I agree that the order should be set aside as to him in light of his retirement from medical practice. Nevertheless, given that Dr. Sailer's retirement constitutes a change of fact and that the Commission has relied entirely on this changed circumstance in reaching its decision, I see no reason for the Commission's order to include the boilerplate paragraph on page 3 that sets forth the separate "public interest" standard for reopening and modifying orders.

[1] Statement of Commissioner Roscoe B. Starek, III, in Home Oxygen and Medical Equipment Co., Docket No. C-3530; Certain Home Oxygen Pulmonologists, Docket No. C-3531; Homecare Oxygen and Medical Equipment Co., Docket No. C-3532.

IN THE MATTER OF

SYNCRONYS SOFTCORP, ET AL.

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

Docket C-3688. Complaint, Oct. 7, 1996--Decision, Oct. 7, 1996

This consent order prohibits, among other things, the California-based computer software manufacturer and three of its officers from making performance claims regarding their software programs or any substantially similar product unless the claims are true and substantiated. The consent order also prohibits the respondents from making any claims that a product intended to improve computer performance is licensed, endorsed, authorized, or certified by any person or organization, unless those claims are true.

Appearances

For the Commission: *Robin Eichen, Douglas Goglia* and *Julie Gearty*.

For the respondents: *Harvey Saferstein, Chadbourne & Parke*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Syncronys Softcorp, a corporation, and Rainer Poertner, Daniel G. Taylor, and Wendell Brown, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Syncronys Softcorp is a Nevada corporation with its principal office or place of business at 3958 Ince Boulevard, Culver City, California.

2. Respondent Rainer Poertner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

3. Respondent Daniel G. Taylor is an officer of the corporate respondent. Individually or in concert with others, he formulates,

directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

4. Respondent Wendell Brown is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed to the public software products intended to improve the performance of personal computers, including "SoftRAM" and "SoftRAM^{95}."

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

BACKGROUND

7. For a computer to work, it must "load" its own operating instructions, the applications programs being used (such as word processing, spreadsheet, and database programs), and the data being worked on into its "random access memory," often referred to as "RAM." As computers' operating instructions and applications programs have become more powerful, they generally have become more "memory intensive," *i.e,* they have needed more RAM to load and run properly. This has been true of the "Windows" operating systems manufactured by Microsoft, Inc. -- the predominant operating systems in personal computers -- and for applications programs sold for use with them.

8. When a computer has inadequate RAM for a user's demands, the computer may operate sluggishly, refuse to run large or multiple programs, or "crash," in effect shutting down catastrophically with resultant loss of data. Additional RAM, however, generally can be purchased and installed in a computer in order to mitigate or remedy these problems. RAM is measured in "megabytes," often abbreviated as "MB," and is purchased in the form of memory chips that are inserted into the computer's processor. Additional RAM is relatively expensive, and personal computer users often spend several hundred dollars to purchase and install additional RAM adequate to their needs.

9. In or about May 1995, respondents began marketing a software product called "SoftRAM." As is more fully described subsequently, respondents promoted SoftRAM to users of the Windows 3.0, 3.1, and 3.11 operating systems (collectively "Windows 3.x") as a substantially less expensive, but functionally identical, alternative to the purchase and installation of additional RAM. To date, respondents have sold approximately 100,000 copies of SoftRAM for that purpose.

10. In or about August 1995, Microsoft, Inc. introduced "Windows 95," a much publicized and awaited operating system said to embody numerous and substantial improvements over Windows 3.x. At the time of its release, it was expected that there would be an unparalleled demand for Windows 95, both as installed in new computers and as "upgrades" to computers using Windows 3.x. Both before and after the introduction of Windows 95, considerable notice was taken by prospective purchasers of the fact that Windows 95 and applications sold for use with it would be particularly "memory hungry," requiring at least eight megabytes of RAM and preferably sixteen. The great number of computer users with only four or eight megabytes of RAM in their computers were frequently cautioned that they could upgrade effectively to Windows 95 only by acquiring additional RAM.

11. As is more fully described subsequently, in or about August 1995, respondents began the promotion and sale of "SoftRAM^{95}," bearing Microsoft's logo "Designed for Windows 95," to prospective and actual Windows 95 users as a substantially less expensive, but functionally identical, alternative to the purchase and installation of additional RAM. To date, respondents have sold approximately 600,000 copies of SoftRAM^{95} for that purpose.

SOFTRAM

12. Since at least May 1995, respondents have disseminated or have caused to be disseminated advertisements and product packaging that make a variety of effectiveness claims for SoftRAM. Respondents' advertisements and product packaging include, but are not necessarily limited to, the attached Exhibit 1. These advertisements and product packages contain the following statements:

A. "Double Your Memory seamlessly with SoftRAM. Eliminate the expense and hassle of opening your PC to install hard RAM." (Emphasis in original; Exhibit 1).

B. "Imagine: 4MB becomes 8, 8 becomes 16 . . . You become doubly productive. Open more applications simultaneously and say good-bye to [computer screen messages indicating error due to insufficient memory]." (Emphasis in original; Exhibit 1).

C. "SoftRAM's Patented Technologies take your Windows memory and effectively double it. And SoftRAM's unique RAM Analyst . . . pre-calculates the most efficient compression method for each RAM page of memory." (Emphasis in original; Exhibit 1).

13. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that:

A. SoftRAM uses compression technology to double the RAM available to a computer using Windows 3.x;

B. SoftRAM produces the effect of doubling RAM in a computer using Windows 3.x, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and a computer with 8MB of RAM will behave as though it had 16MB of RAM;

C. Use of SoftRAM will permit a Windows 3.x user to open more applications simultaneously on a computer as though the amount of RAM in that computer had been doubled; and

D. Use of SoftRAM in a computer using Windows 3.x will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s).

14. Through the means described in paragraph twelve, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph thirteen, at the time the representations were made.

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

16. Since at least August 1995, respondents have disseminated or caused to be disseminated advertisements and product packaging that make a variety of effectiveness claims for SoftRAM[95]. Respondents' advertisements and product packaging include, but are not necessarily limited to, the attached Exhibits 2, 3, and 4. These advertisements and product packages contain the following statements and depictions:

A. "ANNOUNCING THE ONLY DISK THAT DOUBLES YOUR MEMORY FOR WINDOWS 95." (Emphasis in original; Exhibit 2).

B. "Why risk the technical nightmare and expense of adding hard RAM? Just click on SoftRAM[95], the only software to instantly speed up Windows 95 and Windows 3.0 and higher." (Exhibit 2).

C. "Doubling RAM doesn't have to be hard. Install SoftRAM[95] and instantly speed up Windows 95 and Windows 3.0 and higher. Run multimedia and RAM hungry applications. Open more applications simultaneously." (Emphasis in original; Exhibit 3).

D. "4MB becomes at least 8MB. 8MB becomes at least 16MB. . . . (In fact, you can get up to 5 times more memory.)" (Exhibit 3).

E. "Designed for Microsoft Windows 95 [depicting the Microsoft logo]." (Exhibit 4).

F. "Double Your Memory and expand your System Resources seamlessly with SoftRAM[95]. Eliminate the expense and hassle of opening your PC to install HardRAM chips." (Emphasis in original; Exhibit 4).

G. "Imagine: 4MB becomes 8MB, 8MB becomes 16MB . . . You become doubly productive." (Emphasis in original; Exhibit 4).

H. "Say good-bye to 'Out-of-Memory' messages." (Exhibit 4).

I. "SoftRAM[95]'s Patent Pending RAM compression technology takes your Windows memory and at least doubles it. In fact, SoftRAM[95] now achieves RAM compression ratios of up to 5x and higher." (Emphasis in original; Exhibit 4).

17. Through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that:

A. SoftRAM[95] increases RAM in a computer using Windows 95 to a greater extent than other software products;

B. SoftRAM[95] uses compression technology to at least double the RAM available to a computer using Windows 3.x or Windows 95, and achieves RAM compression ratios of up to five times and higher in such a computer;

C. SoftRAM[95] produces the effect of at least doubling RAM in a computer using Windows 3.x or Windows 95, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and

a computer with 8MB of RAM will behave as though it had 16MB of RAM;

D. Use of SoftRAM^{95} in a computer will speed up Windows 3.x or Windows 95 as though the amount of RAM in that computer had been at least doubled;

E. Use of SoftRAM^{95} will permit a Windows 3.x or Windows 95 user to run larger applications on a computer, and to open more applications simultaneously, as though the amount of RAM in that computer had been at least doubled;

F. Use of SoftRAM^{95} with Windows 3.x or Windows 95 will result in expanded systems resources on a computer and will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); and

G. Microsoft, Inc. has licensed, endorsed, or otherwise approved SoftRAM^{95} for use with Windows 95.

18. In truth and in fact,

A. SoftRAM^{95} does not increase RAM in a computer using Windows 95 to a greater extent than other software products;

B. SoftRAM^{95} does not use compression technology or at least double the RAM available to a computer using Windows 95, nor does it achieve RAM compression ratios of up to five times and higher in a computer using Windows 95; in fact, SoftRAM^{95} does not increase the RAM available to a computer using Windows 95;

C. SoftRAM^{95} does not produce the effect of at least doubling RAM in a computer using Windows 95, such that a computer with 4MB of RAM will behave as though it had 8MB of RAM and a computer with 8MB of RAM will behave as though it had 16MB of RAM; in fact, SoftRAM^{95} does not produce the effect of increasing RAM in a computer using Windows 95;

D. Use of SoftRAM^{95} in a computer will not speed up Windows 95 as though the amount of RAM in that computer had been at least doubled; in fact, use of SoftRAM^{95} will not speed up Windows 95;

E. Use of SoftRAM^{95} will not permit a Windows 95 user to run larger applications on a computer, or to open more applications simultaneously, as though the amount of RAM in that computer had been at least doubled; in fact, use of SoftRAM^{95} will not permit a Windows 95 user to run larger applications or to open more applications simultaneously;

F. Use of SoftRAM[95] with Windows 95 will not result in expanded systems resources on a computer and will not substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); and

G. Microsoft, Inc. has not licensed, endorsed, or otherwise approved SoftRAM[95] for use with Windows 95.

Therefore, the representations set forth in paragraph seventeen, to the extent applicable to Windows 95, were, and are, false or misleading.

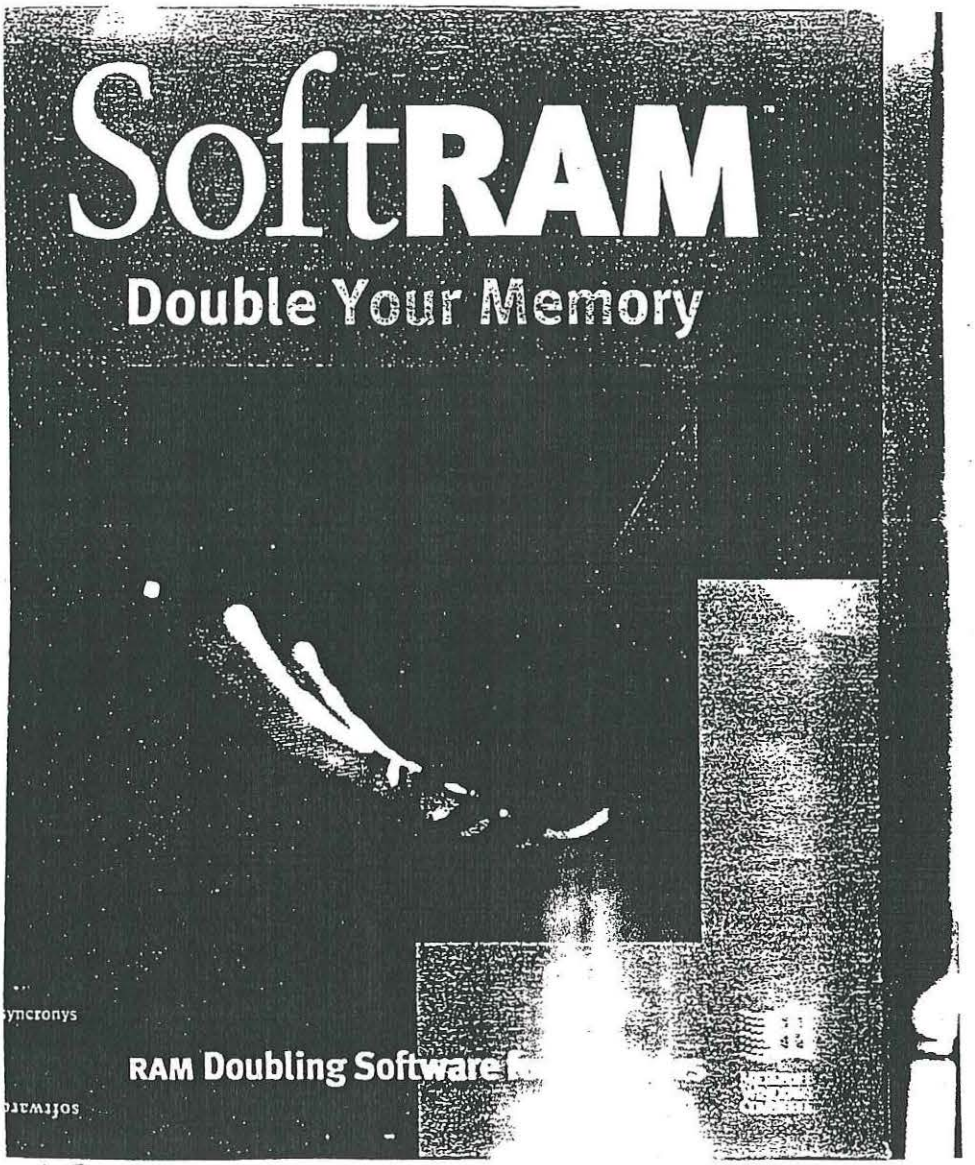
19. Through the means described in paragraph sixteen, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seventeen, subparagraphs A through F, at the time the representations were made.

20. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seventeen, subparagraphs A through F, at the time the representations were made. Therefore, the representation set forth in paragraph nineteen was, and is, false or misleading.

21. 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 1

EXHIBIT 1



FRONT OF B

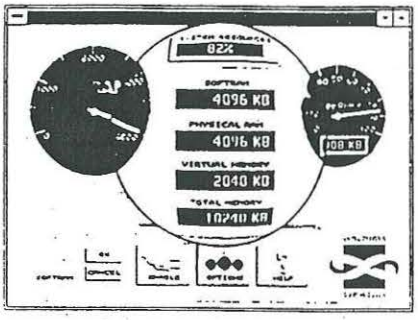
EXHIBIT 1

SoftRAM

RAM Doubling Software for Windows

Double Your Memory
seamlessly with SoftRAM. Eliminate the expense and hassle of opening your PC to install hard RAM.

Imagine: 4MB becomes 8
8 becomes 16... You become doubly productive. Open more applications simultaneously and say good-bye to



SoftRAM's Patented Technologies
take your Windows memory and effectively double it. And SoftRAM's unique RAM Analyst dynamically reviews the memory requirements of all of your applications and pre-calculates the most efficient compression method for each RAM page of memory. All of this is tracked and continuously updated in a knowledge database to optimize performance on the applications you use.

- Avoid the expense & hassle of hard RAM
- One-click, one-time installation
- Automatic, transparent & user configurable
- Works with all 386 & higher desktops & laptops
- Use with as little as 4MB
- Works with Windows 3.0 & higher
- Free Update to SoftRAM for Windows 95
- Compatible with all Windows applications
- Ideal for graphics programs & large data files

3350 Ince Boulevard
Culver City, CA 90232
Tel 310 842 9203 Fax 310 842 9014

BACK OF BOX

282 Complaint

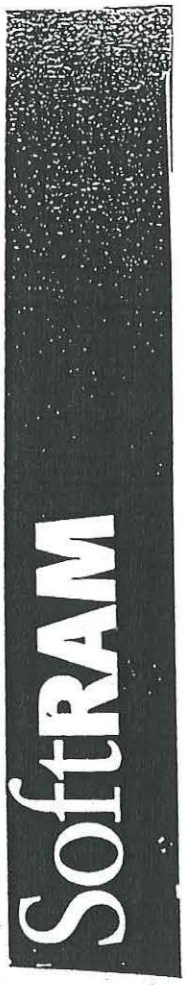
EXHIBIT 1

SIDE OF BOX

EXHIBIT 1


SoftRAM
MICROSOFT WINDOWS COMPATIBLE
syncronys
software

EXHIBIT 1



TOP OF BOX

EXHIBIT 1

BOTTOM OF BOX

EXHIBIT 2

EXHIBIT 2

ANNOUNCING THE ONLY DISK THAT DOUBLES YOUR MEMORY FOR WINDOWS 95.

■ Why risk the technical nightmare and expense of adding hard RAM? Just click on SoftRAM™ the only software to instantly speed up Windows 95 and Windows 3.0 and higher. Run multimedia and RAM hungry applications. Open more applications simultaneously. 4MB becomes at least 8MB. 8MB becomes at least 16MB. (In fact, you can get up to 5 times more memory.) Works with all 386 and higher desktops and laptops. Good-bye "Out-of-Memory." Hello, SoftRAM.

Don't Run Windows Without It.

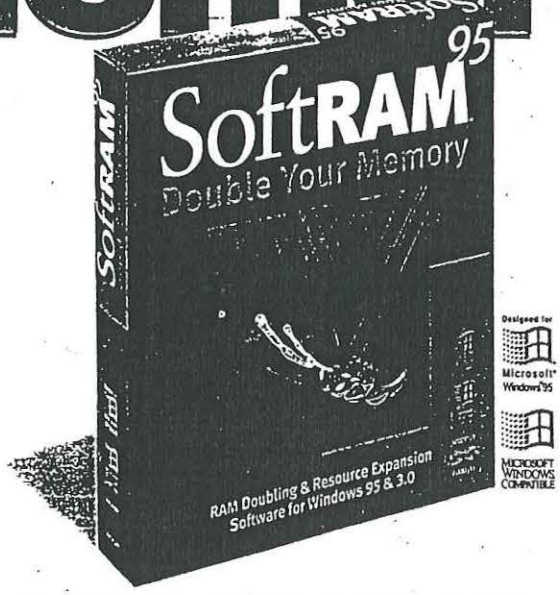
syncronys

SoftRAM™ is now at resellers everywhere or direct from 1-800-691-7981.

EXHIBIT 3

EXHIBIT 3

double click. double memory.



■ Doubling RAM doesn't have to be hard. Install SoftRAM™ and instantly speed up Windows 95 *and* Wir .ows 3.0 and higher. Run multimedia and RAM hungry applications. Open more applications simultaneously. Say good-bye to "Out-of-Memory" messages. 4MB becomes at least 8MB. 8MB becomes at least 16MB. Get the idea? (In fact, you can get up to 5 times more memory.) SoftRAM™ works with all 386 and higher desktops and laptops. *PC Novice* calls SoftRAM the "real RAM doubler for Windows." Executive Summary: Don't Run Windows Without It.™

SoftRAM™ is now at resellers everywhere or direct from 1-800-691-7981.

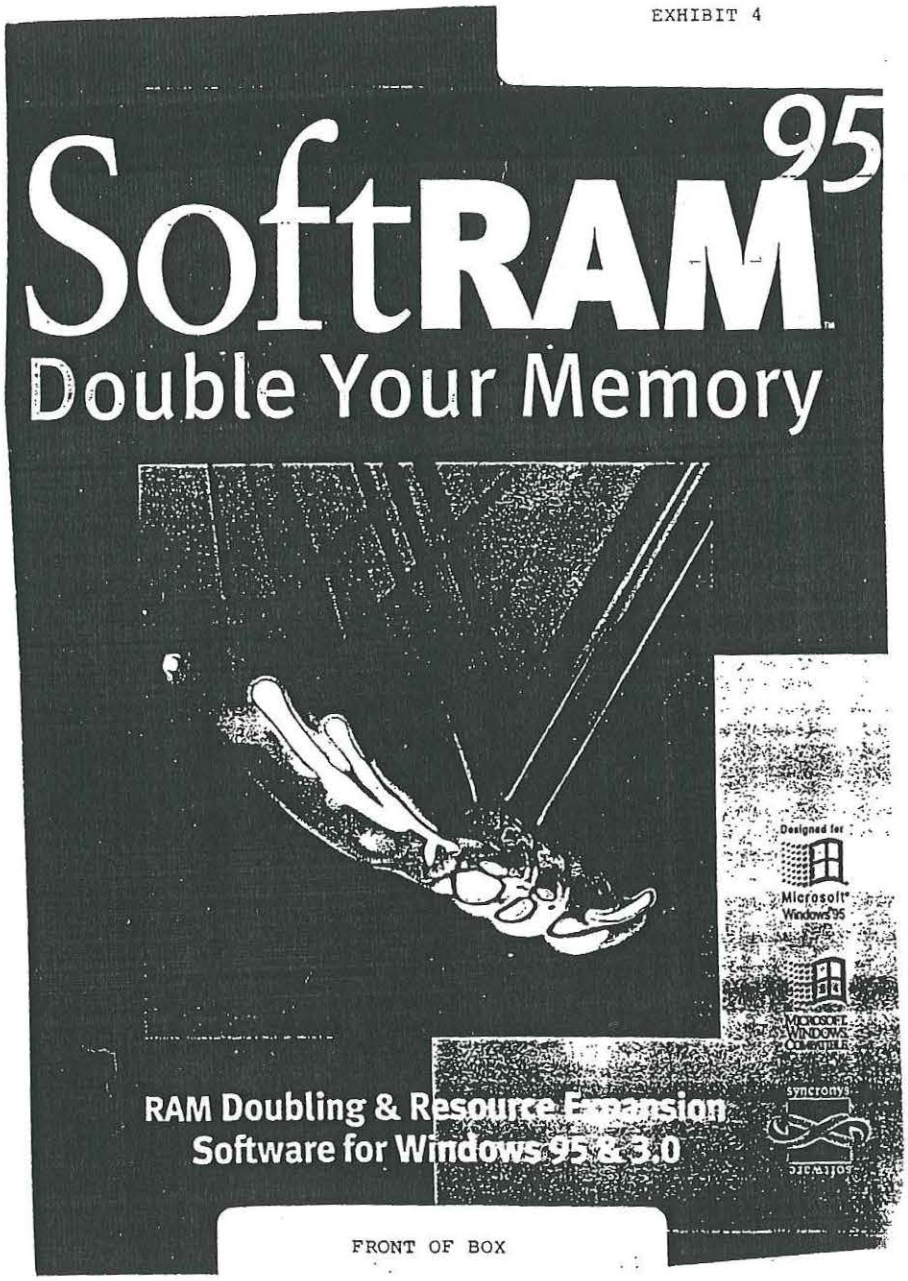
syncronys software

Circle 215 on reader service card

282 Complaint

EXHIBIT 4

EXHIBIT 4



FRONT OF BOX

EXHIBIT 4

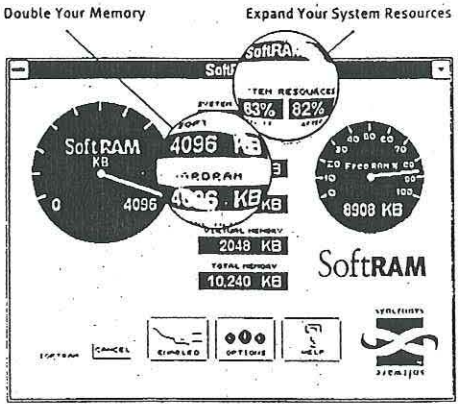
SoftRAM 95

RAM Doubling & Resource Expansion Software

Double Your Memory
and expand your System Resources seamlessly with SoftRAM™. Eliminate the expense and hassle of opening your PC to install HardRAM chips. SoftRAM™ installs in seconds and is compatible with Windows 95, Windows 3.0 & higher and all Windows applications.

Imagine: 4MB becomes 8MB
8MB becomes 16MB... You become doubly productive. Install SoftRAM™ and instantly speed up Windows, run larger applications and open more applications simultaneously. Say good-bye to 'Out-of-Memory' messages.

SoftRAM™'s Patent Pending
RAM compression technology takes your Windows memory and at least doubles it. In fact, SoftRAM™ now achieves RAM compression ratios of up to 5x and higher. And SoftRAM™ expands System Resource space under Windows 3.0 so you can load and run more applications and take full advantage of Windows' powerful multi-tasking. SoftRAM™ even clears Windows 3.0 'critical' memory bottlenecks under 1MB - the space used, often wastefully, by system software and device drivers. SoftRAM™ configures automatically to both your PC and to you. Our unique RAM Analyst™ dynamically tracks and records the memory requirements of the applications you use and optimizes performance based on your patterns of usage.



- Avoid the expense & hassle of installing HardRAM
- Works with WIN 95 and WIN 3.0 & higher
- Installs in seconds – safe, tested & guaranteed
- Automatic, transparent & user configurable
- Works with all 386 & higher desktops & laptops
- Use with as little as 4MB HardRAM
- Compatible with all Windows applications
- Ideal for Multi-media & RAM hungry programs

Don't Run Windows Without It!

Syncronys Softcorp
3960 Ince Boulevard
Culver City, CA 90232
NASDAQ: SYCR

BACK OF BOX

EXHIBIT 4

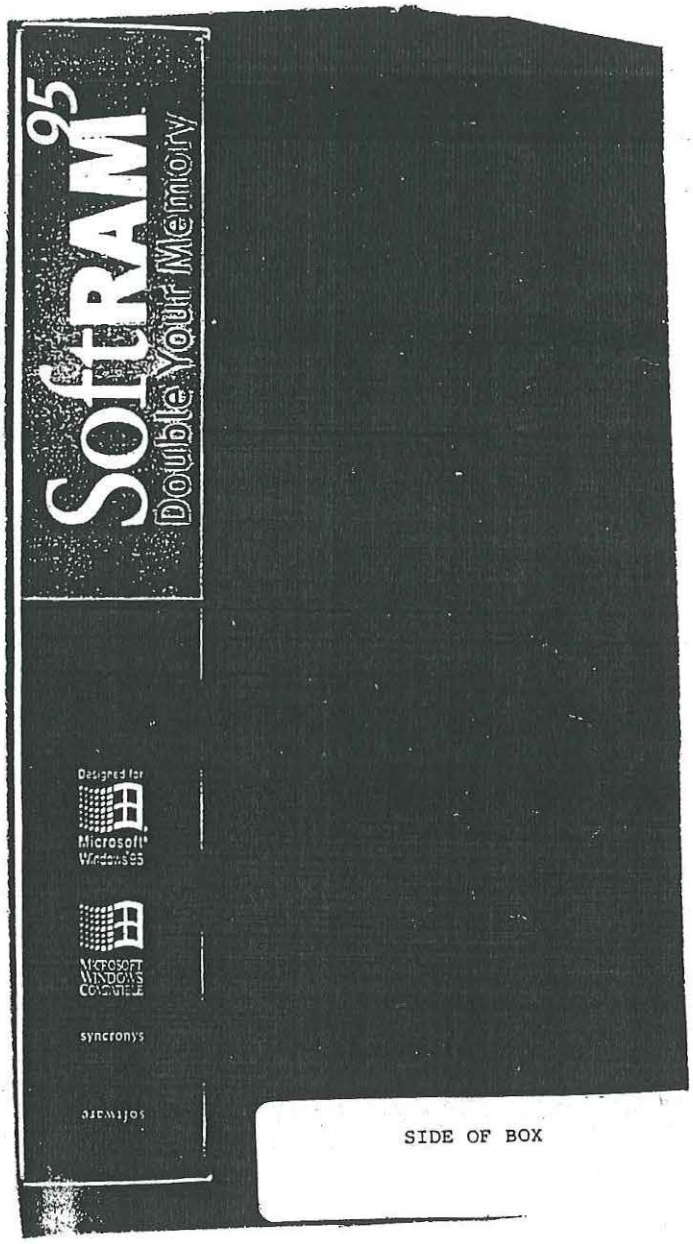


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EXHIBIT 4

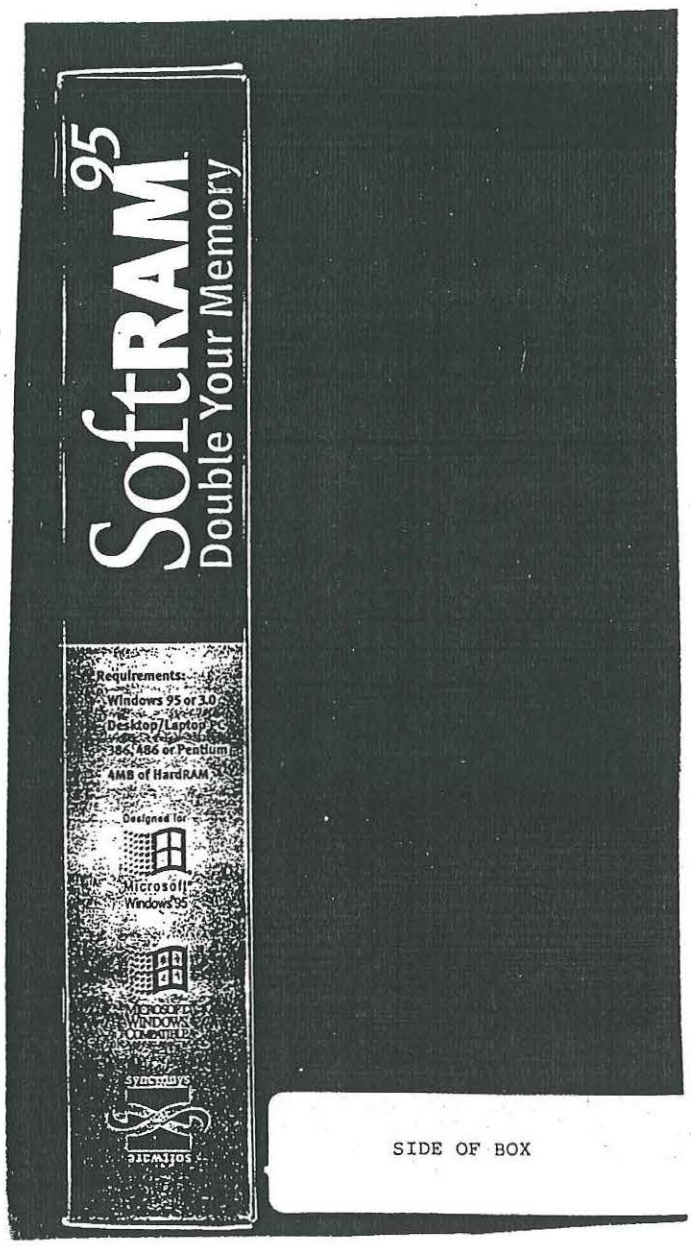
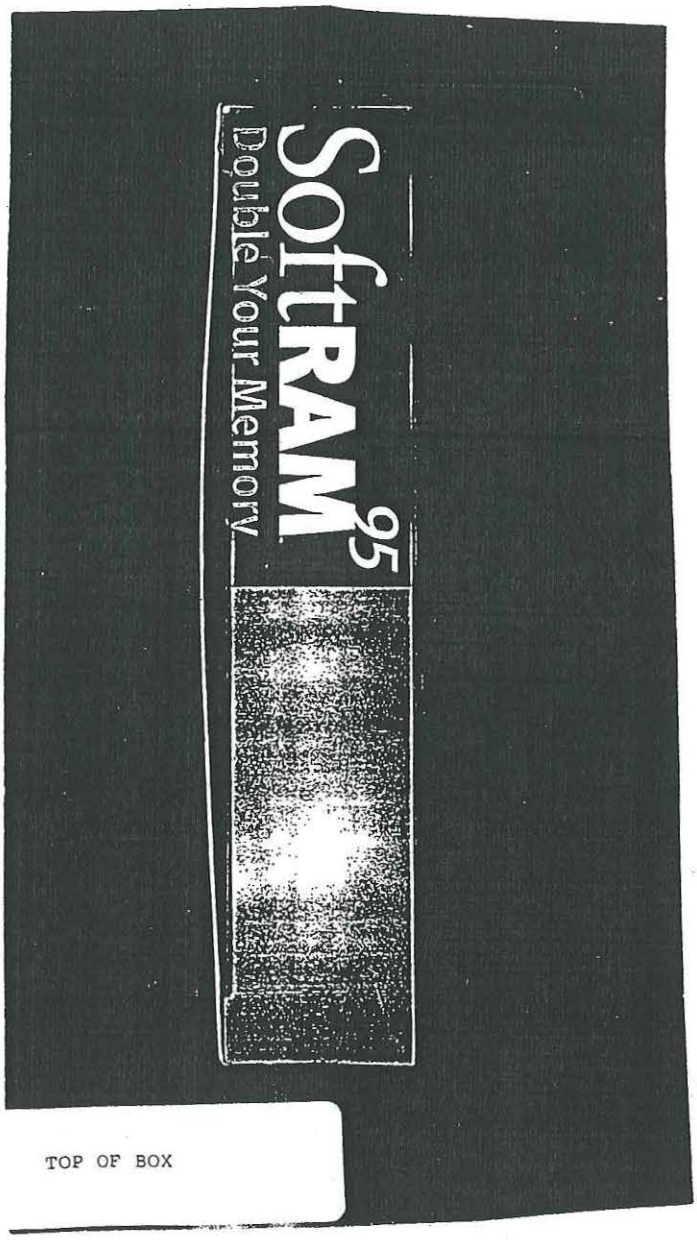

SoftRAM 95
Double Your Memory
Requirements:
Windows 95 or 3.0
Desktop/Laptop PC
386, 486 or Pentium
4MB of HardRAM
Designed for
Microsoft Windows 95
SoftRAM
SIDE OF BOX

EXHIBIT 4



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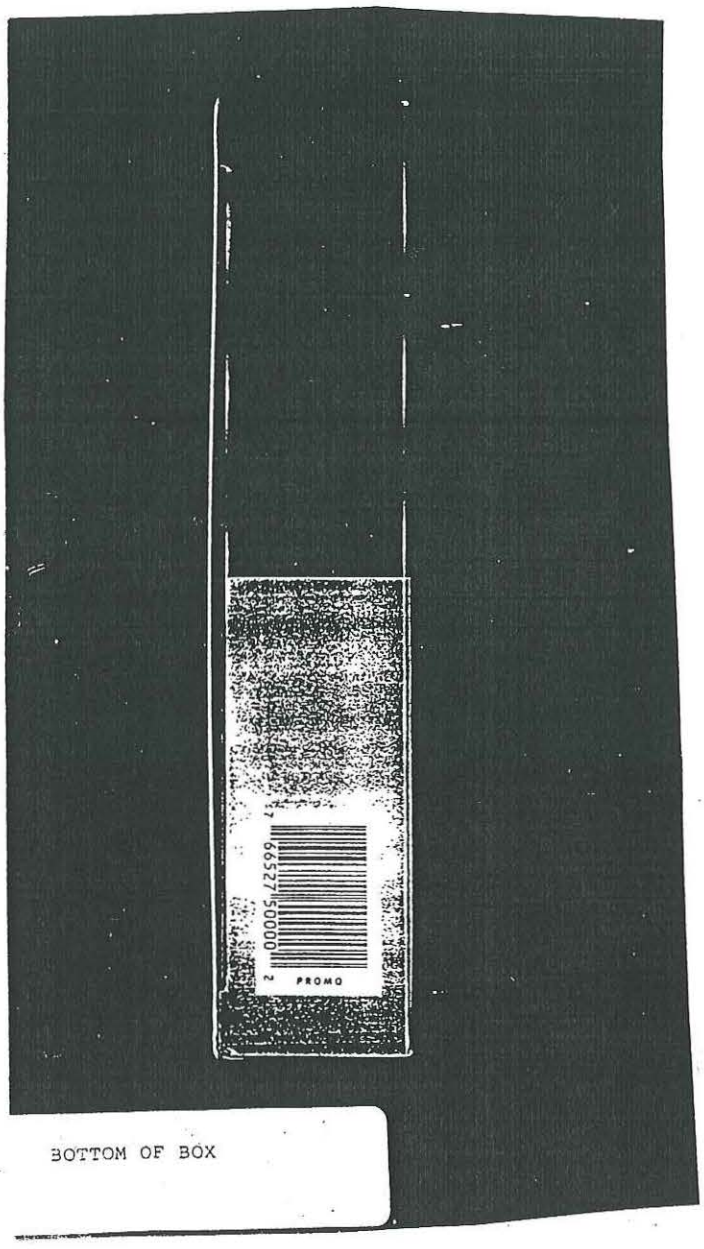

DECISION AND ORDER

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 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 Syncronys Softcorp is a Nevada corporation with its principal office or place of business located at 3958 Ince Boulevard, Culver City, California.

Respondent Rainer Poertner is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

Respondent Daniel G. Taylor is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

Respondent Wendell Brown is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Syncronys Softcorp.

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

ORDER

DEFINITIONS

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

1. *"Random access memory ("RAM")"* is the primary working memory in a computer. The instructions provided by a computer program and the data being worked on are stored in RAM while the program is running. Additional RAM, measured in megabytes ("MBs"), can be purchased in the form of microchips that are physically inserted into a computer.

2. *"Compression technology"* is a process which allows more information to reside in RAM. Compression technology eliminates redundant data by utilizing various recipes for analyzing and transforming it.

3. *"Windows 95"* refers to the Windows 95 software operating system manufactured by Microsoft, Inc.

4. *"Substantially similar product"* shall mean any software product that uses or purports to use compression technology and that is intended or purports to increase the amount of RAM in a computer or to accomplish any effect similar to one that would be caused by increasing the amount of RAM in a computer. These effects include, but are not limited to, increase in speed of computer operations, increase in size or number of applications that can be run simultaneously, and expansion of systems resources or reduction or elimination of "insufficient memory" errors or messages.

5. *"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.

6. Unless otherwise specified, *"respondents"* shall mean Syncronys Softcorp, a corporation, its successors and assigns and its officers; Rainer Poertner, Daniel G. Taylor, and Wendell Brown, individually and as officers of the corporation; and each of the above's agents, representatives, and employees.

7. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of SoftRAM[95] or any substantially similar product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that:

A. Such product increases RAM in a computer using Windows 95 to a greater extent than other software products;

B. Such product uses compression technology to increase the RAM available to a computer using Windows 95 or achieves RAM compression ratios of up to five times or higher in a computer using Windows 95;

C. Such product produces the effect of increasing the RAM available to a computer using Windows 95;

D. Use of such product in a computer will speed up Windows 95;

E. Use of such product will permit a Windows 95 user to run larger applications on a computer or to open more applications simultaneously;

F. Use of such product with Windows 95 will result in expanded systems resources on a computer and will substantially reduce or eliminate the occurrence of computer screen messages that indicate that the computer has insufficient memory to run the user's application(s); or

G. Microsoft, Inc. has licensed, endorsed, or otherwise approved such product for use with Windows 95.

II.

It is further ordered, That respondents, 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 SoftRAM, SoftRAM[95], or any substantially similar product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute performance, attributes, benefits, or effectiveness of 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 the representation.

III.

It is further ordered, That respondents, 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 intended to improve the performance of any computer in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product has been authorized, certified, licensed, endorsed, or otherwise approved by any person or organization, unless such representation is true.

IV.

It is further ordered, That respondents, 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 intended to improve the performance of any computer in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the relative or absolute performance, attributes, benefits, or effectiveness of such product, unless, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

V.

It is further ordered, That respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, within ten (10) business days of their receipt of a written request, make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

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

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Syncronys Softcorp and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent Syncronys Softcorp and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent Syncronys Softcorp and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation

or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondents Rainer Poertner, Daniel G. Taylor, and Wendell Brown, for a period of five (5) years after the date of issuance of this order, shall each notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any company engaged in the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product intended to improve the performance of any computer in or affecting commerce. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

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

X.

This order will terminate on October 7, 2016, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying

consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

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

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

IN THE MATTER OF

FRESENIUS AG, 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-3689. Complaint, Oct. 15, 1996--Decision, Oct. 15, 1996

This consent order requires, among other things, the California-based subsidiary of Fresenius AG to divest its Lewisberry, Pennsylvania hemodialysis concentrate production facility to Di-Chem, Inc., of Maple Grove, Minnesota, or to another Commission-approved acquirer, if the Di-Chem deal falls through.

Appearances

For the Commission: *Howard Morse, Steven Wilensky* and *William Baer.*

For the respondents: *David Beddow* and *Richard Parker, O'Melveny & Myers*, 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 Fresenius AG, the parent company of Fresenius USA, Inc. (collectively "Fresenius"), has entered into an Agreement and Plan of Reorganization with W.R. Grace & Co. ("Grace") whereby Fresenius will acquire from Grace the businesses comprising National Medical Care, Inc. ("NMC"), 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, as amended, 15 U.S.C. 45, and having reason to believe that Fresenius has entered into such agreement 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 RESPONDENTS

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany with its office and principal place of business located at Borkenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California.

3. At all times relevant herein, the respondents (collectively "Fresenius") have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44) and Section 1 of the Clayton Act (15 U.S.C. 12), and are corporations 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 ACQUISITION

4. On or about February 24, 1996, Fresenius and Grace executed an Agreement and Plan of Reorganization in which Fresenius would acquire the assets and businesses comprising Grace's NMC subsidiary.

5. Fresenius and NMC are substantial direct competitors in the United States market for hemodialysis concentrate.

III. THE RELEVANT LINE OF COMMERCE

6. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for hemodialysis concentrate. Hemodialysis concentrate is a bicarbonate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

7. Hemodialysis concentrate is a necessary product for hemodialysis treatment with no available substitute. The cost of the hemodialysis concentrate accounts for a small portion of the cost of hemodialysis treatment.

8. Imports of hemodialysis concentrate into the United States are rare. The potential for significant imports is constrained by the fact

that most concentrate is shipped in an aqueous solution, making shipping costs very high relative to the value of the product.

9. Total sales of hemodialysis concentrate in the United States are approximately $50 million.

IV. MARKET CONCENTRATION

10. Fresenius and NMC are two of a small number of producers of hemodialysis concentrate in the United States. NMC is the leading producer. The other producers include CGH Medical, Minn-Tech Corporation, Rockwell Medical and Dana Laboratories. After the acquisition, Fresenius would have a market share of hemodialysis concentrate sales of over 50 percent in the United States.

11. The United States market for hemodialysis concentrate is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). On the basis of capacity, the proposed acquisition would increase concentration, as measured by the HHI, by over 1250 points, to over 3100. On the basis of sales, the proposed acquisition would increase concentration, as measured by the HHI, by over 950 points, to over 3000.

V. CONDITIONS OF ENTRY

12. Entry into the hemodialysis concentrate market would not be likely to deter or offset reductions in competition resulting from the acquisition.

13. In addition to obtaining FDA approval, a new entrant would need to obtain a relatively high volume of sales in order to have cost-competitive production, and to support the costs of product testing. The need to capture a large market share makes the success of new entry less likely, and acts as a deterrent to entry. Most of the investment in production would likely be sunk in the event that entry were unsuccessful.

14. The likelihood of new entry is also reduced by the fact that a significant proportion of the dialysis clinics that use hemodialysis concentrate, including NMC, also produce the concentrate, and therefore are unlikely to purchase from a new entrant. Vertically integrated firms account for approximately a third of patients receiving hemodialysis treatment.

15. Moreover, a new entrant into hemodialysis concentrate would need to have an effective distribution system. However, there are only

a few large full-line distributors of hemodialysis products, the largest of which (Fresenius, NMC, and CGH Medical) already produce hemodialysis concentrate.

VI. EFFECTS OF THE ACQUISITION

16. The acquisition of NMC by Fresenius may substantially lessen competition in the United States market for hemodialysis concentrate because, among other things:

a. It will eliminate substantial head-to-head competition between NMC and Fresenius;

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

c. It will increase the likelihood of coordinated interaction among producers of hemodialysis concentrate;

d. Company documents project that the increased "consolidation" of suppliers will likely lead to "price stabilization;" and

e. It will likely result in increased prices for hemodialysis concentrate.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Fresenius and NMC described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

18. The proposed acquisition of NMC by Fresenius 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.

Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Fresenius AG, the parent company of Fresenius USA, Inc. (collectively "Fresenius" or "respondents"), of National Medical Care, Inc. from W.R. Grace & Co., which acquisition is more fully described at paragraph I.D. below, and Fresenius 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 Fresenius with violations of the Clayton Act and 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, 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, makes the following jurisdictional findings and enters the following order:

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Borkenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California.

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. *"Respondents"* or *"Fresenius"* means Fresenius AG and Fresenius USA, Inc., their directors, officers, employees, agents and representatives, their predecessors, successors, and assigns; their subsidiaries, divisions, and groups and affiliates controlled by Fresenius, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; their domestic and foreign parents, and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. *"NMC"* means National Medical Care, Inc., its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NMC, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and foreign parents, including W.R. Grace & Co., and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

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

D. *"NMC acquisition"* means the acquisition by Fresenius AG of NMC that is the subject of an Agreement and Plan of Reorganization entered into on or about February 4, 1996.

E. *"Hemodialysis concentrate"* means the acid portion of the dialysate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

F. *"Assets and businesses"* means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets,

technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses, and permits;

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (other than contracts in which hemodialysis concentrate is sold as part of a package of products), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

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

7. All separately maintained, as well as relevant portions of not separately maintained, books, records and files; and

8. All items of prepaid expense.

G. *"Hemodialysis business to be divested"* means the Fresenius Lewisberry, Pennsylvania Hemodialysis Manufacturing Facility, and any additional Fresenius hemodialysis concentrate assets and businesses (as defined) as are necessary to assure the viability and competitiveness of the hemodialysis business to be divested in the manufacture, marketing or distribution of hemodialysis concentrate.

H. *"Viability and competitiveness"* means that the hemodialysis concentrate business to be divested is capable of functioning independently and competitively in the hemodialysis concentrate business in substantially the same manner achieved by Fresenius prior to the divestiture.

II.

It is further ordered, That:

A. Respondents shall, absolutely and in good faith, divest the hemodialysis business to be divested to Di-Chem, Inc. ("Di-Chem"), within 10 business days of either (i) the date this order is made final, or (ii) the closing of the NMC Acquisition, whichever is later, pursuant to and in accordance with the May 17, 1996 agreement between Fresenius USA, Inc. and Di-Chem ("Divestiture Agreement"). If the terms of such Divestiture Agreement are changed or supplemented in any way, notice of such changes or

supplementations must be provided to the Commission, and any material changes or supplementations may be made only with the prior approval of the Commission. In the event that the Divestiture Agreement is terminated through no fault of respondents, respondents shall divest the hemodialysis business to be divested within four (4) months of either (i) the date this order is made final, or (ii) the closing of the NMC Acquisition, whichever is later, and respondents shall also effect such additional arrangements so as to assure the viability and competitiveness of the hemodialysis business to be divested. Respondents shall divest the hemodialysis business to be divested 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 enable the acquirer to compete in the manufacture and sale of hemodialysis concentrate in the United States and to remedy the lessening of competition resulting from the NMC Acquisition as alleged in the Commission's complaint.

B. Pending divestiture of the hemodialysis business to be divested, respondents shall take such actions as are necessary to maintain the marketability, viability and competitiveness of the hemodialysis business to be divested, including, but not limited to, taking necessary steps to ensure that the Lewisberry plant is capable of, and has been approved for, commercial production, and to prevent destruction, removal, wasting, deterioration or impairment of the hemodialysis business to be divested, other than ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested the hemodialysis business to be divested within four (4) months of either (i) the date this order becomes final, or (ii) the closing of the NMC Acquisition, whichever is later, the Commission may appoint a trustee to divest the hemodialysis business to be divested pursuant to paragraph II 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. The Commission shall select the trustee under this paragraph, 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, divestitures, and licensing. If respondents 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 respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

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. Subject to the prior approval of the Commission and consistent with the provisions of paragraph II of this order, the trustee shall have the exclusive power and authority to divest the hemodialysis business to be divested.

2. Within ten (10) days after the 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 divestiture required by this order.

3. The trustee shall have twelve (12) months from the date the trust agreement described in this paragraph III.B is approved by the Commission to accomplish the divestiture of the hemodialysis business to be divested, which 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 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.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the hemodialysis business to be divested and to any other relevant information as the

trustee may reasonably request. Respondents shall develop such financial or other information as the 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 divestiture. 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.

5. 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 divestiture shall be made in the manner and to an acquirer as set out in paragraph II of this order; provided however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve without bond or other security at the cost and expense of respondents, and 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 reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 hemodialysis business to be divested.

7. 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 duties of the trustee, 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.

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 have no obligation or authority to operate or maintain the hemodialysis business to be divested.

11. The trustee shall report in writing to respondents and the Commission every thirty (30) days concerning efforts to accomplish the divestiture.

IV.

It is further ordered, That:

A. Within twenty (20) days after the date this order becomes final and every thirty (30) 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 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 paragraph II 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.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any

assets for manufacturing hemodialysis concentrate or any hemodialysis concentrate manufacturing facility, that have been employed in hemodialysis concentrate manufacturing in the United States within one (1) year of the date of an offer by Fresenius to purchase the assets, or any interest in a hemodialysis concentrate manufacturing facility in the United States, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a hemodialysis concentrate manufacturing facility in the United States. Provided, however, that this paragraph V shall not be deemed to require Prior Notification to the Commission for (i) the construction of new facilities by Fresenius, (ii) the acquisition of new or used equipment in the ordinary course of business from a person other than the acquirer of the hemodialysis business to be divested, or any other present producer of hemodialysis concentrate; or (iii) the purchase or lease by Fresenius of a facility that has not been operated as a hemodialysis concentrate manufacturing facility at any time during the year immediately prior to the purchase or lease by Fresenius.

"Prior Notification to the Commission" required by paragraph V shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), 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 shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Fresenius and not of any other party to the transaction. Fresenius shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Fresenius shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, Fresenius shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That until the obligations set forth in paragraphs II, III and V are met, 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 corporations that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondents, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on five days notice to respondents, 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 respondents relating to any matters contained in this order; and

B. Without restraint or interference from respondents, to interview respondents' officers, directors, or employees, who may have counsel present, regarding such matters.

Commissioner Starek dissenting.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

There were no public comments on the consent agreement in this matter, and I am not aware of any other information that has come to the Commission's attention since its acceptance of that agreement that would persuade me to join in its decision to issue the complaint and final order in this matter. The evidence accumulated in the investigation was not sufficient to give rise to reason to believe that respondents' acquisition of National Medical Care, Inc. ("NMC") from W.R. Grace & Co. is likely to lessen competition substantially in a United States market for hemodialysis concentrate ("HD concentrate").

HD concentrate consists of various salts (sodium chloride, magnesium chloride, calcium chloride, and potassium chloride) and dextrose in purified water, with sodium bicarbonate (*i.e.*, baking soda) added at a later stage. Because this easily formulated mixture does not enter the body and therefore is not a "drug" for purposes of Food and Drug Administration ("FDA") regulation, the FDA applies to HD concentrate the somewhat more lenient regulations applicable to medical devices. Regulatory delay thus does not significantly constrain entry by new firms or expansion by incumbents.

The investigation revealed that various producers of HD concentrate -- including Fresenius itself -- entered quickly and easily into the manufacture of the product, and some stated that they could inexpensively increase their capacity to make HD concentrate by as much as 60 percent within 30 days, without substantial investment or the need for additional FDA approval.[1] These indicia of cheap and simple entry and expansion may explain why the delivered price of HD concentrate has fallen continuously since the product first became available.[2]

Thus, any assessment of this acquisition's potential to increase concentration in the market for HD concentrate -- and in turn make likelier an exercise of market power -- must take into account several strongly mitigating factors, including approximately 40 percent current excess capacity, the aforementioned ability of manufacturers to expand capacity speedily and at minimal cost, and the evident ability of customers (hemodialysis clinics) to integrate into the manufacture of HD concentrate in the event concentrate producers behave anticompetitively. Certain customers that speculated that the acquisition might lead to higher prices for HD concentrate appear to have been unaware of current plans for significant entry or capacity expansion by firms other than Fresenius and NMC. Moreover, other customer complaints seem to have been motivated by a fear that the vertical integration of Fresenius (a manufacturer of kidney dialysis products) and NMC (an operator of hemodialysis treatment centers,

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[1] Given the contrast between the time required for entry in the United States and that required in Germany, it is perhaps unsurprising that the latter nation's Bundeskartellamt concluded that Fresenius' acquisition of a competitor in HD concentrate would have anticompetitive effects. Entry into the German HD concentrate business apparently takes three to five years. In the United States, entry requires around nine months.

[2] It is difficult to accept the proposition that "[m]ost of the investment in production would likely be sunk in the event that entry were unsuccessful" (complaint, ¶ 13). The equipment used in the manufacture of HD concentrate appears to be adaptable to alternate uses, and indeed the investigation in this case turned up evidence of firms planning to convert some HD concentrate facilities to other purposes.

among its other businesses) could make the merged firm a stronger competitor in dialysis treatment.

As I said several months ago, it is always tempting to accept the "bird in the hand" represented by a consent agreement proffered in the early stages of an investigation, such as the one entered into (apparently without significant resistance) by Fresenius. Nevertheless, when the evidence on entry, expansion, and the absence of anticompetitive effects is as clear as in this case, the issuance of a consent order is unwarranted.

I therefore dissent.