

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Home Products Corporation ("AHP") is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at Five Giralda Farms, Madison, New Jersey.

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

### ORDER

#### I.

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

A. "*AHP*" or "*respondent*" means American Home Products Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by AHP, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Solvay*" means Solvay S.A., a corporation organized, existing and doing business under the laws of Belgium with its principal place of business located at Rue du Prince Albert, 33, 1050 Brussels, Belgium.

C. "*Acquisition*" means the acquisition by AHP of the animal health business of Solvay pursuant to a letter of intent dated September 12, 1996.

D. "*Interim Trustee*" means the trustee set forth in paragraph III of this order.

E. "*Divestiture Trustee*" means the trustee set forth in paragraph IV of this order.

F. "*Acquirer*" means Schering-Plough, Ltd., ("Schering-Plough") or the entity to whom AHP shall divest the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets pursuant to paragraph II of this order.

G. "*New Acquirer*" means the entity to whom the Divestiture Trustee shall divest the Solvay Companion Animal Vaccine Assets pursuant to paragraph IV of this order.

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

I. "*Canine Lyme Vaccine*" means all Solvay vaccines used to create and maintain antitoxin levels in dogs to prevent lyme disease.

J. "*Canine Lyme Vaccine Assets*" means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Canine Lyme Vaccine that are not part of Solvay's physical facilities; provided, however, that for the single antigen lyme, "Canine Lyme Vaccine Assets" does not include, and AHP may retain, a non-exclusive right for AHP to research, develop, manufacture and sell products for use in species other than canines. "Canine Lyme Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, and manufacture Canine Lyme Vaccine for sale outside the United States and Canada.

K. "*Canine Corona Virus Vaccines*" means all Solvay combination vaccines used to create and maintain antitoxin levels in dogs to prevent corona virus, including the single antigens contained therein, individually, or in any combination.

L. "*Canine Corona Virus Vaccine Assets*" means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Canine Corona Virus Vaccines that are not part of Solvay's physical facilities. "Canine Corona Virus Vaccine Assets" includes, but is not limited to, any single antigen included in any Solvay canine corona virus combination vaccine and those Solvay projects relating to improving any of the antigens currently in any canine corona virus combination vaccine or the research and development of any antigens for possible inclusion in any canine corona virus combination vaccine in the future; provided, however, that for the single antigen corona, "Canine Corona Virus Vaccine Assets" does not include, and AHP may retain, a non-exclusive right for AHP to research, develop, manufacture and sell products for use in species other than canines. "Canine Corona Virus Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, and manufacture Canine Corona Virus Vaccines for sale outside the United States and Canada.

M. "*Feline Leukemia Vaccines*" means all Solvay combination vaccines used to create and maintain antitoxin levels in cats to

prevent feline leukemia, including the single antigens contained therein, individually, or in any combination.

N. "*Feline Leukemia Vaccine Assets*" means Solvay's assets and rights, as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Feline Leukemia Vaccines that are not part of Solvay's physical facilities. "Feline Leukemia Vaccine Assets" includes, but is not limited to, any single antigen in any Solvay feline leukemia combination vaccine and Solvay projects relating to improving any of the antigens currently in any feline leukemia combination vaccine or the research and development of any antigens for possible inclusion in any feline leukemia combination vaccine in the future. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, manufacture, and sell Solvay's feline leukemia combination vaccines with rabies for a period of four years from the date this order becomes final. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right to research, develop, manufacture and sell the rabies single antigen. AHP shall have the exclusive rights to any combination of the rabies antigen with other AHP antigens. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, co-exclusive rights to all regulatory approvals relating to sales outside the United States and Canada and a non-exclusive right for AHP to research, develop, manufacture and sell Feline Leukemia Vaccines outside the United States and Canada. "Feline Leukemia Vaccine Assets" does not include, and AHP may retain, an exclusive right for AHP to research, develop, manufacture and sell products incorporating the feline immunodeficiency virus and feline infectious peritonitis antigens.

O. "*Equine Vaccines*" means all Solvay equine vaccines in combination or single antigen.

P. "*Equine Vaccine Assets*" means Solvay's assets and rights as of the date AHP signs this agreement containing consent order, relating to the research, development, manufacture and sale of Equine Vaccines manufactured at the Charles City Facility that are not part of Solvay's physical facilities. "Equine Vaccine Assets" includes, but is not limited to, any single antigens included in any Solvay equine combination vaccine and those Solvay projects relating to improving



any of the antigens currently in any equine combination vaccine or the research and development of any antigens for possible inclusion in any equine combination vaccine.

Q. "*Solvay Companion Animal Vaccine Assets*" means Solvay's assets and rights, including, but not limited to, all inventory designated for sale in the United States and Canada and 50% of the inventory designated for sale outside the United States and Canada, as of the date the Divestiture Trustee divests to the New Acquirer, relating to the research, development, manufacture and sale of Canine Lyme Vaccine Assets, Canine Corona Virus Vaccines Assets, Feline Leukemia Vaccines Assets and Equine Vaccines Assets, including the single antigens contained therein, individually, or in any combination. "Solvay Companion Animal Vaccine Assets" includes, but is not limited to, the Charles City Facility and at AHP's discretion a supply contract, for a term not to exceed (3) three years, from the date of the divestiture between AHP and the New Acquirer, to supply AHP (i) any swine or poultry vaccines for sale worldwide, (ii) any Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines for sale by AHP outside the United States and Canada and (iii) single antigen rabies vaccine and feline leukemia combination vaccine containing rabies for sale worldwide being produced at the Charles City Facility at the time of divestiture to the New Acquirer and priced at each vaccine's Average Total Cost.

R. "*Divestiture Agreement*" means the agreement for the sale of Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets between AHP and an Acquirer or New Acquirer.

S. "*Charles City Facility*" means the facility located in Charles City, Iowa, in which Solvay manufactures companion animal biologicals.

T. "*Contract Manufacture Agreement*" means an agreement to manufacture Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or rabies vaccine by AHP for sale to the Acquirer or New Acquirer.

U. "*Contract Manufacture*" means the manufacture of Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or rabies vaccine by AHP for sale to the Acquirer or New Acquirer.

V. "*Cost*" means Solvay's average direct per unit cost for each of the single antigens and the combination vaccines referred to in Definitions "J," "L" and "N".



W. "USDA" means the United States Department of Agriculture.

X. "Average Total Cost" means average direct per unit cost including all allocated overhead for each of the swine and poultry vaccines, Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines, single antigen rabies vaccine and feline leukemia combination vaccine with rabies referred to in Definition "Q".

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, the Solvay Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and the Feline Leukemia Vaccine Assets to (1) Schering-Plough, in accordance with the agreement dated January 30, 1997, no later than ten (10) days after the date on which this order becomes final; or, (2) at no minimum price, within ninety (90) days of the date on which this order becomes final, to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets is to ensure the continued use of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets in the same business in which the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets and Feline Leukemia Vaccine Assets are engaged at the time of the proposed Acquisition and to remedy the lessening of competition resulting from the proposed Acquisition as alleged in the Commission's complaint.

B. Respondent shall enter into a Divestiture Agreement with Schering-Plough or an Acquirer that shall include the following and AHP shall commit to satisfy the following:

1. AHP shall Contract Manufacture and deliver to the Acquirer (or the New Acquirer, as applicable) in a timely manner and under reasonable terms and conditions, a supply of Solvay's Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines specified in the Divestiture Agreement at Cost for a period not to exceed twenty-four (24) months from the date the Divestiture Agreement (or the New Acquirer's Divestiture Agreement) is approved, or three (3) months after the date the Acquirer or the New

Acquirer obtains all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States, whichever is earlier; provided, however, that the twenty-four (24) month period may be extended by the Commission for one additional period of up to twelve (12) months if the Interim Trustee submits to the Commission the certification provided for in subparagraph II.B.8 of this order.

2. After AHP commences delivery of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines to the Acquirer or the New Acquirer pursuant to subparagraph II.B of this order, all United States and Canadian inventory of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines acquired by AHP through the Acquisition may be sold by AHP only to the Acquirer (or the New Acquirer, as applicable).

3. AHP shall make representations and warranties to the Acquirer or the New Acquirer that the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines supplied pursuant to the Contract Manufacturing Agreement by AHP to the Acquirer or the New Acquirer meet the USDA approved specifications. AHP shall agree to indemnify, defend and hold the Acquirer or the New Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines supplied to the Acquirer or New Acquirer pursuant to the Contract Manufacturing Agreement by AHP to meet USDA specifications. This obligation shall be contingent upon the Acquirer or the New Acquirer giving AHP prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting AHP to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel. This obligation shall not require AHP to be liable for any negligent act or omission of the Acquirer or the New Acquirer or for any representations and warranties, express or implied, made by the Acquirer or the New Acquirer that exceed the representations and warranties made by AHP to the Acquirer or the New Acquirer.

4. During the term of the Contract Manufacturing Agreement between AHP and the Acquirer or the New Acquirer, upon reasonable request by the Acquirer, New Acquirer or the Interim Trustee, AHP shall make available to the Interim Trustee all records kept in the normal course of business that relate to the Cost of manufacturing

Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines.

5. Upon reasonable notice and request from the Acquirer or the New Acquirer to AHP, AHP shall provide: (a) such assistance and advice as is reasonably necessary to enable the Acquirer or the New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States; (b) such assistance to the Acquirer or New Acquirer as is reasonably necessary to enable the Acquirer or New Acquirer to manufacture Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in substantially the same manner and quality employed or achieved by Solvay at the time the agreement containing consent order is signed; and (c) consultation with knowledgeable employees of AHP and training at either the Charles City Facility or the Acquirer's or New Acquirer's facility, at the Acquirer's or New Acquirer's option for a period of time until the Acquirer or New Acquirer receives certification from the USDA or abandons its efforts for certification from the USDA, sufficient to satisfy reasonably the management of the Acquirer or New Acquirer that its personnel are adequately trained in the manufacture and sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. Such assistance shall include an on-site inspection of the Charles City Facility, at the Acquirer's or New Acquirer's request, that is the specified source of supply of the Contract Manufacturing. AHP may require reimbursement from the Acquirer or New Acquirer for all its direct out-of-pocket expenses incurred in providing the services required by this subparagraph II.B.5.

6. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Commission, at the same time that the respondent submits its application for approval of divestiture, a certification attesting to the good faith intention of the Acquirer or the New Acquirer, including an actual plan by the Acquirer or the New Acquirer, to obtain in an expeditious manner all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States.

7. The Divestiture Agreement shall require the Acquirer or the New Acquirer to submit to the Interim Trustee, periodic verified written reports setting forth in detail the efforts of the Acquirer or the New Acquirer to sell in the United States, Canine Lyme Vaccine,



Canine Corona Virus Vaccines, and Feline Leukemia Vaccines obtained pursuant to the Contract Manufacturing Agreement and to obtain all USDA approvals necessary to manufacture and sell its own Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. The Divestiture Agreement shall require the first such report to be submitted 60 days from the date the Divestiture Agreement is approved by the Commission and every 90 days thereafter until all necessary USDA approvals are obtained by the Acquirer or the New Acquirer to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States. The Divestiture Agreement shall also require the Acquirer or the New Acquirer to report to the Commission and the Interim Trustee within ten (10) days of its ceasing the sale in the United States of Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines obtained pursuant to the Contract Manufacture Agreement for any time period exceeding sixty (60) days or abandoning its efforts to obtain all necessary USDA approvals to manufacture and sell its own Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States.

8. The Divestiture Agreement shall provide that the Commission may terminate the Divestiture Agreement if the Acquirer or the New Acquirer: (a) voluntarily ceases for sixty (60) days or more the sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen) in the United States prior to obtaining all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines in the United States; (b) abandons its efforts to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen) in the United States; or (c) fails to obtain all necessary USDA approvals of its own to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines or Feline Leukemia Vaccines (except for feline leukemia combinations including the rabies antigen) in the United States within twenty-four (24) months from the date the Commission approves the Divestiture Agreement between AHP and the Acquirer or the New Acquirer; provided, however, that the twenty-four (24) month period may be extended by the Commission for one additional period of up to twelve (12)

months if the Interim Trustee certifies to the Commission that the Acquirer or the New Acquirer made good faith efforts to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States and that such USDA approvals appear likely to be obtained within such extended time period.

9. The Divestiture Agreement shall provide that if it is terminated, the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets shall revert back to AHP and the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets shall be divested by the Divestiture Trustee to a New Acquirer pursuant to the provisions of paragraph IV of this order.

C. While the obligations imposed by paragraphs II, III or IV of this order are in effect, respondent shall take such actions as are necessary: (1) to maintain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines, including the single antigen rabies, and Equine Vaccines in the United States; (2) to maintain the viability and marketability of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets, including single antigen rabies, and Equine Vaccine Assets, as well as all tangible assets, including the Charles City Facility, used to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines; and (3) to prevent the destruction, removal, wasting, deterioration or impairment of the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets and Equine Vaccine Assets, including the Charles City Facility, used to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, Feline Leukemia Vaccines or Equine Vaccines except for ordinary wear and tear. Nothing herein shall prohibit AHP from transferring products, including the single antigen rabies, other than the Canine Lyme Vaccine Assets, Canine Corona Virus Vaccine Assets, Feline Leukemia Vaccine Assets, or Equine Vaccine Assets from the Charles City Facility to any other AHP facility.

D. Respondent agrees not to sue the Acquirer or the New Acquirer for patent infringement with regard to the Acquirer's or the New Acquirer's manufacture or sale of Canine Corona Virus Vaccines or Feline Leukemia Vaccines. Respondent agrees not to

acquire the right to sue the Acquirer or the New Acquirer for patent infringement with regard to the Acquirer's or the New Acquirer's manufacture or sale of the Canine Lyme Vaccine.

### III.

*It is further ordered, That:*

A. At any time after the order becomes final, the Commission may appoint an Interim Trustee to monitor that AHP and the Acquirer or New Acquirer, expeditiously perform their respective responsibilities as required by this order and the Divestiture Agreement approved by the Commission. AHP shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this paragraph:

1. The Commission shall select the Interim Trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. If AHP has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to AHP of the identity of any proposed trustee, AHP shall be deemed to have consented to the selection of the proposed trustee.

2. The Interim Trustee shall have the power and authority to monitor AHP's compliance with the terms of this order and with the terms of the Divestiture Agreement with the Acquirer or New Acquirer.

3. Within ten (10) days after appointment of the Interim Trustee, AHP shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor AHP's compliance with the terms of this order and with the Divestiture Agreement with the Acquirer or New Acquirer, and to monitor the compliance of the Acquirer or New Acquirer under the Divestiture Agreement.

4. The Interim Trustee shall serve until such time as the Acquirer or New Acquirer has received all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines (except for feline leukemia combinations including rabies) in the United States.



5. The Interim Trustee shall have full and complete access to AHP's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, importation, distribution and sale of Canine Lyme Vaccine, Canine Corona Virus Vaccines, or Feline Leukemia Vaccines, or to any other relevant information, as the Interim Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacturing of Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines. AHP shall cooperate with any reasonable request of the Interim Trustee. AHP shall take no action to interfere with or impede the Interim Trustee's ability to monitor AHP's compliance with paragraphs II, III and IV of this order and the Divestiture Agreement between AHP and the Acquirer or New Acquirer.

6. The Interim Trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the cost and expense of AHP, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

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

8. If the Interim Trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in subparagraph III.A.1 of this order.

9. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this order and the Divestiture Agreement with the Acquirer or New Acquirer.

10. The Interim Trustee shall evaluate reports submitted to it by the Acquirer or the New Acquirer with respect to the efforts of the Acquirer or the New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines. The Interim Trustee shall report in writing to the Commission every two months concerning compliance by AHP and the Acquirer or New Acquirer, with the provisions of paragraphs II, III and IV of this order and the efforts of the Acquirer or New Acquirer to obtain all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines in the United States.

B. If the Commission terminates the Divestiture Agreement pursuant to subparagraph II.B.8 of this order, the Commission may direct the Interim Trustee to seek a New Acquirer, as provided for in subparagraph II.B.9 of this order.

#### IV.

*It is further ordered, That:*

A. If AHP fails to divest absolutely and in good faith, and with the Commission's prior approval: the Canine Lyme Vaccine Assets, the Canine Corona Virus Vaccine Assets, and the Feline Leukemia Vaccine Assets and comply with the requirements of paragraph II of this order, or if Schering-Plough or the Acquirer abandons its efforts or fails to obtain all necessary regulatory approvals in the manner set out in paragraph II.B.8(b) and (c), then any executed Divestiture Agreement between AHP and Schering-Plough or an Acquirer, as applicable, shall be terminated and the Commission may appoint a Divestiture Trustee to divest the Solvay Companion Animal Vaccine Assets and execute a new Divestiture Agreement that satisfies the requirements of paragraph II of this order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Solvay Companion Animal Vaccine Assets absolutely and in good faith, and with the Commission's prior approval. The proceeds of any divestiture by the Divestiture Trustee shall be for the account of AHP.

B. If the Commission terminates a Divestiture Agreement and if a Divestiture Trustee is appointed or directed by the Commission or a court pursuant to subparagraph A of this paragraph to divest the

Solvay Companion Animal Vaccine Assets to a New Acquirer, AHP shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Divestiture Trustee shall have the same authority and responsibilities with respect to the New Acquirer as those described in paragraph III of this order, as well as the authority and responsibility necessary to effect the required divestiture pursuant to this paragraph.

2. Neither the decision of the Commission to direct the Divestiture Trustee, nor the decision of the Commission not to direct the Divestiture Trustee, to divest any of the assets under subparagraph A of this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

3. The Commission shall select the Divestiture Trustee, subject to the consent of AHP, which consent shall not be unreasonably withheld. If AHP has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to AHP of the identity of any proposed Divestiture Trustee, AHP shall be deemed to have consented to the selection of the proposed Divestiture Trustee. The Divestiture Trustee may be the same person as the Interim Trustee.

4. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Solvay Companion Animal Vaccine Assets to a New Acquirer pursuant to the terms of this order and to enter into a Divestiture Agreement with the New Acquirer pursuant to the terms of this order, which Divestiture Agreement shall be subject to the prior approval of the Commission.

5. Within ten (10) days after appointment of the Divestiture Trustee, AHP shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Solvay Companion Animal Vaccine Assets to a



New Acquirer and to enter into a Divestiture Agreement with the New Acquirer.

6. The Divestiture Trustee shall have six (6) months from the date the Commission approves the trust agreement described in subparagraph IV.B.3 of this order to divest the Solvay Companion Animal Vaccine Assets and to enter into a Divestiture Agreement with the New Acquirer that satisfies the requirements of paragraph II of this order. If, however, at the end of the applicable six (6) month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such 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 such divestiture period only two (2) times.

7. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of AHP related to the manufacture, distribution, or sale of the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines or to any other relevant information, as the Divestiture Trustee may request. AHP shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. AHP shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.

8. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to AHP's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of the order; to assure that AHP enters into a Divestiture Agreement that complies with the provisions of paragraph IV.A; to assure that AHP complies with the remaining provisions of paragraphs IV of this order; and to assure that the New Acquirer obtains all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines in the United States. The divestiture shall be made to, and the Divestiture Agreement executed with, the New Acquirer in the manner set forth in paragraph II of this order; provided, however, if the Divestiture 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 Divestiture Trustee shall divest to

the acquiring entity selected by AHP from among those approved by the Commission.

9. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of AHP, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of AHP, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 AHP. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this order.

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

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

12. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this order.

13. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Solvay Companion Animal Vaccine Assets.

14. The Divestiture Trustee shall report in writing to AHP and the Commission every two months concerning his or her efforts to divest the relevant assets, AHP's compliance with the terms of this order,

and the New Acquirer's efforts to obtain all necessary USDA approvals to manufacture and sell the Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines.

V.

*It is further ordered, That:*

A. Within sixty (60) days of the date this order becomes final and every ninety (90) days thereafter until AHP has fully complied with the provisions of paragraphs II, III and IV of this order, AHP shall submit to the Commission a verified written report setting forth in detail the manner and form of which it intends to comply, is complying, and has complied with these paragraphs of this order. AHP shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these paragraphs of this order, including a description of all substantive contacts or negotiations for accomplishing the divestiture and entering into the Divestiture Agreement required by this order, including the identity of all parties contacted. AHP shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the Divestiture Agreement required by paragraph II.

B. One (1) year from the date this order becomes final and annually until AHP has complied with all terms of this order or until the Acquirer or New Acquirer has obtained all necessary USDA approvals to manufacture and sell Canine Lyme Vaccine, Canine Corona Virus Vaccines and Feline Leukemia Vaccines in the United States, and at such other times as the Commission may require, AHP shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VI.

*It is further ordered, That,* for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representatives of the Commission:



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

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

## VII.

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

IN THE MATTER OF  
SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC.

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

*Docket C-3741. Complaint, May 16, 1997--Decision, May 16, 1997*

This consent order prohibits, among other things, the Tennessee-based manufacturer of health care products from making certain claims about the effectiveness or length of protection provided by any children's sun protection product unless they possess scientific evidence to substantiate the claims, and from misrepresenting the existence, contents, validity, results or conclusions of any test or study concerning sun protection products. The consent order requires the respondent to produce and distribute 150,000 consumer education brochures regarding sunscreen protection for children.

*Appearances*

For the Commission: *Mamie Kresses and Toby Levin.*

For the respondent: *Nancy Buc, Buc & Beardsley, Washington, D.C.*

COMPLAINT

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

PARAGRAPH 1. Respondent Schering-Plough Healthcare Products, Inc. is a Delaware corporation, with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

PAR. 2. Respondent has manufactured, advertised, labeled, promoted, offered for sale, sold, and distributed over-the-counter health care products, including "Coppertone Kids" sunblock lotion, to consumers. Coppertone Kids is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for Coppertone Kids, including but not necessarily limited to the attached

Exhibits A through H. These advertisements and promotional materials contain the following statements and depictions:

A. (Depiction: child performing cannonball dive off of diving board) Coppertone Kids sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Introducing new Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And goes on protecting. In and out of the water, all day long. Because it's the sunblock that keeps kids protected from the sun, and waterproof for a full six hours. As proven by kids themselves in test after test. Coppertone Kids 6-Hour Waterproof Sunblock. It goes on. And stays on. Read and follow label directions (Exhibit A)(magazine ad)

B. (Depiction: child performing cannonball dive off of diving board) Coppertone KIDS sunblock lasts through 32 back flips, 64 cannonballs and 52 belly flops. Coppertone KIDS 6-Hour Waterproof Sunblock goes on and stays on. In and out of the water. All day long. Because it's the waterproof sunblock that keeps kids protected from the sun for a full six hours. As proven by kids themselves in test after test. Coppertone KIDS 6-Hour Waterproof Sunblock. It goes on and stays on. Read and follow label directions (Exhibit B)(magazine ad)

C. (Sound effects: kids playing in pool) ... Kids can last in the water for hours...But all sunblocks can't. That's why there's Coppertone Kids Waterproof Sunblock. It lasts 6 full hours, in and out of the water, so you don't have to reapply it as often. Which means your kids get great protection, and you get peace of mind...Coppertone Kids 6-Hour Waterproof Sunblock. It goes on and stays on. Use as directed. (Exhibit C) (radio ad)

D. (Sound effects: kids playing in pool; mother repeating herself) Billy, time for more sunblock. ...time for more sunblock. ...time for more sunblock... Coppertone Kids waterproof sunblock is made to last a full 6 hours, in and out of the water, so you won't have to reapply it as often. That means your kids get great protection, and you can stop repeating yourself... Coppertone Kids 6 hour waterproof sunblock. It goes on. And stays on. (Exhibit D) (radio ad)

E. (Depiction: Three mothers fishing at the ocean. One mother reels in her son from the water, applies sunscreen on the child, and then cuts the fishing line holding him) ...Mom's gotta keep a line on her kids... 'cause she's gotta keep re-applying that sunblock every time they come out of the water. But now there's new Coppertone Kids 6 Hour Waterproof Sunblock. (super: USE ONLY AS DIRECTED) It keeps a kid protected from the sun, and waterproof for a full six hours. So Mom puts it on...and cuts them loose... New Coppertone Kids 6 Hour Waterproof Sunblock. It goes on and stays on. (Super: It goes on. And stays on.) (Exhibit E) (tv ad)

F. Coppertone Kids sunblock is uniquely formulated to provide long-lasting waterproof protection. This waterproof formula lasts for a full 6 HOURS in and out of the water, and keeps kids protected from the sun's burning UVA and UVB rays. 6-HOUR WATERPROOF - Ideal for water active kids. LONG LASTING - Kid tested to go on and stay on... (Exhibits F & G) (label and promotion sample)

G. Dear Doctor: ...Coppertone, the most trusted name in suncare, now provides a complete line of sunblocks specially formulated for children...Coppertone KIDS offers 6-hour waterproof protection. ...

Coppertone KIDS

\* Waterproof for a full 6 hours



\* Long-lasting protection...

\* Available in SPF 15 and 30

... All Coppertone Children's Sunblocks are clinically tested on children, so you can be confident your patients are getting safe, effective sun protection. (Exhibit H) (promotional letter to doctors)

PAR. 5. Through the use of the statements and depictions contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A through H, respondent has represented, directly or by implication, that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

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

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

PAR. 8. Through the use of statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, F, G and H, respondent has represented, directly or by implication, that it has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.

PAR. 9. In truth and in fact, respondent has not conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. Among other reasons, none of the tests relied upon by respondent evaluated a single application of the product under the advertised conditions of use, *i.e.*, sustained

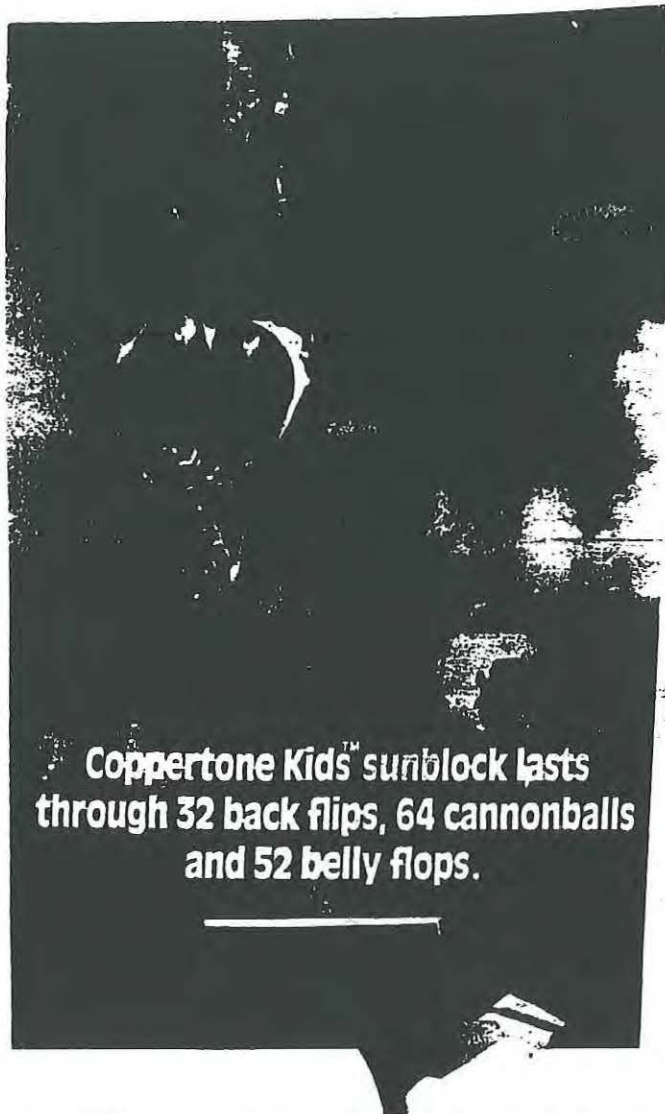
vigorous activity in and out of the water. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

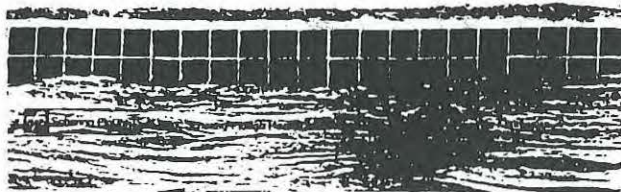
1301

Complaint

EXHIBIT A



**Coppertone Kids™ sunblock lasts  
through 32 back flips, 64 cannonballs  
and 52 belly flops.**



Introducing new Coppertone Kids  
6-Hour Waterproof Sunblock. It  
goes on. And goes on protecting.  
In and out of the water, all day long.  
Because it's the sunblock that  
keeps kids protected from the sun,  
and waterproof for a full six hours.  
As proven by kids themselves in  
test after test. Coppertone Kids  
6-Hour Waterproof Sunblock.  
It goes on. And stays on.



Read and follow label directions.

**NEW!  
Coppertone  
KIDS™**

**The 6-Hour  
Waterproof Sunblock.**

EXHIBIT B



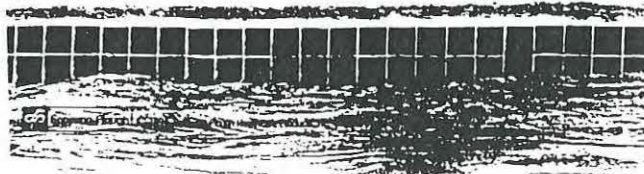
Complaint

123 F.T.C.

## EXHIBIT B



**Coppertone KIDS<sup>®</sup> sunblock lasts  
through 32 back flips, 64 cannonballs  
and 52 belly flops.**



010005

Coppertone KIDS 6-Hour  
Waterproof Sunblock goes on and  
stays on. In and out of the water.  
All day long. Because it's the  
waterproof sunblock that keeps  
kids protected from the sun  
for a full six hours. As proven by  
kids themselves in test after test.  
Coppertone KIDS 6-Hour  
Waterproof Sunblock. It goes on  
and stays on.



Read and follow label directions

**Coppertone  
KIDS<sup>®</sup>**

**It goes on.  
And stays on.**

301

Complaint

## EXHIBIT C



C10010

MESSNER VETERE BERGER McNAMEE SCHMETTERER/EURO RSCG

Tom Messner  
Barry Vetere  
Ron Berger  
Louise McNamee  
Bob Schmetterer  
Ed Tedeschi  
Larry Ditzelmer  
Jim Durfee  
Richard Roth  
Phil Silvestri  
Paul Wolfe

**AS RECORDED RADIO SCRIPT****COPPERTONE KIDS 6-HOUR WATERPROOF SUNBLOCK**

Job # SPC-34014

Recorded: 3/22/94

CK1002-3

**"CANNONBALL" :30**

**SFX:** (KIDS PLAYING IN POOL-LAUGHING/SPLASHING)

**KID:** (SCREAMING) C-a-n-n-o-n-b-a-l-l !

**SFX:** (LOUD SPLASH)

**ANNCR:** Kids can last in the water for hours.

**KID:** (SCREAMING) J-a-c-k k-n-i-f-e !

**SFX:** (LOUD SPLASH)

**ANNCR:** But all sunblocks can't. That's why there's Coppertone Kids Waterproof Sunblock. It lasts 6 full hours, in and out of the water, so you don't have to reapply it as often. Which means your kids get great protection, and you get peace of mind.

**KID:** (SCREAMING) B-e-l-l-y-f-l-o-p !

**SFX:** (LOUD SLAP)

**ANNCR:** Coppertone Kids 6-Hour Waterproof Sunblock. It goes on and stays on. Use as directed.

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Complaint

123 F.T.C.

## EXHIBIT D

010013

SCHERING-PLOUGH HEALTHCARE PRODUCTS ADVERTISING CORP.

DATE: MARCH 18, 1994                      AIR DATE: FEBRUARY 28, 1994  
PRODUCT: COPPERTONE KIDS                      LENGTH: RADIO :30  
TITLE: "BROKEN RECORD"                      COMML CODE: CK1001-3

(SOUND EFFECTS OF KIDS PLAYING IN POOL KEEP REPEATING WOMAN'S VOICE)

WOMAN: BILLY, TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

...TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

...TIME FOR MORE SUNBLOCK.

(RECORD SCRATCHES)

(MUSIC)

ANNCR: COPPERTONE KIDS WATERPROOF SUNBLOCK IS MADE TO LAST A FULL 6 HOURS, IN AND OUT OF THE WATER, SO YOU WON'T HAVE TO REAPPLY IT AS OFTEN. THAT MEANS YOUR KIDS GET GREAT PROTECTION, AND YOU CAN STOP REPEATING YOURSELF. AT LEAST ABOUT ONE THING.

WOMAN: BILLY, TIME FOR BED.

(RECORD SCRATCHES)

...TIME FOR BED.

(RECORD SCRATCHES)

...TIME FOR BED.

ANNCR: COPPERTONE KIDS 6 HOUR WATERPROOF SUNBLOCK. IT GOES ON. AND STAYS ON.

©1994 Schering-Plough HealthCare Products, Inc.

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Complaint

EXHIBIT E

# COPPERTONE KIDS

## "MOMS FISHING"

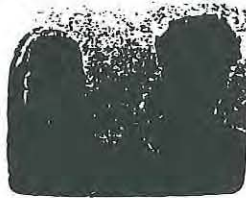
Coppertone  
**KIDS**

CLIENT: Schering-Plough HealthCare Products

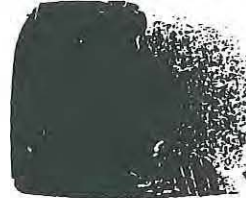
PXCK-3913 TV :30



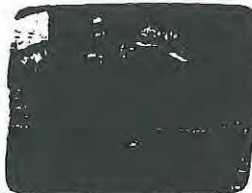
**1ST MOM:**  
Looks like Betty's got one.



**2nd MOM:**  
Way to go Betty.  
**1st MOM:**  
Get ready, he's gonna run.



**3rd MOM:**  
Not if I can help it. Gotcha!



**ANNCR: (VO)**  
Mom's gotta keep a line on her kids...



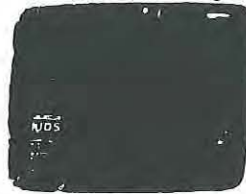
'cause she's gotta keep re-applying that sunblock every time they come out of the water.



But now there's new  
Coppertone Kids



6 Hour Waterproof Sunblock.



It keeps a kid protected from the sun, and waterproof for a full six hours.



So Mom puts it on... and cuts them loose.



**MOM:**  
Have fun Billy!



**ANNCR: (VO)**  
New Coppertone Kids  
6 Hour Waterproof Sunblock.



It goes on. And stays on.

It goes on and stays on.

00000020

Complaint

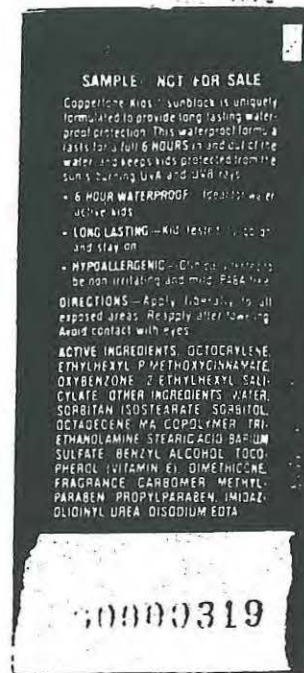
EXHIBIT F



1301

Complaint

## EXHIBIT G





Complaint

123 F.T.C.

## EXHIBIT H

**Coppertone®**  
**Children's Sunblocks**

Dear Doctor:

As a healthcare professional, you know that it has been estimated that 50% of the sun damage a person experiences over a lifetime occurs before age 18. However, research indicates that regular use of a sunblock with a Sun Protection Factor of 15 during the first 18 years of a child's life can reduce the risk of developing some types of skin cancer later in life by as much as 78%.

Coppertone®, the most trusted name in suncare, now provides a complete line of sunblocks specially formulated for children — Water BABIES® and Coppertone KIDS™. Coppertone KIDS offers 6-hour waterproof protection.

**Water BABIES®**

- Specially formulated for baby's delicate skin
- Hypoallergenic, non-irritating
- Waterproof
- Available in SPF 15, 30, and 45

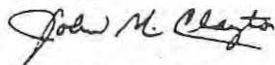
**Coppertone KIDS™**

- Waterproof for a full 6 hours
- Long-lasting protection
- Hypoallergenic, non-irritating
- Available in SPF 15 and 30

Enclosed please find samples of both Water BABIES and Coppertone KIDS plus an educational brochure called "Sun Safety for Children." This brochure offers parents some practical tips on how to block the sun's damaging rays without blocking the fun.

All Coppertone Children's Sunblocks are clinically tested on children, so you can be confident your patients are getting safe, effective sun protection.

Sincerely,



John M. Clayton, Ph.D.

00000116

## DECISION AND ORDER

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

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

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

1. Respondent Schering-Plough Healthcare Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office or place of business at 3030 Jackson Avenue, Memphis, Tennessee.

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

## ORDER

## I.

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

A. "*Sun protection product*" shall mean any product intended for, or promoted as, providing users with protection against the harmful effects of sun exposure or ultraviolet radiation, including but not limited to products containing a sunscreen ingredient.

B. "*Children's sun protection product*" shall mean any sun protection product that uses the word "babies," "children," "kids," or words of similar import in the name or promotion of the product, or that is advertised or promoted for use primarily by children under the age of twelve (12).

C. "*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 respondent, Schering-Plough Healthcare Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Coppertone Kids or any other children's sun protection product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication:

A. The length of time that a single application of the product will provide protection from the sun for individuals engaged in sustained vigorous activity in and out of the water; or

B. The efficacy of such product in providing protection against any harmful effect of sun exposure or ultraviolet radiation,

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.



## II.

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

## III.

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

## IV.

*It is further ordered,* That respondent shall design, produce and print a color brochure concerning the importance of sunscreen usage by children, which contains all of the following messages or themes:

- A. The importance of sunscreens in preventing skin damage, including skin cancer, sunburn and premature skin aging;
- B. Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;
- C. A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;
- D. The importance of proper application of sunscreens;
- E. The need to reapply sunscreens after toweling or sustained vigorous activity; and
- F. The need to use sunscreens during outdoor activities -- not only in connection with water activities.

Respondent shall submit a draft of the brochure, and a draft plan for its dissemination, no later than sixty (60) days after the date of service of this order, to the Associate Director of the Commission's Division of Advertising Practices for review and approval. No later than sixty (60) days after the Associate Director's approval of the brochure and the dissemination plan, respondent shall disseminate 150,000 copies of the brochure to parents or organizations with access to parents or others who work with or care for children under the age of 12.

V.

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

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

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

VI.

*It is further ordered*, That the provisions of this order shall not apply to any label or labeling printed prior to the date of service of this order and shipped by respondent to purchasers for resale prior to one hundred (100) days after service of this order.

VII.

*It is further ordered*, That respondent, its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, provide a copy of this order to each of respondent's current principals, officers, and directors, and to all personnel, managers, 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 service of this order, provide a copy of this order to each of respondent's principals, officers, and directors, and to all personnel, managers, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order within three (3) days after the person assumes his or her position.

#### VIII.

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

#### IX.

This order will terminate on May 16, 2017, or twenty 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.

## X.

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

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA  
CONCURRING IN PART AND DISSENTING IN PART

Today, the Commission issues a final decision and order resolving allegations about certain claims in the advertising of Coppertone Kids 6-Hour Waterproof Sunblock. I concur except with respect to Part IV of the order, which requires the respondent to develop and disseminate a consumer education brochure addressing the dangers of unprotected exposure to the sun. Consumer education brochures are an integral part of the Commission's consumer protection program, but they are not necessarily defensible adjuncts to Commission orders.

A fencing-in provision will be sustained by the courts as long as it is "reasonably related" to the violation found.<sup>1</sup> Fencing-in relief properly may include requirements beyond simply prohibiting the challenged conduct that are designed to "close all roads to the prohibited goal, so that [the Commission's] order may not be bypassed with impunity."<sup>2</sup> The allegedly deceptive claim is that the respondent's sunblock for children would remain effective for six hours even if the children engaged in "sustained vigorous activities in and out of the water," such as playing in sand, taking off and putting on clothes and toweling off after swimming. Complaint ¶ 5. The order expressly enjoins the respondents from making the challenged claim, either directly or indirectly, for the product at issue as well as for "any other children's sun protection product." Order ¶ I.

In addition, the order requires the respondent to develop and distribute 150,000 copies of a color brochure concerning the importance of sunscreen usage by children. The order requires that the brochure contain six messages or themes only one of which addresses the issue in this case, the need to reapply so-called water-

<sup>1</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957).

<sup>2</sup> *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).



proof or water-resistant sunblock after vigorous activity or after toweling off. Order ¶ IV-E.

The brochure requirement, even the message that relates most closely to the challenged claim, is not focused on preventing the respondent from making the challenged claim or otherwise from avoiding compliance with the order. The brochure would help educate consumers regarding an important health issue, and, presumably, make them less likely to be misled by the kind of implied claims challenged in this action.<sup>3</sup> There is no reason to think that it would enhance the deterrent effect of the order on Schering.

Presumably, the brochure requirement will not be unduly burdensome or costly for Schering because it will promote the use of its product, and the brochure is undoubtedly commendable as a public health initiative. Nevertheless, under the circumstances, it is an overly broad requirement as measured against the current standard for ordering relief.<sup>4</sup> There is a value to the Commission in maintaining the integrity of the standard for imposing a fencing-in remedy.

I respectfully dissent from Part IV of the order.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III  
CONCURRING IN PART AND DISSENTING IN PART

I have voted to approve final issuance of the complaint and consent order against Schering-Plough Healthcare Products, Inc. ("Schering"), because I have reason to believe that the challenged advertisements are deceptive and I find that the order, for the most part, provides appropriate relief. I continue, however, to oppose the requirement that Schering produce and distribute a consumer education brochure that includes numerous specified "messages or themes." This remedy is overbroad and is unlikely to assist in the prevention of the violations alleged in the complaint. Although I am an advocate of a strong Commission consumer education program, and we can be proud of the valuable work done by the Bureau of Consumer Protection's Office of Consumer and Business Education, the consumer education remedy contained in this order is a well-meaning but not legally justifiable effort to fund a general consumer education campaign.

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<sup>3</sup> The product label already contains the statement, "Reapply after toweling."

<sup>4</sup> It would be even more difficult to justify Part IV of the order as corrective advertising, because it is unlikely that the implied claim challenged in the complaint would linger in the minds of consumers long after it ceased being made. See *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

The Commission enjoys extensive authority to fashion fencing-in relief for deceptive practices so long as the remedy has a reasonable relation to the violations alleged in the complaint. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957). With such authority, however, comes the responsibility to exercise it judiciously. In my view, the consumer education remedy mandated by this order bears no reasonable relationship to the violations alleged in the complaint.

The complaint alleges that Schering lacked a reasonable basis for the claim that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water.<sup>1</sup> The order addresses this allegation by requiring scientific substantiation for claims about the efficacy of any children's sun protection product in providing protection against any harmful effect of sun exposure or ultraviolet radiation, or about the length of time that any such product will provide sun protection for individuals engaged in sustained vigorous activity in and out of the water.

In addition, however, the order requires Schering to design, produce and print a brochure -- subject to the approval of the Associate Director of the Division of Advertising Practices ("DAP") in the Commission's Bureau of Consumer Protection -- about the importance of sunscreen usage by children. The order mandates that the brochure include all of the following "messages or themes":

(A) The importance of sunscreens in preventing skin damage, including skin cancer, sunburn, and premature skin aging;

(B) Regular use of a high SPF sunscreen during childhood can significantly reduce the risk of certain types of skin cancers later in life;

(C) A single bad sunburn during childhood can significantly increase a child's risk of developing skin cancer later in life;

(D) The importance of proper application of sunscreens;

(E) The need to reapply sunscreens after toweling or sustained vigorous activity; and

(F) The need to use sunscreens during outdoor activities -- not only in connection with water activities.

<sup>1</sup> The complaint challenges as false the claim that Schering has conducted tests demonstrating that a single application of Coppertone Kids provides six hours of protection from the sun for children engaged in sustained vigorous activity in and out of the water. The order broadly prohibits false establishment claims for any sun protection product.

Order ¶ IV. Schering must disseminate 150,000 copies of this brochure to parents or to organizations with access to parents or others who work with or care for children under age twelve.<sup>2</sup>

Of the six required messages, only statement (E) seems likely to assist in the prevention of future deception like or related to that alleged in the complaint. Yet by including this key reapplication information in an extensive list of other facts about sunscreen, the order makes it less likely that consumers will see the reapplication information. In my view, it is highly unlikely that a parent who receives and reviews whatever brochure is approved will recall the one piece of information related to the complaint allegation when the parent makes a sunscreen purchase. Because the scope of the information to be included in the brochure is so broad, the consumer education remedy is not reasonably related to the violations alleged in the complaint.<sup>3</sup>

It is also troubling that the Commission essentially is ordering the respondent to advertise that persons should buy and use more of the respondent's products. Schering already has every incentive to communicate the required messages to consumers. In fact, the consumer education remedy is advertising ("use more sunscreen") that the company might wish to do in any event since the conduct provisions of the order may prevent it from continuing to distinguish its children's sun protection product from others by claiming that it requires fewer applications. The deterrence value of this remedy is minimal at best.

Finally, if this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. For purposes of First Amendment analysis, there is no difference between compelled speech and restrictions on speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97

<sup>2</sup> Like the brochure, the dissemination plan is subject to the approval of the Associate Director in charge of DAP.

<sup>3</sup> The consumer education remedy here stands in contrast to a fencing-in provision contained in a consent order issued by the Commission last year. See *Blenheim Expositions, Inc.*, Docket No. C-3633 (Jan. 18, 1996) (requiring a franchise show promoter to undertake a limited distribution of an FTC consumer education brochure to customers attending its franchise shows). The respondent in *Blenheim* allegedly made unsubstantiated claims regarding the earnings and success of franchise owners and false claims regarding a poll of franchise owners. The brochure specifically identified FTC requirements with which franchisors must comply, including consumers' right to receive an earnings claims document, and it provided instructions on how to evaluate earnings claims. It thus contained information likely to assist the respondent's customers to detect and protect themselves from possible future misrepresentations of earnings like those alleged in the complaint. Although the brochure also addressed other issues related to the purchase of a franchise, all of the advice in the brochure at least arguably would help prospective franchisees avoid becoming victims of future violations by the respondent.



(1988). A valid restriction on commercial speech must be no more extensive than necessary to serve the substantial governmental interest directly advanced by the restriction. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (discussing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Thus, disclosures compelled by the FTC can be no broader than necessary to prevent future deception or to correct the effects of past deception. See, e.g., *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Additionally, the government bears the burden of showing that a speech restriction will advance its interest "to a material degree." 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1509 (1996) (plurality opinion of Justice Stevens) (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). A commercial speech restriction that "provides only ineffective or remote support for the government's purpose" does not pass this test. 44 *Liquormart*, 116 S. Ct. at 1509 (citing *Central Hudson*, 447 U.S. at 564).

The dubious efficacy of this consumer education remedy makes it unlikely that it will directly advance the asserted governmental interest in preventing future deception by the respondent. In addition, I doubt that a credible argument can be made that the information that the order specifically requires be included in the brochure is no more extensive than necessary to prevent future violations by Schering. Certainly Schering has waived any First Amendment objections to this relief by entering into the consent agreement. Nonetheless, when a remedy implicates First Amendment rights, the Commission should be particularly reluctant to obtain through negotiation relief that it lacks at least a colorable chance to obtain in litigation.

In my view, it would be better to have no consumer education remedy in the consent order if the only alternative is an overbroad remedy of doubtful efficacy that raises First Amendment concerns.



1323

Complaint

IN THE MATTER OF

GENERAL MILLS, INC.

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

*Docket C-3742. Complaint, May 16, 1997--Decision, May 16, 1997*

This consent order requires General Mills, among other things, to permit New Ralcorp to transfer to any successor party, without authorization or approval from General Mills, the right to manufacture and sell cereals identical to the Chex brand products. The consent order also prohibits General Mills from delaying production of the private label Chex rivals.

### *Appearances*

For the Commission: *Phillip Broyles and Anthony Joseph.*

For the respondent: *James Rill, Collier, Shannon, Rill & Scott,*  
Washington, D.C.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent General Mills, Inc., subject to the jurisdiction of the Commission, has agreed to acquire the branded ready-to-eat cereal and snack mix businesses from Ralcorp Holdings, Inc., in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

#### I. RESPONDENT GENERAL MILLS, INC.

1. Respondent General Mills, Inc. ("General Mills"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware. General Mills' headquarters, office and principal place of business is located at Number One General Mills Boulevard, Minneapolis, Minnesota. In fiscal year 1996, General Mills had sales of approximately \$5.4 billion.

2. Respondent General Mills is, and at all times relevant herein has been, engaged in the sale of branded ready-to-eat ("RTE") cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. General Mills's primary RTE cereals include Cheerios, Total, and Wheaties. General Mills is the nation's second largest producer of RTE cereals, measured based on pound sales or dollar revenues. General Mills's revenue from the sale of RTE cereals worldwide was \$2.75 billion in fiscal year 1996.

## II. RALCORP HOLDINGS, INC.

3. Ralcorp Holdings, Inc. ("Ralcorp"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri. Ralcorp's headquarters, office and principal place of business is located at 800 Market Street, Suite 2900, St. Louis, Missouri. In fiscal year 1995, Ralcorp had sales of approximately \$1 billion.

4. In 1994, the Ralston Purina Company created Ralcorp, as a wholly-owned subsidiary, and then distributed Ralcorp's shares to Ralston Purina's shareholders. As part of the creation of an independent Ralcorp, Ralston Purina entered into a technology license authorizing Ralcorp to use certain identified technology in the production of branded and private label RTE cereals.

5. Ralcorp is, and at all times relevant herein has been, engaged in the sale of branded and private label RTE cereals to retail grocery stores, grocery wholesalers, and others throughout the United States. Ralcorp's primary RTE cereals include Corn CHEX, Rice CHEX, and Wheat CHEX. Ralcorp is the nation's fifth largest producer of branded RTE cereals and the largest producer of private label RTE cereals. Ralcorp's revenue from the sale of RTE cereals was \$585.5 million in fiscal year 1995. Its revenue from branded RTE cereals was more than \$311 million for the same year.

## III. JURISDICTION

6. General Mills 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.

## IV. THE ACQUISITION

7. On or about August 13, 1996, General Mills and Ralcorp entered into an agreement for General Mills to acquire Ralcorp's branded RTE cereal and snack mix businesses. In exchange for these businesses, General Mills agreed to give Ralcorp's shareholders General Mills' common stock and to assume certain Ralcorp debt. The total value of this consideration is approximately \$570 million.

8. General Mills will not acquire Ralcorp's private label RTE cereal business or other non-cereal or snack mix businesses. Ralcorp will form a new entity, New Ralcorp Holdings, Inc., ("New Ralcorp") to hold the businesses that General Mills will not acquire. As a result of the acquisition agreement, New Ralcorp acquired the right to manufacture and sell private label CHEX products, but was restricted from transferring this right to a third party without permission from General Mills and Ralston Purina Company. The agreement also restricts New Ralcorp from producing private label CHEX products for a period ending eighteen months after consummation of General Mills' acquisition of Ralcorp's branded RTE cereal and snack mix businesses.

## V. TRADE AND COMMERCE

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of branded and private label RTE cereals.

10. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the acquisition is the United States.

## VI. MARKET STRUCTURE

11. The sale of RTE cereals in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly called the "HHI") or by four-firm concentration ratios.

12. The post acquisition HHI for the sale of RTE cereals in the United States measured based on dollar revenues would increase by approximately 223 points, from 2,317 to 2,540. Measured in pounds, the post acquisition HHI for the sale of RTE cereals in the United States would increase by 158, from 2,103 to 2,261. Post acquisition General Mills' market share in dollars would be almost 31 percent. Its share in pounds would be almost 27 percent.

## VII. ENTRY CONDITIONS

13. Entry of new RTE cereal producers into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

## VIII. EFFECTS OF THE ACQUISITION

14. The effects of the acquisition, if consummated, may be substantially to lessen competition in the RTE cereal market in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by increasing the likelihood of the unilateral exercise of market power and simultaneously restricting the entry of new private label cereal products into competition with General Mills.

## IX. VIOLATIONS CHARGED

15. The acquisition agreement, entered into between General Mills and Ralcorp for General Mills to acquire Ralcorp's branded RTE cereal and snack mix businesses, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and 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 having initiated an investigation of the acquisition by General Mills, Inc. ("GMI"), of the branded cereals and snack mix businesses of Ralcorp Holdings, Inc. ("Ralcorp"), and it now appearing that GMI, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the



aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent GMI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Number One General Mills Boulevard, Minneapolis, MN.

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

## ORDER

### I.

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

A. "*Respondent*" or "*GMI*" means General Mills, Inc., its subsidiaries, divisions, and groups and affiliates controlled by General Mills, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

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

C. "*New Ralcorp*" means New Ralcorp Holdings, Inc., an entity created by the Reorganization Agreement to acquire the Private Label cereal business and other businesses from Ralcorp.

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

E. "*Ralston Purina Company*" means Ralston Purina Company, a Missouri corporation, having its principal office in St. Louis, Missouri, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Ralston Purina Company, their successors and assigns, and their directors, officers, employees, agents, and representatives.

F. "*Private Label*" means a cereal product bearing the trade names or trademarks owned by a grocery retailer, a wholesaler, or broker, which entity is not a cereal producer or primarily in the cereal business, which trade names or trademarks are used by such entities to identify grocery products sold by such entities and in which New Ralcorp has no rights, except for the right to produce products utilizing such trade names or trademarks for such entities or their licensees, but which shall not, in any event, include trade names or trademarks described in sections 2(d)(i) and 2(d)(ii)(A) of the Trademark Agreement.

G. "*Successor Party*" means any entity which acquires (by way of asset transfer, stock transfer, merger, or otherwise), following the date of the acquisition of Ralcorp by GMI, all or substantially all of New Ralcorp's assets, title, properties, interests, rights, and privileges, tangible and intangible, to manufacture and sell cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, including any entity that is a subsidiary or affiliate of New Ralcorp, and any entity that is a subsequent transferee of such assets, title, properties, interests, rights, and privileges.

H. The "*relevant geographic market*" means the United States.

I. "*CHEX trademark*" has the same meaning as any "CHEX trademark" identified in the Trademark Agreement.

J. "*Agreement and Plan of Merger*" means the Agreement and Plan of Merger by and among Ralcorp, GMI, and General Mills Missouri, Inc., dated August 13, 1996.

K. "*Reorganization Agreement*" means the Reorganization Agreement attached as Exhibit A to the Agreement and Plan of Merger.

L. "*Technology Agreement*" means the Technology Agreement attached as Exhibit 6.2(c) to the Reorganization Agreement.

M. "*Trademark Agreement*" means the Trademark Agreement attached as Exhibit 6.2(b) to the Reorganization Agreement.

N. "*Supply Agreement*" means the Transition Services -- Supply Agreement attached as Exhibit 6.2(d) to the Reorganization Agreement.

## II.

*It is further ordered, That:*

A. Respondent shall, before consummating the Agreement and Plan of Merger, include in its agreements with Ralcorp and New Ralcorp provisions that will permit the transfer to any Successor Party of the right to manufacture and sell in the relevant geographic market Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark. These provisions shall permit the Successor Party to manufacture and sell these Private Label cereals without further authorization or approval from GMI or Ralston Purina Company.

B. Respondent shall not enter into, enforce or attempt to enforce any agreement that prohibits or delays New Ralcorp, as long as it retains the rights referred to in II.A, *supra*, or a Successor Party thereafter, from manufacturing and selling in the relevant geographic market any Private Label cereals that are identical to or substantially similar in form or overall appearance to cereal products bearing the CHEX trademark upon consummation of the Agreement and Plan of Merger.

C. Respondent shall not enforce any provision in the Technology Agreement, the Reorganization Agreement, the Trademark Agreement, the Agreement and Plan of Merger, or any other agreement with Ralcorp that would prevent the transfer to any Successor Party, of the right to manufacture and sell in the relevant geographic market Private Label cereals substantially similar in form or overall appearance to cereal products bearing the CHEX trademark, provided, however, that nothing in this paragraph shall be construed to interfere with General Mills' rights to enforce the provisions of the Supply Agreement.

## III.

*It is further ordered, That:*

A. Within sixty (60) days after consummating the Agreement and Plan of Merger, respondent shall submit to the Commission a verified

written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II. A of this order.

B. One year (1) from the date this order becomes final, annually for the next three (3) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. B, and C, and III of this order.

#### IV.

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

#### V.

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

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

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

#### VI.

*It is further ordered*, That this order shall terminate on May 16, 2017.

Commissioner Starek dissenting.



## APPENDIX I

## INTERIM AGREEMENT

This Interim Agreement is by and between General Mills, Inc., a corporation organized and existing under the laws of the State of Delaware ("General Mills") and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (the "Commission").

*Whereas*, General Mills has proposed to acquire Ralcorp Holdings, Inc.'s ("Ralcorp") branded ready-to-eat ("RTE") cereal and snack businesses pursuant to an Agreement and Plan of Merger dated August 13, 1996 ("the proposed Acquisition"); and

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

*Whereas*, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and,

*Whereas*, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm, and relief resulting from a proceeding challenging the legality of the proposed Acquisition might not be possible, or might be less than an effective remedy; and

*Whereas*, the entering into this Interim Agreement by General Mills shall in no way be construed as an admission by General Mills that the proposed Acquisition constitutes a violation of any statute; and

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

*Now, therefore*, General Mills agrees, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the

Commission's agreement that, at the time it accepts the Consent Agreement for public record comment, it will grant early termination of the Hart-Scott-Rodino-waiting period, as follows:

1. General Mills agrees to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date General Mills signs the Consent Agreement.

2. General Mills agrees to submit, within twenty (20) days of the date the Consent Agreement is signed by General Mills, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraph II.A of the Consent Agreement, written reports, pursuant to Section 2.33 of the Commission's Rules, signed by General Mills setting forth in detail the manner in which General Mills will comply or has complied with paragraph II.A of the Consent Agreement.

3. General Mills agrees that, from the date it signs the Consent Agreement until the first of the dates listed in subparagraphs 3.a and 3.b, it will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

4. General Mills waives all rights to contest the validity of this Interim Agreement.

5. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, General Mills shall permit any duly authorized representative or representatives of the Commission:

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

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

6. Should the Federal Trade Commission seek in any proceeding to compel General Mills to divest itself of Ralcorp, or any other assets that it may hold as a result of the proposed Acquisition, or to seek any other injunctive or equitable relief, General Mills shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the proposed Acquisition.

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

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA  
CONCURRING IN PART AND DISSENTING IN PART

The Commission today issues a consent order based on a complaint alleging that the acquisition by General Mills, Inc., of the branded ready-to-eat cereal business of Ralcorp Holdings, Inc., violates Section 7 of the Clayton Act. The order is narrow, but I would narrow it even further. In particular, I would delete paragraph II(B) of the proposed order, which requires elimination of a noncompete clause that would have prevented Ralcorp for a period of eighteen months from introducing a new private label cereal identical or similar to the CHEX-brand cereals being sold to General Mills.

Paragraph fourteen of the complaint alleges that the noncompete clause described in paragraph eight would have the anticompetitive effect of "restricting the entry of new private label cereal products into competition with General Mills." That effect, however, is precisely the purpose of this (and every other) noncompete clause.<sup>1</sup> Although the complaint might be read as alleging that noncompete clauses are *per se* anticompetitive, that interpretation would be inconsistent with the Commission's recent decision in another case to issue an order that imposed an affirmative prohibition on competition for six years between the merged firm and the acquirer of certain assets to be divested under the order. *See Ciba Geigy Limited*, (Docket No. C-3725, March 24, 1997). The Ciba Geigy decision recognizes the efficiency potential of noncompete clauses, which, among other benefits, can facilitate an orderly transfer to ownership

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<sup>1</sup> The noncompete clause described in paragraph eight of the complaint prohibits Ralcorp from entering the market with a private label, CHEX-type cereal product for eighteen months. As indicated in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992), a merger is unlikely to create or enhance market power if entry is "timely, likely and sufficient," and entry is deemed "timely" if it can be achieved within two years. Under this standard, the noncompete clause is unlikely to create or enhance market power.



and provide a brief transition period for new owners to establish themselves in the business.

Although the appropriate duration of a noncompete clause may vary depending on the circumstances of the industry and the acquisition, using a noncompete clause for a short period to smooth a transition may be procompetitive. I do not find reason to believe that this short-term noncompete clause is anticompetitive, and I dissent from the order requirement to eliminate it.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the decision of the majority to issue a consent order against General Mills, Inc. relating to the acquisition of the branded ready-to-eat ("RTE") cereal and snack food businesses of Ralcorp Holdings, Inc. ("Ralcorp"). My dissent rests on two grounds.

As noted in the Commission's complaint, General Mills will not acquire the private label RTE cereal or snack food businesses of Ralcorp. Ralcorp instead will form a new entity, New Ralcorp Holdings, Inc. ("New Ralcorp"), to hold the private label cereal and snack food businesses that General Mills will not acquire. Under the acquisition agreement, New Ralcorp has the right to manufacture and sell a private label version of the Chex RTE cereal products, but is restricted from transferring this right to a third party without permission from General Mills. The acquisition agreement further provides that New Ralcorp may not produce private label Chex products for a period of eighteen months following consummation of the acquisition.

My first reason for voting against issuing the consent order is that the Commission lacks sufficient evidence to support the unilateral effects theory alleged in the complaint. Second, it is completely unnecessary -- and in fact creates inefficiency -- to bar enforcement of the parties' non-compete agreement. Whatever minimal competitive risks this transaction may raise are adequately addressed by eliminating the restrictions on Ralcorp's ability to transfer manufacturing and sales rights for private label Chex to a third party.

General Mills' share of the RTE cereal market will increase by approximately three percent as a result of the acquisition. The number of competitors in the RTE cereal industry will remain the same, and General Mills will remain the second largest RTE cereal producer in



the United States.<sup>1</sup> New Ralcorp will immediately assume Ralcorp's position as the largest private label cereal producer in the United States. Moreover, General Mills' post-merger share of the RTE cereal market will be between 25 and 31 percent (depending on whether share is measured in pounds or sales dollars), well below levels suggested by the Horizontal Merger Guidelines as the minimum threshold at which the Commission might reasonably presume market power.<sup>2</sup> It is hard to understand under these simple facts how the majority determined that the acquisition will enable General Mills unilaterally to exercise market power.

Unable to presume market power, the Commission instead relies upon a "close substitutes" theory of unilateral harm, notwithstanding a paucity of empirical evidence demonstrating that Ralcorp's branded Chex products are the closest substitutes to the branded cereals of General Mills. Although Chex products clearly compete with the branded General Mills RTE cereal products, consumers have a preference for variety when they choose RTE cereals and frequently choose among the many branded and private label cereals produced by RTE cereal manufacturers in the United States. Not surprisingly, Judge Wood reached this conclusion in her opinion explaining why she refused to block the acquisition of the Nabisco RTE cereal assets by Kraft General Foods in early 1993.<sup>3</sup> In *Kraft General Foods*, an empirical analysis of cereal purchasing patterns suggested -- as it does in the present matter -- that consumers have many attractive alternatives from which to choose in the event that one RTE cereal producer tries to raise prices above competitive levels. Overall, the empirical evidence does not support the Commission's claim, under either a "close substitutes" or a dominant firm theory, that General Mills would be able unilaterally to raise the prices of its branded RTE cereals after the acquisition.

Even if I agreed with the majority that this consent order rests upon an empirically sound theory of competitive harm, the order would bar General Mills from enforcing an arguably procompetitive non-compete agreement that is properly limited in scope and

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<sup>1</sup> General Mills' share of branded cereals will of course increase as a result of the transaction, but the complaint does not allege a relevant market consisting of "branded RTE cereal." Indeed, the provisions of the order (which affect the disposition of assets used in the production of nonbranded cereals; make sense only in the context of an "all RTE cereal" product market.

<sup>2</sup> See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines Section 2.211, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-79.

<sup>3</sup> *State of New York v. Kraft General Foods, Inc.*, 1995-1 Trade Cas. (CCH) ¶ 70,911, at 74,039, 74,066 (S.D.N.Y. 1995).

duration. Covenants not to compete are often included in contracts for the sale of a business, and generally are enforceable when ancillary to an enforceable agreement and reasonable in geographic coverage, scope of activity, and duration. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) ("The recognized benefits of reasonably enforced non-competition covenants are now beyond question."), *cert denied*, 455 U.S. 921 (1982); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898), *aff'd* as modified, 175 U.S. 211 (1899).<sup>4</sup> Judicial inquiry into non-compete provisions generally focuses on whether the restriction is reasonably necessary to protect the legitimate business interests of the party seeking to enforce the provision. *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Sound Ship Bldg. Corp. v. Bethlehem Steel Corp.*, 387 F. Supp. 252, 255 (D.N.J. 1975), *aff'd*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 680. (1976).

The Commission has often recognized that competitive benefits can flow from a non-compete clause in the context of the sale of a business. The Commission's recent issuance of a consent order in Ciba-Geigy, Ltd., et al., Docket No. C-3725 (April 8, 1997), is illustrative. In Ciba-Geigy, the Commission imposed an affirmative obligation on the newly merged entity, Novartis AG, not to compete in the United States and Canada for six years in the sale of animal flea control products.<sup>5</sup> As the Ciba-Geigy order indicates, the Commission clearly recognizes that non-compete clauses -- even when long in duration and broad in scope -- can serve legitimate procompetitive purposes in some circumstances by allowing an acquiring entity a brief period to re-deploy the acquired assets in a manner that increases competition in the marketplace. I am therefore puzzled why the Commission so hastily condemns a non-compete provision here that is only eighteen months in duration, limited to the manufacture and sale of private label Chex products, and arguably necessary to protect the legitimate interests of the contracting parties.<sup>6</sup>

Because I find that the facts do not support the Commission's theory of unilateral competitive harm in this instance, and because in any event I disagree with the Commission's decision to bar enforcement of the non-compete provision contained in the parties' acquisition agreement, I have voted against issuance of the consent order.

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<sup>4</sup> See also *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 ("The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market.")

<sup>5</sup> See paragraph VI of the order in Ciba-Geigy.

<sup>6</sup> Barring enforcement of the non-compete agreement might undermine adherence by the parties to the supply agreement, an element of the acquisition agreement found acceptable by the majority.

IN THE MATTER OF  
TENET HEALTHCARE CORPORATION

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

*Docket C-3743. Complaint, May 20, 1997--Decision, May 20, 1997*

This consent order, among other things, requires Tenet Healthcare Corporation ("Tenet"), a California acute care hospital chain, to divest OrNda's French Hospital Medical Center and related assets and facilities by August 1, 1997. The consent order also requires Tenet to maintain the marketability and viability of French Hospital, pending the divestiture of French, and to notify the Commission before combining its acute care hospitals in San Luis Obispo County with any other acute care hospital in the area and before acquiring any Monarch stock.

*Appearances*

For the Commission: *Robert Leibenluft, Oscar Voss and William Baer.*

For the respondent: *Clifford Aronson, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Tenet Healthcare Corporation ("Tenet"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Tenet will acquire the stock of OrNda HealthCorp ("OrNda"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:



Complaint

123 F.T.C.

## DEFINITIONS

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

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

(b) "*Acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

## THE PARTIES

PAR. 2. Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California. Tenet owns and operates, among other things, over seventy-five acute care hospitals throughout the United States. Included among those hospitals are Sierra Vista Regional Medical Center ("Sierra Vista"), a 195-bed acute care hospital in the city of San Luis Obispo, California, and Twin Cities Community Hospital, an 84-bed acute care hospital in Templeton, California, about twenty-two miles north of the city of San Luis Obispo. In fiscal year 1996, Tenet had total sales of approximately \$5.6 billion, and its two hospitals in San Luis Obispo County, California had total sales of about \$83 million.

PAR. 3. OrNda is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 3401 West End Avenue, Nashville, Tennessee. OrNda owns and operates over fifty acute care hospitals throughout the United States. Included among those hospitals is French Hospital Medical Center ("French Hospital"), a 147-bed acute care hospital in the city of San Luis Obispo, California. In fiscal year 1996, OrNda had total sales of about \$1.8 billion, and French Hospital had total sales of about \$47 million.



## JURISDICTION

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

## THE PROPOSED ACQUISITION

PAR. 5. On or about October 16, 1996, Tenet and OrNda entered into an agreement whereby Tenet will acquire 100 percent of the voting stock of OrNda, and OrNda stockholders will receive Tenet voting stock in exchange. Tenet will also assume OrNda debt. The total value of the transaction is about \$3.1 billion.

## NATURE OF TRADE AND COMMERCE

PAR. 6. The relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. The relevant section of the country in which to analyze the proposed acquisition is San Luis Obispo County, California ("San Luis Obispo County"), and/or any narrower area contained therein.

## MARKET STRUCTURE

PAR. 8. Tenet currently owns two of the five acute care hospitals in San Luis Obispo County, including Sierra Vista, the largest acute care hospital in the county. Tenet's acquisition of OrNda would add the largest of its competitors, French Hospital, to its holdings in San Luis Obispo County. Sierra Vista and French each provide a broader range of acute care inpatient hospital services than any of the other three acute care hospitals in San Luis Obispo County, and are each other's principal and most direct competitor. The other providers of acute care inpatient hospital services in San Luis Obispo County are Arroyo Grande Community Hospital, a 79-bed hospital in Arroyo Grande, about thirteen miles south of the city of San Luis Obispo, and San Luis Obispo General Hospital, a 64-bed hospital located in the city of San Luis Obispo and operated by the San Luis Obispo County

government. The long-term competitive prospects of San Luis Obispo General Hospital are clouded by its need for expensive capital improvements to, among other things, meet stringent new state earthquake safety requirements.

PAR. 9. The relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by market share. The proposed acquisition would significantly increase concentration in this market. It would increase Tenet's market share by at least 17%, to at least 71%. The HHI would increase at least 2000 points, to a post-acquisition level over 5000.

#### ENTRY CONDITIONS

PAR. 10. It is unlikely that entry into the relevant market would prevent, or remedy in a timely manner, any anticompetitive effects from the proposed acquisition. Entry is difficult, and likely to take more than two years, due to among other things the time required to obtain necessary government permits, including state architectural review, and to complete construction of an acute care hospital.

#### COMPETITION

PAR. 11. Tenet and OrNda are actual and potential competitors in the relevant market.

#### EFFECTS

PAR. 12. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Tenet and OrNda;

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

(c) It would eliminate OrNda as a substantial, independent and competitive provider;

(d) It may permit Tenet to unilaterally raise prices;

(e) It may result in less favorable prices and other terms for health plans that contract with providers of acute care hospital services;

(f) It may increase the possibility of collusion or interdependent coordination by the remaining providers of acute care inpatient hospital services;

(g) It may deny patients, physicians, third-party payers, and other consumers of acute care inpatient hospital services the benefits of free and open competition based on price, quality, and service; and

(h) It may deny the San Luis Obispo County government the ability to purchase on competitive terms the acute care inpatient hospital services it must provide to certain indigent County residents, as a potentially less costly alternative to providing such services to those residents at its own hospital.

#### VIOLATIONS CHARGED

PAR. 13. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 14. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

#### DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of OrNda Healthcorp by Tenet Healthcare Corporation ("Tenet" or "respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition and the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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:

A. Respondent Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California.

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

#### ORDER

##### I.

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

A. "*Tenet*" or "*respondent*" means Tenet Healthcare Corporation; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Tenet Healthcare Corporation; and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

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

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

D. The "*Acquisition*" means the transaction contemplated by the October 16, 1996 Agreement and Plan of Merger between Tenet and OrNda, pursuant to which OrNda will become a wholly-owned subsidiary of Tenet.

E. "*Acute care hospital*" means a health care facility, licensed as a hospital, other than a federally-owned facility, having a duly



organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, that may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities.

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

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

H. "*Relevant area*" means the county of San Luis Obispo in California.

I. The "*Schedule A assets*" mean the assets identified in the attached Schedule A.

J. The "*Schedule B assets*" mean the assets identified in the attached Schedule B.

K. "*Monarch Health Systems*" or "*Monarch*" means Monarch Medical Alliance, Inc., doing business as Monarch Health Systems (a corporation with its headquarters in Santa Barbara, California), its subsidiaries, and their successors and assigns.

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

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

2. All contracts and agreements with physicians, other health care providers, unions, third party payers, health maintenance organizations and other health plans, customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees (collectively, the "contracts");

3. All machinery, equipment, fixtures, vehicles, furniture, inventories, and supplies (other than such inventories and supplies as

are used in the ordinary course of business during the time that Tenet owns the assets) (collectively, the "personal property");

4. All research materials, technical information, management information systems, software, software licenses, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes, and quality control data (collectively, the "intangible personal property");

5. All books, records, and files, excluding, however, the corporate minute books and tax records of Tenet, OrNda, and their affiliates; and

6. All prepaid expenses.

M. To "*operate*" an acute care hospital means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

N. To "*acquire*" an acute care hospital means, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. To acquire the whole or any part of the assets used or previously used within the last two years (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital;

2. To acquire the whole or any part of the stock, share capital, equity, or other interest in any person engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital;

3. To acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of an acute care hospital; or

4. To enter into any other arrangement to obtain direct or indirect ownership, management, or control of an acute care hospital or any part thereof, including, but not limited to, a lease of or management contract for an acute care hospital.

## II.

*It is further ordered, That:*

A. Respondent shall divest, absolutely and in good faith, on or before August 1, 1997, the Schedule A assets.

B. Respondent shall also divest, absolutely and in good faith, on or before August 1, 1997, such additional ancillary assets and

businesses, and effect such arrangements, as are necessary to assure the marketability, independence, viability, and competitiveness of French Hospital Medical Center.

C. Respondent shall also divest, absolutely and in good faith, on or before August 1, 1997, all of its stock in Monarch Health Systems. The Monarch Health Systems stock may be, but need not be, divested to the same person to whom the Schedule A assets are divested.

D. The purpose of the foregoing divestitures is to ensure the continuation of French Hospital Medical Center as an ongoing, independent, and viable acute care hospital, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

E. Respondent shall divest the Schedule A assets, the Monarch Health Systems stock, and any additional assets that must be divested pursuant to paragraph II.B above, only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that respondent may divest the Monarch Health Systems stock, or that stock together with the loan agreement identified in Schedule A, without the prior approval of the Commission, to a person other than respondent in connection with that person's acquisition of all, or substantially all, Monarch Health Systems stock.

F. Respondent shall comply with all terms of the Agreement to Hold Separate concerning the Schedule A assets, the Schedule B assets, and the Monarch Health Systems stock, attached hereto and made a part hereof as Appendix I. Said Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this paragraph II or until such other time as said Hold Separate provides.

G. Pending the divestitures required by this paragraph II, respondent shall take such actions as are necessary to maintain the present marketability, viability, and competitiveness of the Schedule A and Schedule B assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Schedule A and Schedule B assets, except for ordinary wear and tear.

H. A condition of approval by the Commission of the divestiture of the Schedule A assets shall be a written agreement by the acquirer(s) of those assets that it will not sell for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without prior notification to the Commission in the manner prescribed by paragraph IV of this



order, any Schedule A asset to any person who operates, or will operate immediately following the sale, any other acute care hospital in the relevant area.

### III.

*It is further ordered, That:*

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A assets, in accordance with this order, on or before August 1, 1997, the Commission may appoint a trustee to effect the divestiture of the Schedule A assets. The trustee may on his or her initiative, or at the direction of the Commission, also divest some or all of the Schedule B assets, to the extent such additional divestitures are necessary to completely fulfill the purpose, identified in paragraph II.D above, of the divestiture of the Schedule A assets.

B. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, its stock in Monarch Health Systems, in accordance with this order, on or before August 1, 1997, the Commission may appoint a trustee to effect the divestiture of the Monarch Health Systems stock.

C. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under paragraph III.A or paragraph III.B shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to them for any failure by the respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any



proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission (except with respect to any divestiture of Monarch Health Systems stock which paragraph II.E permits to be made without Commission approval), the trustee shall serve as an agent of the Commission and shall have the exclusive power and authority to divest (a) the Schedule A assets and, as necessary, some or all of the Schedule B assets, if the trustee is appointed pursuant to paragraph III.A, and (b) respondent's Monarch Health Systems stock, if the trustee is appointed pursuant to paragraph III.B.

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

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

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets he or she is to divest, as well as to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request, and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the trustee's fiduciary duty to the Commission and to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to an acquirer as set forth in paragraph II; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity for the Schedule A assets (along with, if necessary, some or all of the Schedule B assets), or for the Monarch Health Systems stock, and if the Commission determines to approve more than one such acquiring entity (or, for the Monarch Health Systems stock, more than one entity is either approved to acquire the stock, or does not require Commission approval under paragraph II.E), the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A assets (if the trustee is appointed pursuant to paragraph III.A) and the Monarch Health Systems stock (if the trustee is appointed pursuant to paragraph III.B).

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

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

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of French Hospital Medical Center.

12. The trustee shall have no obligation or authority to operate or maintain the Schedule A assets, or the Schedule B assets, or to take any actions (other than in furtherance of divestiture) relating to the Monarch Health Systems stock.

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

#### IV.

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

A. Acquire any stock, share capital, equity, or other interest in any person, other than respondent, operating an acute care hospital in the relevant area;

B. Acquire any assets of an acute care hospital in the relevant area, or any assets used within the two years preceding such acquisition (and still suitable for use) for operating an acute care hospital in the relevant area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the relevant area, including but not limited to, a lease of or management contract for any such facility;



D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any acute care hospital in the relevant area;

E. Permit any acute care hospital it operates in the relevant area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the relevant area; or

F. Acquire any stock, share capital, equity, or other interest in Monarch Health Systems.

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 any such notification, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the 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 or documentary material (within the meaning of 16 CFR 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information and documentary material. 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 pursuant to this paragraph IV, or pursuant to paragraph II.H of this order, shall not be required for:

(1) The establishment by respondent of an acute care hospital in the relevant area: (a) that is a replacement for an existing acute care hospital, if that facility is operated by respondent and is not required to be divested pursuant to paragraph II of this order; or (b) that is not a replacement for any acute care hospital in the relevant area;

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



(3) Any 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.

V.

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

VI.

*It is further ordered*, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraph II of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph II of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph II of the order, including a description of all substantive contacts or negotiations for the divestitures, and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures.

VII.

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

## VIII.

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

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

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

## SCHEDULE A

The "Schedule A assets" to be divested pursuant to paragraph II shall include all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture) of French Hospital Medical Center, 1911 Johnson Avenue, San Luis Obispo, California, including without limitation OrNda's ownership, partnership, or leasehold interests in the following properties and businesses in San Luis Obispo County, California:

1. Pacific Medical Plaza, 1941 Johnson Avenue, San Luis Obispo, California;

2. Pulse Health Services, 1911 Johnson Avenue, San Luis Obispo, California;

3. Med Stop Urgent Care Centers, at 283 Madonna Road, San Luis Obispo, California, and 877 Oak Park Boulevard, Pismo Beach, California;

4. Central Coast Surgery Center, 1941 Johnson Avenue, Suite 103, San Luis Obispo, California;

5. San Luis Recovery Partners, 1575 Bishop, San Luis Obispo, California; and

6. La Posada Medical Center, 225 Posada Lane, Templeton, California.

The "Schedule A assets" shall include, in addition, the January 1997 loan agreement between OrNda Investments, Inc. and Monarch

Health Systems, including all of OrNda Investments' rights and obligations thereunder, and all promissory notes issued thereunder.

#### SCHEDULE B

The "Schedule B assets" shall consist of all Assets and Businesses (including all improvements, additions and enhancements made to such assets prior to divestiture) of Valley Community Hospital, 505 East Plaza Drive, Santa Maria, California, including without limitation OrNda's ownership, partnership, or leasehold interests in the following properties and businesses in Santa Barbara County, California:

1. Valley Medical Plaza, 525 East Plaza Drive, Santa Maria, California;
2. Valley Medical Courtyard, 505 and 506 East Plaza Drive, Santa Maria, California; and
3. Knollwood Business Plaza, 5075 South Bradley Road, Santa Maria, California.

#### APPENDIX I

##### AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between Tenet Healthcare Corporation ("Tenet" or "respondent"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business at 3820 State Street, Santa Barbara, California; 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.*

#### PREMISES

*Whereas*, on October 16, 1996, Tenet and OrNda Healthcorp ("OrNda") entered into an Agreement and Plan of Merger pursuant to which OrNda will become a wholly-owned subsidiary of Tenet (the "Acquisition"); and

*Whereas*, Tenet with its principal place of business at 3820 State Street, Santa Barbara, California, owns and operates, among other things, acute care hospitals in San Luis Obispo County, California, and elsewhere; and

*Whereas*, Tenet through the Acquisition will acquire French Hospital Medical Center and related OrNda assets and businesses in San Luis Obispo County, California; Valley Community Hospital and related OrNda assets and businesses in northern Santa Barbara County, California; about one-third of the outstanding stock of Monarch Medical Alliance, Inc., doing business as Monarch Health Systems ("Monarch"), an integrated health care delivery system which is a major customer of French Hospital Medical Center; and a short-term loan agreement for OrNda to lend funds to Monarch; and

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

*Whereas*, if the Commission accepts the Agreement Containing Consent Order in this matter, which would require the divestiture of French Hospital Medical Center and certain related assets identified in Schedule A of the Consent Order (the "Schedule A assets") and respondent's Monarch stock, and may require the divestiture of certain other assets identified in Schedule B of the Consent Order (the "Schedule B assets") pursuant to paragraph II of the Consent Order, the Commission must place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

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

*Whereas*, if the Commission accepts the Consent Order, and Tenet has not divested with the Commission's prior approval French Hospital Medical Center, related assets, and its Monarch stock, in accordance with the Consent Order, on or before August 1, 1997, the Commission may appoint a trustee to divest those assets; and

*Whereas*, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of French Hospital Medical Center, related assets, and Monarch stock, and the Commission's right to have



French Hospital Medical Center continue as a viable acute care hospital independent of Tenet; and

*Whereas*, the purposes of this Agreement and the Consent Order are to:

(1) Preserve French Hospital Medical Center as a viable, competitive, and ongoing acute care hospital, independent of Tenet, pending the divestiture required under the terms of the Consent Order;

(2) Prevent interim harm to competition from the operation of French Hospital Medical Center pending the divestiture required under the terms of the Consent Order; and

(3) Remedy any anticompetitive effects of the Acquisition;

*Whereas*, respondent's entering into this Agreement shall in noway be construed as an admission by respondent that the Acquisition is illegal; and

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

*Now, therefore*, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, and unless the Commission determines to reject the Consent Order, it will not seek further relief from respondent with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the divestitures required by the Consent Order are not accomplished on or before August 1, 1997, to appoint a trustee to seek divestiture of French Hospital Medical Center, related assets, and Monarch stock pursuant to the Consent Order, to seek civil penalties, to seek a court appointed trustee, and/or to seek other equitable relief, as follows:

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

2. Respondent agrees that:

a. From the date this Agreement to Hold Separate is accepted until the earliest of the dates listed in subparagraphs 2.a.(i) or 2.a.(ii), it will comply with the provisions of paragraph 3 of this Agreement:

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

(ii) The day after the divestitures required by paragraphs II.A and II.B of the Consent Order are completed.

b. From the date this Agreement to Hold Separate is accepted until the earliest of the dates listed in subparagraphs 2.b(i) or 2.b(ii), it will comply with the provisions of paragraph 4 of this Agreement:

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

(ii) The day after the divestiture required by paragraph II.C of the Consent Order is completed, or, if later, the day after all loan agreements between respondent and Monarch expire, are terminated, or are divested in accordance with paragraph II.A of the Consent Order.

3. To ensure the complete independence and viability of the Schedule A assets and the Schedule B assets, and to ensure that no competitive information is exchanged between respondent and the managers of the Schedule A assets and the Schedule B assets, respondent shall hold the Schedule A assets and the Schedule B assets, as they are presently constituted, separate and apart on the following terms and conditions:

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

b. Prior to, or simultaneously with the Acquisition, respondent shall adopt, for the corporations that now own and operate, respectively, French Hospital Medical Center (the "French

Company"), and Valley Community Hospital (the "Valley Company"), constituent documents that are not inconsistent with other provisions of this Agreement or the Consent Order. Respondent shall transfer to the French Company all ownership and control of any Schedule A assets it does not already own and control. Respondent shall transfer to the Valley Company all ownership and control of any Schedule B assets it does not already own and control. The French Company and the Valley Company shall hereafter be described collectively as the "Hold Separate Companies."

c. The boards of directors of each of the Hold Separate Companies ("Hold Separate Companies Boards") shall have the same three members for each of the Hold Separate Companies. Respondent shall elect the members of the Hold Separate Companies Boards. The Hold Separate Companies Boards shall consist of the following three persons: (i) Michael D. Bakst; (ii) Thomas Sawicki, and (iii) Michael H. Focht Sr., provided they agree, or comparable, knowledgeable persons. The Chairman of the Hold Separate Companies Boards shall be Michael D. Bakst, provided he agrees, or a comparable, knowledgeable person, who shall remain independent of respondent and competent to assure the continued viability and competitiveness of the Schedule A assets and the Schedule B assets. The Hold Separate Companies Boards shall include no more than one member who is a director, officer, employee, or agent of respondent, who shall be Michael H. Focht Sr., provided he agrees, or a comparable, knowledgeable person ("the respondent's Hold Separate Companies Boards member"). The Hold Separate Companies Boards shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Hold Separate Companies Boards during the term of this Agreement shall be audiographically transcribed and the tapes retained for two (2) years after the termination of this Agreement.

d. The operations of the Hold Separate Companies shall, to the extent deemed desirable by the Hold Separate Companies Boards, coordinate their operations with each other as if they were a single company.

e. Respondent shall not exercise direction or control over, or influence directly or indirectly, the Schedule A assets, the Schedule B assets, the independent Chairman of the Boards of the Hold Separate Companies, or any of their operations or businesses; provided, however, that respondent may exercise only such direction and control over the Hold Separate Companies as is necessary to



assure compliance with this Agreement or the Consent Order, or with all applicable laws.

f. Respondent shall maintain the viability, competitiveness, and marketability of the Schedule A assets and the Schedule B assets; shall not sell, transfer, or encumber the Schedule A assets or the Schedule B assets (other than in the normal course of business); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Schedule A assets or the Schedule B assets.

g. Except for the respondent's Hold Separate Companies Boards member, respondent shall not permit any director, officer, employee, or agent of respondent to also be a director, officer, or employee of the Hold Separate Companies.

h. The Hold Separate Companies shall be staffed with sufficient employees to maintain the viability and competitiveness of the Schedule A assets and the Schedule B assets, which employees shall be selected from the existing employee base of each facility or entity and may also be hired from sources other than these facilities and entities.

i. Respondent shall not employ, or make offers of employment to, any person employed by the Schedule A assets or the Schedule B assets in any capacity relating to the management or marketing activities of those assets. Respondent shall encourage and facilitate continued employment by the Schedule A assets and the Schedule B assets of such employees; shall not offer any incentive to such employees to cease employment with the Schedule A assets or the Schedule B assets, or to accept other employment with respondent; and shall take all actions necessary to remove any impediments that may deter such employees from continuing their employment with the Schedule A assets or the Schedule B assets, including but not limited to, the payment, or transfer for the account of the employee, of all accrued bonuses, pensions and other accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of respondent.

j. With the exception of the respondent's Hold Separate Companies Boards Member, respondent shall not change the composition of the Hold Separate Companies Boards unless the independent Chairman consents. The independent Chairman shall have power to remove members of the Hold Separate Companies Boards for cause and to require respondent to appoint replacement members to the Hold Separate Companies Boards as provided in



paragraph 3.c. Respondent shall not change the composition of the management of the Hold Separate Companies, except that the Hold Separate Companies Boards shall have the power to remove management employees for cause.

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

l. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with this Agreement or the Consent Order, respondent shall not receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about the Hold Separate Companies, the activities of the hospitals operated by the Hold Separate Companies Boards, the activities of Monarch, the Schedule A assets, or the Schedule B assets. Nor shall the Hold Separate Companies or the Hold Separate Companies Boards receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about respondent and relating to respondent's acute care hospitals. Respondent may receive, on a regular basis, aggregate financial information relating to the Hold Separate Companies necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, Medicare or Medicaid cost reports, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material Confidential Information," as used herein, means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, customer lists, price lists, health plan contracts, marketing methods, patents, technologies, processes, or other trade secrets.)

m. Except as permitted by this Agreement, the respondent's Hold Separate Companies Boards member shall not, in his or her capacity as a Hold Separate Companies Boards member, receive Material Confidential Information, and shall not disclose any such information received under this Agreement to respondent, or use it to obtain any advantage for respondent. The respondent's Hold Separate Companies Boards member shall enter a confidentiality agreement prohibiting disclosure of Material Confidential Information. The respondent's

Hold Separate Companies Boards member shall participate in matters that come before the Hold Separate Companies Boards only for the limited purposes of considering a capital investment or other transaction exceeding \$250,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this Agreement and the Consent Order. Except as permitted by this Agreement, the respondent's Hold Separate Companies Boards member shall not participate in any matter, or attempt to influence the votes of the other members of the Hold Separate Companies Boards with respect to matters, that would involve a conflict of interest if respondent and the Hold Separate Companies were separate and independent entities.

n. Any material transaction of the Hold Separate Companies that is out of the ordinary course of business must be approved by a majority vote of the Hold Separate Companies Boards; provided that the Hold Separate Companies shall engage in no transaction, material or otherwise, that is precluded by this Agreement.

o. If necessary, respondent shall provide the Hold Separate Companies with sufficient working capital to operate the Schedule A assets and the Schedule B assets at their current rate of operation, to fulfill respondent's obligations under the loan agreement identified in Schedule A of the Consent Order, and to carry out any capital improvement plans for the Schedule A assets and the Schedule B assets that have already been approved.

p. Respondent shall continue to provide the same support services to the Schedule A assets and the Schedule B assets as are being provided to them by OrNda as of the date this Agreement is signed. Respondent may charge the Hold Separate Companies the same fees, if any, charged by OrNda as of December 1, 1996 for such support services. Respondent's personnel providing such support services must retain and maintain all Material Confidential Information of the Schedule A assets and the Schedule B assets on a confidential basis, and, except as is permitted by this Agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Schedule A assets and the Schedule B assets.

q. During the period commencing on the date this Agreement is effective and terminating on the earlier of (i) August 1, 1997, or (ii)

the date contemplated by subparagraph 2.a(ii) (the "Initial Divestiture Period"), respondent shall make available for use by the Hold Separate Companies funds sufficient to perform all necessary routine maintenance to, and replacements of, the Schedule A assets and the Schedule B assets ("normal repair and replacement"). Provided, however, that in any event, respondent shall provide the Hold Separate Companies with such funds as are necessary to maintain the viability, competitiveness, and marketability of the Schedule A assets and the Schedule B assets.

r. Respondent shall circulate, to its management employees responsible for the operation of acute care hospitals in San Luis Obispo County, California, a notice of this Hold Separate and Consent Order in the form attached as Attachment A.

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

t. The Hold Separate Companies Boards shall have access to and be informed about all companies who inquire about, seek, or propose to acquire the Schedule A assets or the Schedule B assets.

u. Within thirty (30) days after the date this Agreement is accepted by the Commission and every thirty (30) days thereafter until this Agreement terminates, the Hold Separate Companies Boards shall together report in writing to the Commission concerning those Boards' efforts to accomplish the purposes of this Hold Separate.

4. To ensure the complete independence of Monarch from respondent (meaning here and hereinafter, Tenet excluding the Schedule A assets and the Schedule B assets), and to ensure that no competitive Monarch information is disclosed to respondent, respondent shall establish a trust for Tenet's Monarch stock, on the following terms and conditions:

a. Prior to, or simultaneously with the Acquisition, respondent shall establish a voting trust for Tenet's Monarch stock, for which the Trustee shall be the independent Chairman of the Hold Separate Companies Boards. The Trustee shall exercise any and all voting



rights of Tenet's Monarch stock, on all matters (including without limitation the election or removal of directors), voted on by Monarch shareholders, whether at a regular or special meeting, or pursuant to a unanimous written consent. The Trustee shall vote all shares of Tenet's Monarch stock in the same proportion as all other shares of Monarch's stock are voted with respect to such matters. The Trustee shall also be present, in person or by proxy, at all annual or special meetings of Monarch shareholders, so that Tenet's Monarch stock may be counted for purposes of determining the presence of a quorum at such meetings.

b. Tenet shall not use its holdings of Monarch stock, or any loan agreements with Monarch:

(i) To control or influence the conduct of Monarch's business, or Monarch's business relationships with French Hospital Medical Center; or

(ii) To obtain Material Confidential Information of Monarch, except Monarch financial information necessary and essential to allow respondent to prepare United States consolidated financial reports and tax returns, to allow respondent to prepare Medicare or Medicaid cost reports, or for use by the Hold Separate Companies in order to carry out the loan agreement identified in Schedule A of the Consent Order (which Monarch information shall be used only for the purposes set forth in this subparagraph).

c. Tenet shall not permit any director, officer, employee, agent, or representative of Tenet to serve on Monarch's board of directors.

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

6. To the extent that this Agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by



the terms of this Agreement or the Consent Order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this Agreement or the Consent Order.

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

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

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

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

#### ATTACHMENT A

##### NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Tenet Healthcare Corporation has entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission relating to the divestiture of certain assets, in or near San Luis Obispo County, California, that Tenet is to acquire through its acquisition of OrNda Healthcorp.

Until after the divestitures required under the Consent Agreement are completed, OrNda's hospitals and other businesses in San Luis Obispo County, California, as well as those in Santa Barbara County, California (collectively the "Hold Separate Assets"), must be managed and maintained as a separate, ongoing business, independent of all other Tenet businesses. All competitive information relating to the Hold Separate Assets must be retained and maintained by the persons involved in the operation of those Assets on a confidential basis, and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose

employment involves any other Tenet business. Similarly, all such persons involved in Tenet shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of the Hold Separate Assets. (These confidentiality requirements are subject to limited exceptions, set forth in the Hold Separate Agreement.)

Monarch Health Systems is also to remain independent of Tenet's businesses, other than the Hold Separate Assets, pending Tenet's divestiture of its Monarch stock.

Any violation of the Consent Agreement or the Agreement to Hold Separate (which is incorporated by reference as part of the Consent Order to which Tenet has agreed), may subject Tenet to civil penalties and other relief as provided by law.

IN THE MATTER OF  
GERBER PRODUCTS COMPANY

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

*Docket C-3744. Complaint, May 27, 1997--Decision, May 27, 1997*

This consent order prohibits Gerber, among other things, from making any claims, without competent and reliable scientific substantiation, about the extent to which doctors or other health, nutrition, child care or medical professionals recommend, approve of, or endorse baby or toddler food; and from misrepresenting the results or existence of any survey, test or research.

*Appearances*

For the Commission: *Jill E. Samuels* and *Rosemary Rosso*.

For the respondent: *John J. James* and *Jane Gennaro*, in-house counsel, Fremont, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gerber Products Company, a corporation ("respondent"), has 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 Gerber Products Company ("Gerber") is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including Gerber baby and toddler foods. Gerber baby and toddler foods are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. Respondent has disseminated or has caused to be disseminated advertisements for Gerber baby and toddler foods, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. [Depiction: Smiling baby]

VOICEOVER: "There's only one baby like yours."

[Depiction: Jar of Gerber baby food]

VOICEOVER: "And only one baby food like ours. Gerber."

[Depiction: Fresh apples]

VOICEOVER: "No one knows more about purity, . . ." [Depiction: Fresh carrots]

VOICEOVER: ". . . safety and nutrition . . ." [Depiction: Toddler being fed]

VOICEOVER: ". . . (and how to make sure baby likes it!) . . ."

[Depiction: Jars of Gerber baby and toddler food]

VOICEOVER: ". . . than Gerber. To learn more why four out of five pediatricians who recommend baby food recommend Gerber, . . ."

[Depiction: Baby being fed] "1-800-4-GERBER"

VOICEOVER: ". . . call us, anytime, day or night. You know you can trust Gerber . . ." [Depiction: Woman eating an apple]

"For learning to eat smart, right from the start."

VOICEOVER: ". . . for learning to eat smart, right from the start."

[Exhibit A, television advertisement]

B. [Ad translated from Spanish] [SFX: Baby crying]

WOMAN: "Oh! Mom could you hand me the baby food from the kitchen. The baby is hungry!"

MOM: "Hey, but not all of them are Gerber."

WOMAN: "But those are less expensive. Aren't they all the same?"

MOM: "Of course not. Gerber is the most recommended by pediatricians."

VOICEOVER: "She knows that there is nothing more nutritious and reliable for babies. As a matter of fact, four out of every five pediatricians that recommend baby food recommend Gerber."

WOMAN: "Now that I know I will always buy Gerber. My baby's health is priceless." [SFX: Baby laughing]

VOICEOVER: "For a better start in life, give him only Gerber."

[Exhibit B, radio advertisement]

C. [Gerber ran a promotion in which consumers who purchased a jar of Beech-Nut baby food were given a checkout coupon for Gerber baby food that offered five minutes of free long-distance telephone time upon calling an 800-number and listening to the following recording]

"Congratulations on your free five minutes of long distance, compliments of Gerber. Gerber feels there are a few things you should know. For one, *nobody* makes a safer baby food than Gerber. Plus, four out of five pediatricians who recommend baby food recommend Gerber. And nobody else knows more about purity, safety, nutrition, and of course, taste. And Gerber offers more variety than any other brand -- more than 180 kinds! In a few of those foods we add a controlled amount of sugar, or tapioca. Because research has proven it enhances the taste, without compromising the nutritional composition. No other baby food in the world does all that. Give Gerber a try and find out why it's the baby food more pediatricians recommend. To begin your call, use your key pad to enter your personal identification number found on your store receipt."

[Exhibit C, script of recorded message]

D. "4 OUT OF 5 PEDIATRICIANS\* RECOMMEND GERBER

\*A 1994 CONTEMPORARY PEDIATRICS RECOMMENDATION STUDY FOUND THAT 88% OF PEDIATRICIANS WHO RECOMMEND BABY FOOD RECOMMEND GERBER."

[Exhibit D, display case sticker]



5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that four out of five pediatricians who recommend baby food recommend Gerber.

6. In truth and in fact, competent and reliable studies or surveys do not show that four out of five pediatricians who recommend baby food recommend Gerber. In the survey relied upon by respondent, 562 of the surveyed doctors responded to the questions concerning baby food. Of these 562 pediatricians, 408 responded that they recommend baby food to their patients at least once per week. Of the 408 pediatricians who recommend baby food to their patients at least once per week, 332, or approximately 82%, responded that they did not recommend any specific brands of baby food. Of the 76 pediatricians who did recommend specific brands, 67 recommended Gerber. Thus, only 67 of the 408 pediatricians who recommend baby food, or approximately 16%, recommend Gerber to their patients. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that approximately four out of five pediatricians recommend Gerber.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraphs five and seven, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraphs five and seven, at the time the representations were made. In the survey relied upon by respondent, 67, or approximately 12%, of the 562 pediatricians surveyed recommended Gerber. Therefore, the representations set forth in paragraphs five and eight were, and are, false or misleading.

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

## Complaint

123 F.T.C.

## EXHIBIT A

RTV

PRODUCT: GERBER PRODUCTS/BABY FOOD  
 TITLE: "FOR LEARNING TO EAT SMART"  
 PROGRAM: NEWS  
 STATION: WABC

10/12/95  
 (NEW YORK)

95-15562 MI

:30  
 12:16PM



(MUSIC)



WOMAN ANNCR: There's only one  
 baby like yours.



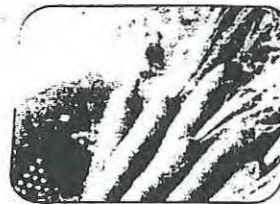
and only one baby food like ours,  
 Gerber.



No one knows more



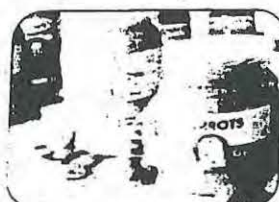
about purity,



safety and nutrition,



and how to make sure baby likes it  
 than Gerber.



To learn more, why four out of five  
 pediatricians



who recommend baby food  
 recommend Gerber,



call us



anytime day or night



You know you can trust Gerber, for  
 learning to eat smart, right from  
 the start. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

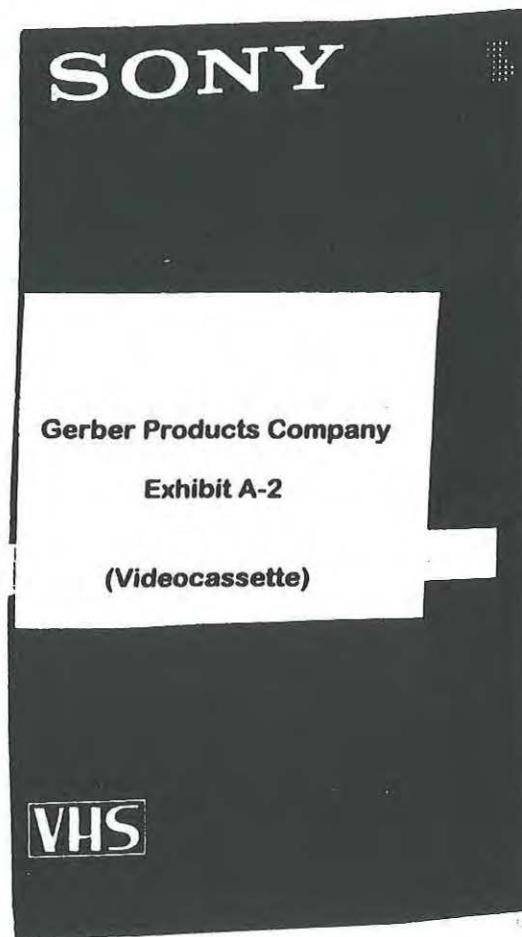
RTV has a disclaimer to assure the accuracy of material submitted to it. It is not responsible for material or omission  
 not to be used. RTV has a disclaimer to assure the accuracy of material submitted to it. It is not responsible for material or omission

Exhibit A-1

1365

Complaint

EXHIBIT A



## Complaint

123 F.T.C.

## EXHIBIT B

Transcripción Gerber  
Spot: "Cuatro de cada cinco"  
30ss / Radio

SFX

-sfx: Bebe llorando

COPY

-Mujer: "Hay mamá alcanzame el baby food  
de la cocina que el bebé tiene  
hambre"

-Mamá: "Cya, pero no todos son Gerber"

-Mujer: "Pero esos son mis favoritos, no es  
igual?"

-sfx: pasos

-Mamá: "Claro que no, Gerber es el más  
recomendado por pediatras."

-sfx: música

-Locutor: "Ella sabe que no hay  
nada más nutritivo y  
confiable para bebés. De  
hecho 4 de cada 5  
pediatras que recomiendan  
alimentos para bebés  
recomiendan Gerber."

-Mujer: "Ahora que lo sé compraré Gerber  
siempre. La salud de mi bebé no  
tiene precio."

-sfx: Bebe llorando

-Locutor: "Para un mejor comienzo en la  
vida sólo son Gerber"

Exhibit B



1365

## Complaint

## EXHIBIT C

Shoppers who have purchased a jar of Beech-Nut baby food in supermarkets (in the St. Louis area, at least) recently, have been given a "Catalina coupon" as they checked out at the register. The coupon offers 5 minutes of free long distance telephone time, if one calls (800) 507-8807. On calling the number, one hears the following:

"Congratulations on your free five minutes of long distance, compliments of Gerber.

Gerber feels there are a few things you should know. For one, nobody makes a safer baby food than Gerber.

Plus, four out of five pediatricians who recommend baby food, recommend Gerber. And nobody else knows more about purity, safety, nutrition, and of course, taste.

And Gerber offers more variety than any other brand, more than one hundred and eighty kinds.

In a few of these foods we add a controlled amount of sugar or tapioca, because research has proven it enhances the taste without compromising the nutritional composition.

No other baby food in the world does all that.

Give Gerber a try and find out why it's the baby food more pediatricians recommend.

To begin your call please use your touch tone phone to enter your pin number found on your red and white phone certificate.

(a beep is heard)"

CHECKOUT COUPON	CHECKOUT COUPON	CHECKOUT COUPON	CHECKOUT COUPON		
		<p>THIS IS A LIVE PHONE CARD!</p> <p><b>FREE</b></p> <p><b>5 MINUTES OF LONG DISTANCE PHONE CALLS</b></p> <p>GOOD IN THE U.S. PUERTO RICO &amp; THE U.S. VIRGIN ISLES</p> <p>DIAL: 800-507-8807</p> <p>PIN NUMBER: 4708236916</p>		<p>To make your FREE call (2) dial 800-507-8807</p> <p>After prompt enter your PIN# 4708236916</p> <p>After tone, dial the area code and number you wish to call</p> <p>You will hear tones to indicate when you have 5, 4, 3, 2, 1 seconds remaining in your call</p> <p>Customer Services 1-800-507-8807</p> <p>FREE PHONE TIME EXPIRES 12/31/80</p>	
CHECKOUT COUPON	CHECKOUT COUPON	CHECKOUT COUPON	CHECKOUT COUPON		

Exhibit C

Complaint

123 F.T.C.

## EXHIBIT D

**4 out of 5**  
**PEDIATRICIANS**  
**RECOMMEND**  
**Gerber®**

\* A TEMPORARY PEDIATRICS RECOMMENDATION STUDY FOUND THAT 4 OUT OF 5 PEDIATRICIANS WHO RECOMMEND BABY FOOD RECOMMEND GERBER.

50-408

Exhibit C

## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Gerber Products Company is a Michigan corporation with its principal office or place of business at 445 State Street, Fremont, Michigan.

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. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise

of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean Gerber Products Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

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

4. "*Baby or toddler food*" shall mean any food or juice manufactured, labeled, advertised, promoted, offered for sale, sold, or distributed by respondent for consumption by infants and children up to 4 years of age.

## I.

*It is ordered*, That respondent, 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 baby or toddler food shall not make any representation, in any manner, expressly or by implication, about:

A. The extent to which doctors or other health, nutrition, child care, or medical professionals recommend such product; or

B. The recommendation, approval, or endorsement of such product by any health, nutrition, child care, or medical professional, profession, group, or other such entity,

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

## II.

*It is further ordered*, That respondent, 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 baby or toddler food, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any survey, test, study, or research.



## III.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any baby or toddler food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection Act or the Poultry Products Inspection Act.

## IV.

*It is further ordered*, That respondent, and its successors and assigns, shall for three (3) years after the last date of dissemination of any representation covered by this order, maintain and upon 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 its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including written consumer complaints or any communications with governmental or consumer protection organizations.

## V.

*It is further ordered*, That respondent, and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to all current principals, officers, directors, and sales, advertising, and marketing managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject matter of this order; and

B. For a period of five (5) years after the date of service of this order, deliver a copy of this order to all future principals, officers, directors, and sales, advertising, and marketing managers, and to all

employees, agents, and representatives having responsibilities with respect to the subject matter of this order, within thirty (30) days after the person assumes such position or responsibilities.

## VI.

*It is further ordered,* That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) 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 respondent learns less than thirty (30) days prior to the date such action is to take place, respondent 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.

## VII.

*It is further ordered,* That respondent, and its successors and assigns, 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 it has complied with this order.

## VIII.

This order will terminate on May 27, 2017, 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;

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Decision and Order

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.

Complaint

123 F.T.C.

IN THE MATTER OF

## ABBOTT LABORATORIES

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3745. Complaint, May 30, 1997--Decision, May 30, 1997*

This consent order prohibits, among other things, the Illinois corporation that manufactures and advertises Ensure, a meal supplement, from making scientifically unsubstantiated claims about the extent to which doctors or other professionals recommend any food dietary or nutritional supplement for healthy adults; and about the recommendation, approval or endorsement of any such product by any person, profession or other entity. The consent order also prohibits the respondent from misrepresenting that one serving of any product sold as a meal replacement or supplement, including Ensure, for healthy adults provides vitamins in an amount comparable to typical vitamin supplements; and from misrepresenting the amount of any vitamin or any other nutrient or ingredient in such products.

*Appearances*

For the Commission: *Michelle Rusk, Michael Ostheimer and C. Lee Peeler.*

For the respondent: *Nancy Buc, Buc & Bearsdley, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Abbott Laboratories, a corporation ("respondent"), has 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 Abbott Laboratories ("Abbott") is an Illinois corporation with its principal office or place of business at One Abbott Park Road, Abbott Park, Illinois.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed nutritional products to the public, including Ensure products. Ensure products are marketed through Abbott's Ross Products Division and include Ensure, Ensure High Protein, Ensure Plus, Ensure With Fiber, Ensure Pudding, and Ensure Light. These products are "foods" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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



4. Respondent has disseminated or has caused to be disseminated advertisements for Ensure, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. VIDEO

Close-up of a graduation photograph of man and woman.

Man and woman who appear to be in their middle thirties.

Can of Ensure being poured into glass.

Man and woman jogging in a park.

Cans of Ensure. Super:

RECOMMENDED #1 BY DOCTORS.

(Exhibit A, television advertisement entitled "Younger Husband/Wife").

B. VIDEO

Close-up of black and white photograph of little girl and young father fishing.

Father and adult daughter fishing on dock.

Three cans of Ensure. Super:  
RECOMMENDED #1 BY DOCTORS.

Can of Ensure being poured into glass.

Father and daughter in boat with father casting.

Three cans of Ensure. Super:  
RECOMMENDED #1 BY DOCTORS.

AUDIO

Man: For 15 years, we've taken good care of each other.

Woman: We sure have.

Man: And to take better care of our health, we started drinking Ensure.

Woman: More than a vitamin supplement, Ensure is a delicious drink with all the nutrients adults need to help stay healthy, active, be energetic.

Man: Drink Ensure as a meal.

Woman: Or in between meals.

Man: Ensure is even recommended number one by doctors as a source of complete balanced nutrition.

Woman: Ensure, to your health honey.

Man: Uh, uh, to our health.

AUDIO

Woman: When I was young, you and mom made sure I ate right.

Man: Well you were my little girl.

Woman: Well today we're listening to our doctors and taking better care of our health with Ensure.

Man: Ensure is recommended number one by doctors as a source of complete balanced nutrition.

Woman: More than a vitamin supplement, Ensure has all the nutrients adults need to help stay healthy, active, be energetic.

Man: Drink Ensure as a meal.

Woman: Or in between meals. Ensure, to your health dad.

Mother: Uh, uh, to our health.

Announcer: Ensure, doctors recommend it number one.

(Exhibit B, television advertisement entitled "Father/Daughter").

Complaint

123 F.T.C.

C. Wife: Oh boy, that water felt great!

Husband: Sure did. I always feel so good after a swim.

Wife: For 15 years, we've shared a pretty active life.

Husband: I've loved every minute.

Wife: And to help make sure we stay active, one thing we've done lately is to drink Ensure.

Husband: Hm Hmm. See, our doctor told us that a key to being energetic and in good health is good nutrition.

Wife: Right. And one way to help guarantee that you're getting the nutrition you need, is by drinking Ensure.

Husband: More than a vitamin supplement, Ensure is a delicious drink that provides complete balanced nutrition.

Wife: It's got the protein, carbohydrates, minerals and vitamins your body needs everyday to help you stay healthy, active, be energetic.

Husband: Drink Ensure anytime.

Wife: I like it as a delicious meal.

Husband: I like it in between meals. Ensure is even recommended number one by doctors and nutritionists for complete balanced nutrition.

Wife: So make sure the ones you love get the nutrition they need. Ensure. To your health, dear.

Husband: Uh, uh, to our health.

(Exhibit C, radio advertisement entitled "Younger Husband/Wife").

D. Depiction: Snapshots of a young man and a young woman. "Back then we promised to make the most out of life...today we're enjoying every moment."

DRINK TO YOUR HEALTH WITH ENSURE.<sup>®</sup> Depiction: Man and woman who appear to be in their thirties holding glasses of Ensure.

The #1 Doctor Recommended Source of Nutrition.

Most doctors will tell you that a key to good health is good nutrition. But even if you've improved your diet by eating more lean meats, fruits and vegetables, you still may not be getting the balanced nutrition you need.

So how can you help guarantee that you and the ones you love get the right nutrition?

With Ensure and *New Ensure High Protein*.

Ensure is more than a vitamin supplement. It's complete balanced nutrition in a delicious ready-to-serve drink that provides an excellent balance of protein, carbohydrate, vitamins, and minerals. In addition, *New Ensure High Protein* is low in cholesterol and low in saturated fat while being high in the nutrients you need everyday to help stay healthy, be energetic and more active. Drink your favorite Ensure anytime. Enjoy it as a healthy meal by itself or as a healthy between-meal snack. Ensure is even recommended #1 by doctors as a complete source of nutrition.

So make sure the ones you love get the right nutrition. Drink Ensure and drink to your health.

(Exhibit D, print advertisement).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that many doctors recommend Ensure as a meal supplement and as a meal replacement for healthy adults, including those in their thirties and forties.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Among other reasons, a survey of doctors relied upon by respondent was not designed to elicit whether many doctors actually recommend Ensure as a meal supplement or meal replacement for healthy adults, as opposed to for adults who are ill or elderly and may have nutritional deficiencies. The survey merely asked doctors to assume that they would recommend a supplement for adults who were not ill, and then to select the brand they would most recommend. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that one serving of Ensure provides vitamins in an amount comparable to typical multivitamin supplements.

9. In truth and in fact, one serving of Ensure does not provide vitamins in an amount comparable to typical multivitamin supplements. While the typical multivitamin supplement provides at least 100% of the recommended daily intake (RDI) of vitamins for which RDIs have been established, at the time the advertisements were first disseminated, one serving of Ensure provided 62% of the RDI of Vitamin C and between 12% and 26% of the RDIs of the other vitamins for which RDIs have been established. Ensure has been reformulated and currently one serving provides 50% of the RDI of Vitamin C and 25% of the RDIs of the other vitamins for which RDIs have been established. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

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



Complaint

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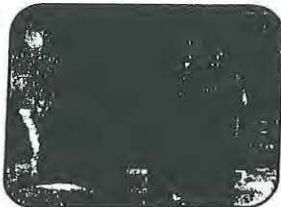
## EXHIBIT A

**RTV**

PRODUCT: ENSURE VITAMIN SUPPLEMENT  
 TITLE: "LOW IN SATURATED FAT"  
 PROGRAM: WORLD NEWS TONIGHT  
 STATION: ABC

6/16/95  
 (NEW YORK)

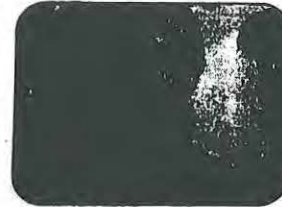
95-09482 KH  
 :30  
 6:47PM



(MUSIC) MAN: For 15 years, we've taken good care of each other.



WOMAN: We sure have.



MAN: And to take better care of our health,



we started drinking Ensure.



WOMAN: More than a vitamin supplement,



Ensure is a delicious drink with all the nutrients



adults need to help stay healthy, active, be energetic.



MAN: Drink Ensure as a meal.  
 WOMAN: Or in between meals.



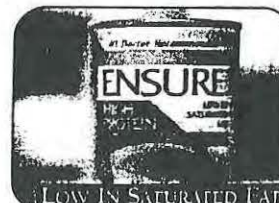
MAN: Ensure is even recommended



number one by doctors as a source of complete balanced nutrition.



WOMAN: Ensure. To your health, honey. MAN: Uh uh, to our health.



ANNCR: Also try Ensure high protein. It's low in saturated fat. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Exhibit A-1

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Complaint

EXHIBIT A

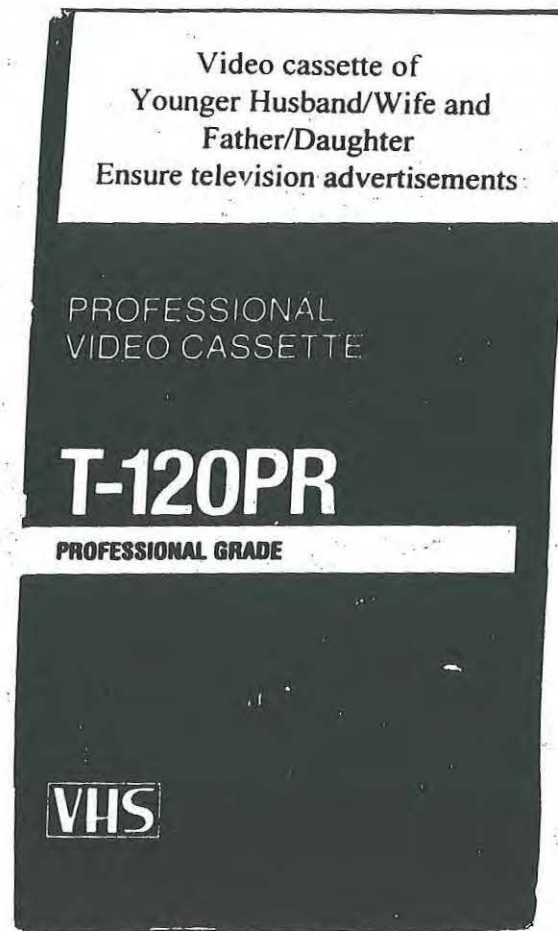


Exhibit A-2

## Complaint

123 F.T.C.

## EXHIBIT B

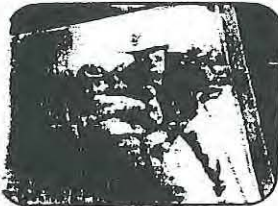
**RTV**

PRODUCT: ENSURE VITAMIN SUPPLEMENT  
 TITLE: "FATHER & DAUGHTER"  
 PROGRAM: CBS EVENING NEWS  
 STATION: CBS

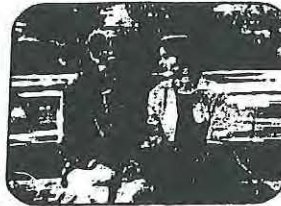
07/10/95  
 (NEW YORK)

95-10434 AH

:30  
 6:48PM



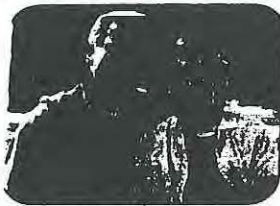
(MUSIC) DAUGHTER: When I was young,



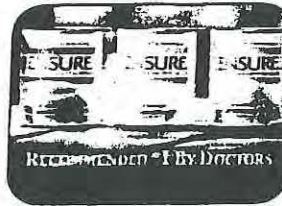
you and Mom made sure I ate right.



FATHER: Well you were my little girl.



DAUGHTER: Well today we're listening to our doctor, and taking better care of our health with Ensure.



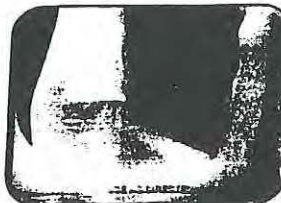
FATHER: Ensure is recommended number one by Doctors as a source of complete balanced nutrition.



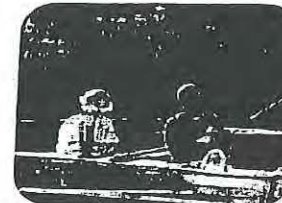
DAUGHTER: More than a Vitamin Supplement



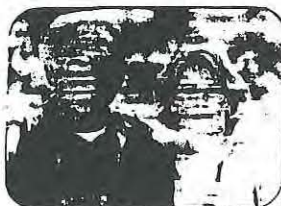
Ensure has all the nutrients



adults need



to help stay healthy, active,



be energetic. FATHER: Drink Ensure as a meal--



DAUGHTER: or in between. Ensure, to your health Dad. FATHER: Uh, to our health.



ANNCR: Ensure, doctors recommend it number one. (MUSIC OUT)

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Exhibit B-1

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Complaint

## EXHIBIT B

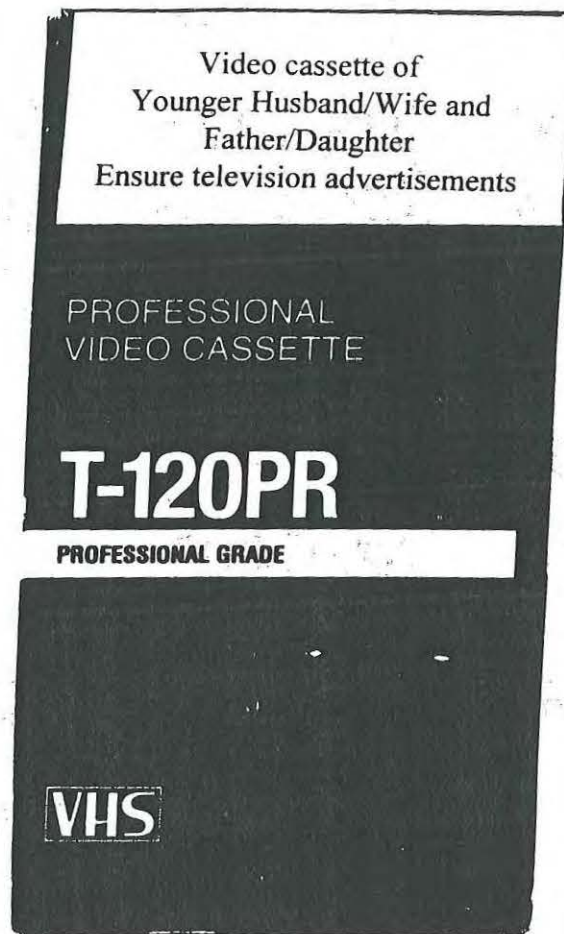


Exhibit B-2

Complaint

123 F.T.C.

## EXHIBIT C

SCRIPT FOR  
☒ RADIO ☐ TELEVISION FROM  
LCF&L

Date: 6/21/94  
Client: Ross Labs/Ensure  
Commercial title: "Younger Husband/Wife"  
Version no: RLE-428-60  
Length: :60

(MUSIC & SFX UNDER)

WIFE: Oh, boy, that water felt great!

HUSBAND: Sure did. I always feel so good after a swim.

WIFE: For 15 years, we've shared a pretty active life.

HUSBAND: I've loved every minute.

WIFE: And to help make sure we stay active, one thing we've been doing lately is to drink ENSURE.

HUSBAND: Hm Hm. See, our doctor told us that a key to being energetic and in good health is good nutrition.

WIFE: Right. And one way to help guarantee that you're getting the nutrition you need, is by drinking ENSURE.

HUSBAND: More than a vitamin supplement, ENSURE is a delicious drink that provides complete balanced nutrition.

WIFE: It's got the protein, carbohydrates, minerals and vitamins your body needs everyday to help you stay health, active, be energetic.

Exhibit C



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Complaint

## EXHIBIT C

HUSBAND: Drink ENSURE anytime.

WIFE: I like it as a delicious meal.

HUSBAND: I like it in between meals. ENSURE is even recommended #1 by doctors and nutritionists for complete balanced nutrition.

WIFE: So make sure the ones you love get the nutrition they need. ENSURE. To your health, dear.

HUSBAND: Uh, uh, to our health.  
(SFX: CLINK)

ANNCR: Use as directed.

Exhibit C

Complaint

123 F.T.C.

## EXHIBIT D



### The #1 Doctor Recommended Source of Nutrition.

Most doctors will tell you that a key to good health is good nutrition. But even if you've improved your diet by eating more lean meats, fruits and vegetables, you still may not be getting the balanced nutrition you need.

So how can you help guarantee that you and the ones you love get the right nutrition?

With Ensure and *New* Ensure High Protein.

Ensure is more than a vitamin supplement. It's complete, balanced nutrition in a delicious ready-to-serve drink that provides an excellent balance

of protein, carbohydrate, vitamins and minerals. In addition, *New* Ensure High Protein is low in cholesterol and low in saturated fat while being high in the nutrients you need everyday to help stay healthy, be energetic and more active. Drink your favorite Ensure anytime. Enjoy it as a healthy meal by itself

or as a healthy between-meal snack.

Ensure is even recommended #1 by doctors as a complete source of nutrition.

So make sure the ones you love get the right nutrition. Drink Ensure and drink to your health.



ENSURE



ENSURE

Exhibit D

Available in 11 Delicious Flavors

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## DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the 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 Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office or place of business at One Abbott Park Road, Abbott Park, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## DEFINITIONS

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

1. Unless otherwise specified, "*respondent*" shall mean Abbott Laboratories, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

2. "*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 respondent, 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 Ensure products, any other food, or any other dietary or nutritional supplement in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The extent to which doctors or other professionals recommend such product for healthy adults; or

B. The recommendation, approval, or endorsement of such product by any person, profession, group, or other entity,

unless, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

*It is further ordered*, That respondent, 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 Ensure products, or any other product advertised, marketed or sold as a meal replacement or meal supplement for healthy adults, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:



A. That one serving of such product provides vitamins in an amount comparable to typical vitamin supplements; or

B. The absolute or comparative amount of any vitamin or any other nutrient or ingredient contained in or provided by such product.

If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

### III.

Nothing in this order shall prohibit respondent 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.

*It is further ordered,* That respondent, and its successors and assigns, shall for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon 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 its 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.

### V.

*It is further ordered,* That respondent, and its successors and assigns, shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to all current principals, officers, directors, and managers, and to all current employees, agents, and representatives having responsibilities with respect to the subject matter of this order; and

B. For a period of five (5) years after the date of service of this order, deliver a copy of this order to all future principals, officers, directors, and managers, and to all employees, agents, and representatives having responsibilities with respect to the subject matter of this order, within thirty (30) days after the person assumes such position or responsibilities.

## VI.

*It is further ordered,* That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) 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 respondent learns less than thirty (30) days prior to the date such action is to take place, respondent 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.

## VII.

*It is further ordered,* That respondent, and its successors and assigns, 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 it has complied with this order.

## VIII.

This order will terminate on May 30, 2017, 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.